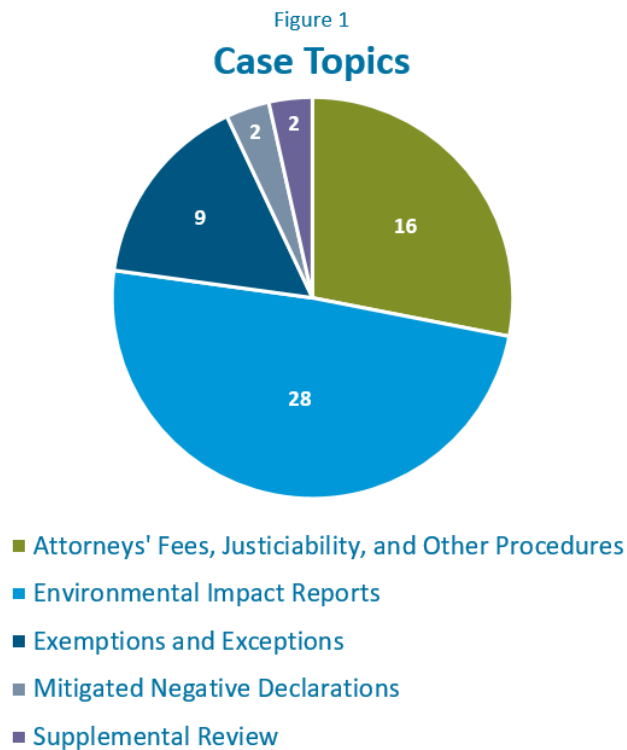


CEQA Case Report

Understanding the Judicial Landscape for Development
2018 Year in Review

CEQA Case Report: Understanding the Judicial Landscape for Development

Public agencies prevailed in 65% of CEQA cases analyzed.



Over the course of 2018, Latham & Watkins lawyers reviewed all 57 California Environmental Quality Act (CEQA) cases, both published and unpublished, that came before California appellate courts. These cases covered a variety of CEQA documents and other topics. Below is a compilation of information from the review and a discussion of the patterns that emerged in these cases. Latham will continue to monitor CEQA cases in 2019, posting summaries to this [blog](#).

The California Court of Appeal heard 55 CEQA cases, while the California Supreme Court heard one case: *Sierra Club v. County of Fresno*. This case concerned what constitutes sufficient detail in an environmental impact report (EIR) and has implications for the preparation of EIRs as well as judicial review of agency decisions certifying EIRs.

In addition to the 56 state cases, one federal CEQA case, *AquAlliance v. U.S. Bureau of Reclamation*, was heard by the Eastern District of California.

Of the 57 cases, 26 were published, 25 were unpublished, and six were partially published.

Figure 1 (above) shows all 57 cases sorted by topic. The greatest number of cases (28 of the 57, or 49%) focused on EIRs. In 2017, only 43% of cases focused on EIRs. Attorneys' Fees, Justiciability, and Other Procedures accounted for 16 cases. This category includes issues such as mootness, statutes of limitations, waiver, and res judicata. Nine cases focused on Exemptions and Exceptions. Two cases focused on Mitigated Negative Declarations and two cases focused on Supplemental Review.

Figure 2 (right) shows the distribution of cases heard among the six appellate districts as well as the public agency success in each district. The Sixth District was the only district in which the public agencies prevailed in all cases. In the Fifth District, public agencies had the least success, prevailing in only 29% of the cases.

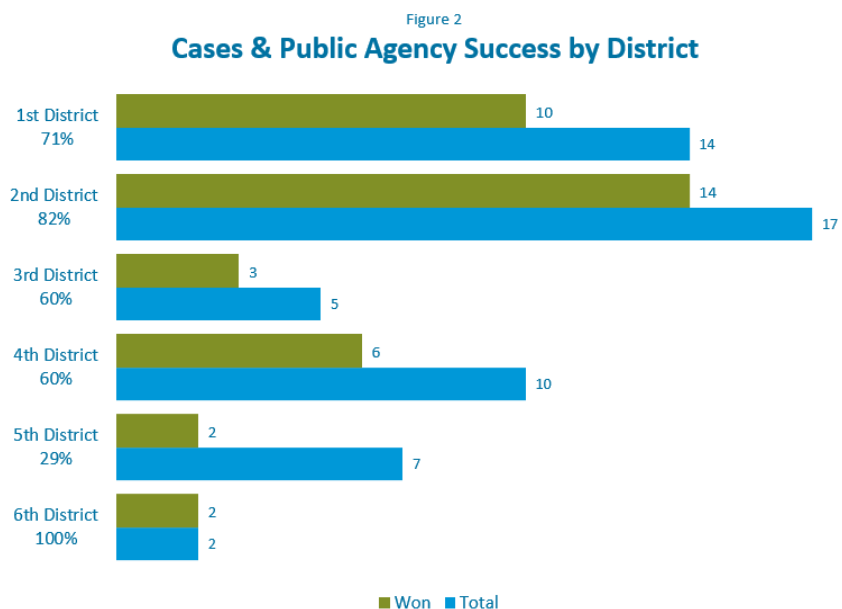
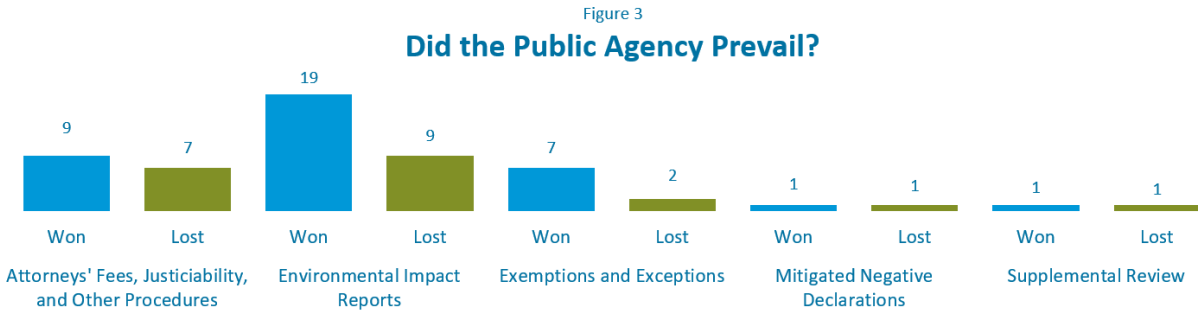


Figure 3 (*below*) sorts cases by topic and includes additional information on whether the public agency prevailed in each kind of case. For the purposes of this summary, if the public agency lost on any issue, it was deemed not to have prevailed. Overall, public agencies prevailed in 37 of 57 cases, or 65% of the time, the same percentage as in 2017, and won in 68% of EIR cases, compared with 55% in 2017. By contrast, public agencies prevailed in only 56% of cases involving Attorneys' Fees, Justiciability, and Other Procedures, compared with 67% in 2017.



Additionally, a suite of amendments to the CEQA Guidelines went into effect this year. The California Office of Administrative Law adopted amendments relating to several sections, including those affecting greenhouse gas impacts, baseline procedural requirements, and permissible mitigation deferral. More detail on these amendments can be found in this [article](#), published on Latham's Environment, Land & Resources blog. The final adopted text of these amendments is publicly available [here](#).

If you have any questions about this *CEQA Case Report*, please contact one of Latham's California Project Siting & Approvals lawyers listed below or the Latham lawyer with whom you normally consult:

[James L. Arnone](#)

james.arnone@lw.com
+1.213.891.8204
Los Angeles

[Marc T. Campopiano](#)

marc.campopiano@lw.com
+1.714.755.2204
Orange County

[Christopher W. Garrett](#)

christopher.garrett@lw.com
+1.858.523.5458
San Diego

[John C. Heintz](#)

john.heintz@lw.com
+1.213.891.7395
Los Angeles

[Duncan Joseph Moore](#)

dj.moore@lw.com
+1.213.891.7758
Los Angeles

[Lucinda Starrett](#)

cindy.starrett@lw.com
+1.213.891.7905
Los Angeles

[Winston P. Stromberg](#)

winston.stromberg@lw.com
+1.213.891.8983
Los Angeles

[Daniel P. Brunton](#)

daniel.brunton@lw.com
+1.858.523.5421
San Diego

[Benjamin J. Hanelin](#)

benjamin.hanelin@lw.com
+1.213.891.8015
Los Angeles

We thank the *CEQA Case Report* Editorial Team:

[James A. Erselius](#)

[Lucas I. Quass](#)

[Natalie C. Rogers](#)

[Samantha K. Seikkula](#)

We gratefully acknowledge the authors of this report:

[Maria Pilar Hoye](#)

[Christopher H. Norton](#)

[Nikki Buffa](#)

[Shivaun A. Cooney](#)

[Peter J. Gutierrez](#)

[Lauren E. Paull](#)

[David B. Amerikaner](#)

[Megan K. Ampe](#)

[Elizabeth K. Annis](#)

[Kimberly D. Farbota](#)

[Diego Enrique Flores](#)

[Derek Galey](#)

[Lauren Glaser](#)

[Nathaniel Lawrence Glynn](#)

[Emily Haws](#)

[Robert C. Hull](#)

[Christopher Adam Martinez](#)

[Brian Francis McCall](#)

[John D. Niemeyer](#)

[Stephanie L. Postal](#)

[Jennifer K. Roy](#)

[Roopika Subramanian](#)

[Taiga Takahashi](#)

[Gregory Michael Van Buiten](#)

We thank our summer associates who assisted in this publication.

2018 CEQA CASE SUMMARIES

Attorneys' Fees, Justiciability, and Other Procedures

	Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status	Page Number
1	<i>Atwell v. City of Rohnert Park</i>	✓	1 st	✓	1
2	<i>Forest Preservation Society v. Department of Forestry and Fire Protection</i>	✓	1 st	✗	3
3	<i>Fudge v. California Coastal Commission</i>	✓	2 nd	✗	6
4	<i>Golden Door Properties v. Vallecitos Water District</i>	✓	4 th	✗	8
5	<i>Inland Oversight Committee v. City of San Bernardino</i>	✓	4 th	✓	10
6	<i>Salamone v. City of Whittier</i>	✓	2 nd	✗	13
7	<i>LandWatch San Luis Obispo v. Cambria Community Services District</i>	✓	2 nd	✓	15
8	<i>Save Lafayette Trees v. City of Lafayette</i>	✓	1 st	✓	17
9	<i>Small Property Owners of San Francisco Institute v. City and County of San Francisco</i>	✓	1 st	✓	19
10	<i>Coston v. Stanislaus County</i>	✗	5 th	✗	21
11	<i>Endangered Habitats League v. City of San Marcos</i>	✗	4 th	✗	23
12	<i>Golden Door Properties v. County of San Diego</i>	✗	4 th	✓	25
13	<i>Heron Bay Homeowners Association v. City of San Leandro</i>	✗	1 st	✓	28
14	<i>John R. Lawson Rock & Oil v. State Air Resources Control Board</i>	✗	5 th	✓	30
15	<i>La Mirada Avenue Neighborhood Association of Hollywood v. City of Los Angeles</i>	✗	2 nd	✓	32

16	<i>Protecting Our Water & Environmental Resources v. Stanislaus County</i>		5 th		35
-----------	--	--	-----------------	--	----

Environmental Impact Reports

	Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status	Page Number
17	<i>Save Adelaida v. County of San Luis Obispo</i>		2 nd		38
18	<i>Alliance of Concerned Citizens Organized for Responsible Development v. City of San Juan Bautista</i>		6 th		40
19	<i>Atherton Cove Property Owners Association v. San Joaquin Area Flood Control Agency</i>		3 rd		43
20	<i>Beverlywood Homes Association v. City of Los Angeles</i>		2 nd		46
21	<i>Citizens Against the 24th Street Widening Project v. City of Bakersfield</i>		5 th		49
22	<i>Citizens Coalition Los Angeles v. City of Los Angeles</i>		2 nd		52
23	<i>Citizens for Open and Public Participation v. City of Montebello</i>		2 nd		55
24	<i>Covina Residents for Responsible Development v. City of Covina</i>		2 nd		57
25	<i>East Sacramento Partnership for a Livable City v. City of Sacramento</i>		3 rd		59
26	<i>Friends of Riverside's Hills v. City of Riverside</i>		4 th		62
27	<i>Friends of the Santa Clara River v. County of Los Angeles</i>		2 nd		64
28	<i>High Sierra Rural Alliance v. County of Plumas</i>		3 rd		67
29	<i>Jensen v. City of Santa Rosa</i>		1 st		69
30	<i>Keep the Code v. County of Mendocino</i>		1 st		71

31	<i>Responsible Development for Water Tank Hill v. County of San Mateo</i>		1 st		75
32	<i>San Franciscans for Livable Neighborhoods v. City & County of San Francisco</i>		1 st		77
33	<i>Save Our Heritage Organisation v. City of San Diego</i>		4 th		81
34	<i>Sunset Coalition v. City of Los Angeles</i>		2 nd		83
35	<i>Visalia Retail v. City of Visalia</i>		5 th		86
36	<i>4140 E. Hammer Lane, LLC v. County of San Joaquin</i>		3 rd		88
37	<i>AquAlliance v. US Bureau of Reclamation</i>		US District Court, Eastern District of California		91
38	<i>City of Long Beach v. City of Los Angeles</i>		1 st		96
39	<i>Georgetown Preservation Society v. County of El Dorado</i>		3 rd		99
40	<i>Los Angeles Conservancy v. City of Los Angeles</i>		2 nd		101
41	<i>Oakdale Groundwater Alliance v. Oakdale Irrigation District</i>		5 th		104
42	<i>Rodeo Citizens Association v. County of Contra Costa</i>		1 st		106
43	<i>Sierra Club v. County of Fresno</i>		Supreme Court of California		109
44	<i>Sierra Club v. County of Kern</i>		5 th		113

Exemptions and Exceptions

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status	Page Number
45 <i>Aptos Residents Association v. County of Santa Cruz</i>		6 th		116

46	<i>California Water Impact Network v. County of San Luis Obispo</i>		2 nd		119
47	<i>Don't Cell Our Parks v. City of San Diego</i>		4 th		121
48	<i>McCorkle Eastside Neighborhood Group v. City of St. Helena</i>		1 st		123
49	<i>San Diegans for Open Government v. City of San Diego</i>		1 st		125
50	<i>Stewards of Public Land v. City of Pasadena</i>		2 nd		127
51	<i>World Business Academy v. California State Lands Commission</i>		2 nd		130
52	<i>Bottini v. City of San Diego</i>		4 th		133
53	<i>County of Ventura v. City of Moorpark</i>		2 nd		135



Mitigated Negative Declarations

	Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status	Page Number
54	<i>Tennis Club Preservation Society v. City of Palm Springs</i>		4 th		137
55	<i>Protect Niles v. City of Fremont</i>		1 st		139

Supplemental Review

	Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status	Page Number
56	<i>Center for Biological Diversity v. County of Los Angeles</i>		2 nd		141
57	<i>Advocates for Better Community Development v. City of Palm Springs</i>		4 th		144

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
1 <i>Atwell v. City of Rohnert Park</i>		1 st	

[*Atwell v. City of Rohnert Park*](#), California Court of Appeal, First Appellate District, Division One, Case Nos. A151896, A153011 (September 18, 2018).

- In determining whether two challenges constitute the same cause of action under the doctrine of res judicata, if a subsequent claim is based on a project proposal that has not changed since the prior action, then a city's approval will only raise a new issue or injury if the city included new or revised conditions or measures that are at issue in the subsequent petition.

In 2015, Nancy Atwell (Petitioner) filed a petition for writ of mandate seeking an order to vacate the City of Rohnert Park's (City's) approvals for a Walmart expansion project (Project) alleging inconsistency with the General Plan. After a briefing on the merits was complete, the City filed a motion for judgment on the pleadings, asserting that Petitioner's claims were barred by the doctrine of res judicata. The trial court concluded that the petition was barred by res judicata and the statute of limitations, and that substantial evidence supported the City Council's determination that the Project complied with the General Plan.

Background for Appeal

In 2010, the City approved the expansion of an existing Walmart store to accommodate a 24-hour grocery/supermarket. Subsequently, Sierra Club and Sonoma County Conservation Action (SCCA) filed a petition for writ of mandate challenging the City Council's environmental impact report (EIR) and project approvals (the Sierra Club action), citing the Project's incompatibility with the goals, policies, and objectives of the City's General Plan, including Policy LU-7. (Under that policy, the City is obligated to "encourage new neighborhood commercial facilities and supermarkets to be located to maximize accessibility to all residential areas.") Although the Sierra Club and SCCA did not ultimately pursue this cause of action, the trial court granted the petition, ordered the City's approvals vacated, and remanded the Project for additional environmental review with regard to traffic mitigation. The City then prepared and certified a revised EIR, which did not alter the original EIR's analysis of the Project's consistency with the General Plan.

In 2015, Petitioner filed the action challenging the Project's consistency with Policy LU-7, arguing that the Project was located in a large commercial area with few residents, which would lead to the closure of neighborhood-serving grocery stores and contribute to an over-concentrated area around a highway interchange.

The trial court denied the petition and granted City's motion for judgment on the pleadings, concluding that the petition was barred by res judicata and the statute of limitations because the General Plan consistency issue could have been litigated in the Sierra Club action. Petitioners appealed in a timely manner, and the court affirmed the trial court's judgment.

Res Judicata

The court held that Petitioner's claim was barred by res judicata because:

- The claim of General Plan consistency was identical to the claim in the Sierra Club action.
- The prior proceeding resulted in a final judgment on the merits.
- Petitioner was in privity with Sierra Club and SCCA.

The court also noted that even though the General Plan consistency issue was not actually litigated in the Sierra Club action, res judicata bars issues that could have been litigated. Petitioner had argued that the City's 2015 resolutions, which were approved after the Sierra Club action, could not have been litigated in the Sierra Club action. In response, the court explained that even though the City's 2015 resolutions were not specifically addressed in the Sierra Club action, Petitioner's challenges to the City's 2015 resolutions were the same as Sierra Club's challenges to the City's 2010 resolutions. The petition included no changes in material facts and raised the same claims as those in the Sierra Club action. Further, the petition's findings with respect to General Plan consistency remained the same; no new or revised conditions or mitigation measures were included in the EIR regarding Policy LU-7, and the arguments regarding Policy LU-7 were identical to those raised in 2010. Therefore, the court found that the claims were identical.

The court explained that Petitioner was in privity with the petitioners in the Sierra Club action because neither petition alleged personal harms that were distinct from those that would be incurred by the larger community related to the impact on neighborhood supermarkets. Since both petitions pursued claims on behalf of the community, the petitioners in both actions shared an identity or community of interest. Therefore, the court concluded that res judicata barred Petitioner's action, and that it need not address whether the petition was also barred by the statute of limitations.

Project Consistency With the General Plan



In the unpublished portion of the opinion, the court held that even assuming that Petitioner's claim was not barred by res judicata, the court could not conclude that no reasonable person could have found the Project consistent with the General Plan and Policy LU-7. Even though the parties had identified contradictory evidence of how the Project would impact supermarket access, the trial court's decision that substantial evidence supported the City Council's determination that the Project was consistent with Policy LU-7 was not unreasonable. The record showed that the Project was in a growth area with increasing residential communities and would provide 24-hour operations and enhanced supermarket access for residents.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's judgment upholding the City's approval of the Project.

- Opinion by Justice Margulies, with Presiding Justice Humes and Justice Banke concurring.
- Trial Court: Sonoma County Superior Court, Case No. SCV256891, Judge Rene A. Chouteau.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
2 <i>Forest Preservation Society v. Department of Forestry and Fire Protection</i>		1 st	

[*Forest Preservation Society v. Department of Forestry and Fire Protection*](#), California Court of Appeal, First Appellate District, Division Three, Case No. A148182 (August 28, 2018).

Forest Preservation Society (Petitioner) requested for writ of mandate, arguing that the California Department of Forestry and Fire Protection (Cal Fire or Department):

- Used an improper baseline for evaluating the impacts of THP 80 on climate change
- Showed no substantial evidence to support its finding that THP 80 would not significantly impact climate change
- Failed to fulfill its duty to create an enforceable mitigation and monitoring plan to alleviate the impacts on climate change

The trial court rejected these arguments and denied the petition, and the Court of Appeal upheld the denial. In summary, the Court of Appeal determined:

- The Department did not abuse its discretion by relying on the California Air Resources Board's Climate Change Scoping Plan — rather than the state's 2020 and 2050 greenhouse gas (GHG) emission reduction targets — as the threshold of significance for evaluating the cumulative impacts on climate change resulting from project-related GHG emissions.
- Substantial evidence, in the form of analyses showing that growth was scheduled to outpace logging across MRC's ownership, supported the Department's finding that the project's cumulative impacts on global warming would be insignificant.
- The Department does not have a duty to enforce mitigation and monitoring of potential impacts on climate change if there are no significant cumulative impacts. Additionally, THP 80 requires that all future MRC timber-harvesting plans and projects be subject to environmental review.

Background for Appeal

On July 23, 2014, Mendocino Redwood Company (MRC) submitted Timber Harvest Plan (THP 80) to Cal Fire. About a week later, Cal Fire instigated an extensive review of THP 80, which ultimately included gathering input from other natural resources agencies, undertaking several rounds of revisions, and providing two opportunities for public comment. Cal Fire officially approved THP 80 on July 30, 2015, and Petitioner filed suit in a timely manner. Petitioner argued that THP 80 was deficient in the following ways:

- Assessing the cumulative impacts on northern spotted owls
- Assessing the cumulative impacts on GHG emissions
- Failing to comply with Forest Protection Rules regarding protection for watersheds with listed anadromous salmonids

After a contested hearing, the trial court denied the petition on April 18, 2016, determining that Cal Fire, in approving THP 80, had proceeded in the manner required by law and relied upon substantial evidence. On April 29, 2016, Petitioner filed a timely notice of appeal. On the same date, Petitioner also filed a petition for a stay of timber harvesting and for a writ of supersedeas, again alleging deficiencies in Cal Fire's assessment of the cumulative impacts on northern spotted owls and GHG emissions. After first granting a temporary stay, the Court of Appeal denied the petition and dissolved the stay on June 9, 2016. This appeal thus proceeded.

Timber-Harvesting Plans and CEQA Review

The preparation and approval of a timber-harvesting plan under the Forest Practices Act is the functional equivalent of, and an adequate substitute for, CEQA's required environmental impact report (EIR) process. CEQA mandamus challenges are reviewed de novo by appellate courts for prejudicial abuse of discretion. If substantial evidence supports an agency's decision, no abuse of discretion has occurred and the decision must be upheld.

Use of the Scoping Plan as a Threshold for Significance

In assessing the significance of GHG emissions associated with THP 80, Cal Fire relied on the California Air Resources Board's Climate Change Scoping Plan. Petitioner argued that the Scoping Plan was an inadequate threshold because agencies routinely rely on the state's 2020 and 2050 GHG emissions targets when evaluating climate change impacts. Citing *Center for Biological Diversity et al. v. California Department of Fish and Wildlife* (2015) 62 Cal.4th 204, 223, Petitioner further asserted that the California Supreme Court has found that the 2020 and 2050 targets are an appropriate baseline. The Court of Appeal rejected this argument, noting that while the targets may be used, *Center for Biological Diversity* does not require that they be used. The administrative record showed that Cal Fire explained in its responses to public comments that the Scoping Plan was used because it specifically recognizes the importance of forestry practices in meeting the state's climate goals. The Court of Appeal agreed that this approach was defensible and based on substantial evidence.

Adequacy of Data Supporting Finding of No Significant Impacts

Due to the condensed timing of logging — as compared with slow, steady, and gradual forest growth — THP 80 would result in short-term GHG emission increases. Petitioner argued that, because of environmental "tipping points" associated with certain total atmospheric levels of GHG concentrations, near-term positive net carbon emissions represent significant environmental harm regardless of whether long-term sequestration exceeds short-term emissions. Documents in the administrative record quantitatively demonstrated that emissions associated with THP 80 would be offset by sequestration associated with growth from 2016 to 2020, a period already underway. The Court of Appeal pointed out that assessments of cumulative impacts must be guided by practicality and reasonableness, and found that MRC's decision to analyze emissions and sequestration over the 2016-2020 period was in accordance with these standards.

Petitioner also argued that it was improper for MRC and Cal Fire to consider the sequestration effects of forest growth across MRC's entire property, when logging covered by THP 80 would take place only in one subsection. In response to similar comments, Cal Fire asserted that this methodology neither understates the emissions — for instance, by comparing the emissions with other state, national, or global figures — nor overstates the emissions by overly limiting the assessment area. The Court of Appeal found that this approach met the standards of practicality and reasonableness, and that Cal Fire's finding of no significant impacts was based on substantial evidence.

Enforceable Mitigation Requirements

Finally, Petitioner argued that the future growth MRC relied on to offset the effects of THP 80 is not enforceable through incorporated mitigation measures. The Court of Appeal rejected this argument on the grounds that there is no duty to mitigate if there are no significant impacts. Further, per the terms of THP



80 and the Forest Preservation Act, all future logging projects will also be subject to environmental review.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's judgment upholding the Department's approval of THP 80.

- Opinion by Justice Jenkins, with Presiding Justice Siggins and Justice Pollack concurring.
- Trial Court: Superior Court of Mendocino County, Case No. SCUJ-CVPT-15-66284.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
3 <i>Fudge v. California Coastal Commission</i>		2 nd	

[*Fudge v. California Coastal Commission*](#), California Court of Appeal, Second Appellate District, Division Four, Case No. B281700 (October 3, 2018).

- For actions challenging decisions made by the California Coastal Commission under its certified regulatory program, the 30-day statute of limitations begins when the Commission files a Notice of Decision.
- The California Coastal Commission lacks jurisdiction to review a local agency's compliance with CEQA.
- If a local agency's approval raises a "substantial issue," the California Coastal Commission will conduct a de novo review, which is exempt from CEQA's procedural requirements.

Background for Appeal

In March 2014, Laguna Beach Golf and Bungalow Village, LLC (Real Party) applied to the City of Laguna Beach's (City's) Planning Commission for a coastal development permit (CDP) and other permits for a project involving the remodel and expansion of hotel, dining, and golf facilities in Aliso Canyon (Project). In May 2014, the City's Planning Commission approved the permits and found the Project exempt from CEQA as construction of new and conversion of existing small structures. In June 2014, Mark Fudge (Petitioner) appealed the City's approval of the CDP to the California Coastal Commission (Commission). Commission staff noted that the appeal raised substantial issues regarding the Project's consistency with California Coastal Act (Coastal Act) policies and the City's Local Coastal Program (LCP) and conducted a de novo review. Although the Commission found a "lack of factual support" for the City's reliance on the categorical CEQA exemption, it concluded that the Commission lacked jurisdiction to review the City's CEQA determination. The Commission ultimately approved the CDP subject to conditions on January 8, 2015, and filed a Notice of Decision (NOD) on January 30, 2015. On March 5, 2015, Petitioner filed a petition for writ of mandate against the Commission, the City, and the Real Party. In April 2015, the Commission adopted revised findings regarding its January approval of the CDP.

The petition asserted four causes of action:

- Violation of CEQA
- Violation of the Coastal Act
- Violation of the City's Municipal Code and the Commission's administrative guidelines
- Claims for declaratory and injunctive relief

The trial court ruled in favor of the City and the Commission, and Petitioner timely appealed.

Petitioner's CEQA Claim Was Time-Barred

Petitioner argued that the trial court erred in sustaining demurrers to the CEQA claim on the basis that it was time-barred. The Court of Appeal rejected this argument, concluding that the Commission's January

30, 2015, filing of the NOD triggered the applicable 30-day statute of limitations, and the CEQA claim raised in the petition filed on March 5, 2015, was therefore time-barred. As to the notice, the court held:

- The statute of limitations began on the date the NOD was posted, rather than on the date the NOD was filed.
- Under the Commission's guidelines, the Commission's decision became final when the tally of votes was announced at the January 8, 2015, hearing, and not when it adopted revised findings.

The court explained that although the Commission was required to conduct an additional hearing to adopt revised findings because its final decision departed significantly from staff recommendations, the additional April hearing solely addressed the revised findings and "did not reopen the earlier final determination, or constitute a new decision." The Commission triggered the statute of limitations when it filed the NOD, and the date the NOD was subsequently posted was irrelevant to the applicable statute of limitations.

Petition Failed to State a Viable Claim That the Commission Violated the Coastal Act

Petitioner argued that the trial court erred in sustaining demurrers to its Coastal Act claim, contending that the Commission violated the Coastal Act because:

- The Commission failed to review the City's notice of exemption under CEQA.
- After the Commission found that the City's approval of the CDP did not comply with CEQA, it failed to review the Project under CEQA's procedural requirements and make CEQA findings.

The court found both contentions to be without merit, and found that the trial court had properly sustained the Commission's demurrer.

First, the court noted that under California law, a statute incorporates another statute only if the latter statute is adopted by specific reference, and determined that the LCP provisions cited by Petitioner did not expressly incorporate CEQA into the City's LCP. The court also explained that once the Commission determined that Petitioner's appeal of the City's CDP approval raised a "substantial issue" and took jurisdiction, the City's CDP decision became a nullity because the Commission conducted a de novo review and an entirely new hearing.



Petitioner argued that the Commission violated the Coastal Act when it failed to review the Project under CEQA's procedural requirements and make CEQA findings. The court rejected this argument, explaining that the Commission's review process is exempt from CEQA's procedural requirements. The court found that the Commission had conducted a de novo analysis and, as Petitioner conceded, made findings regarding the Project's consistency with CEQA.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's judgment denying Petitioner's petition for a writ of mandamus and upholding the Commission's approval of the CDP.

- Opinion by Justice Willhite, with Presiding Justice Manella and Justice Collins concurring.
- Trial Court: Superior Court of Los Angeles County, Case No. BS154300, Judge Richard L. Fruin, Jr.

Attorneys' Fees, Justiciability, and Other Procedures

	Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
4	<i>Golden Door Properties v. Vallecitos Water District</i>		4 th	

[*Golden Door Properties, LLC v. Vallecitos Water District*](#), California Court of Appeal, Fourth Appellate District, Division One, Case No. D072280 (March 26, 2018).

- A Water Supply Assessment issued by a water district in conjunction with a project’s CEQA review process is not independently reviewable and may only be challenged as part of a final EIR.
- Challenges to a rescinded Water Supply Verification are moot if there is uncertainty about whether a particular dispute will recur and, in any case, will not evade review.

Background for Appeal

As part of its lead agency review under CEQA, San Diego County (County) requested the Vallecitos Water District (District) to prepare a Water Supply Assessment (WSA) and a Water Supply Verification (WSV) for a proposed residential development (Project). After the District prepared these assessments as a single combined document, Golden Door Properties, LLC (Golden Door) filed a writ of mandate petition and complaint, requesting the superior court declare the WSV invalid because it was inconsistent with the District’s general water planning documents and contained flawed analysis. In response, the District rescinded the combined document and reissued the document solely as a WSA. Golden Door amended its complaint, asserting similar challenges against the WSA, and requested that the court address its challenges to the WSV as an exception to the mootness doctrine. The court sustained the District’s demurrer without leave to amend on grounds of lack of finality, failure to exhaust remedies, and mootness. Golden Door appealed.

Water Supply Assessment Must Be Challenged as Part of Final EIR

Golden Door argued that the WSA was inadequate and inconsistent with the District’s general water planning documents. Under CEQA, a lead agency is responsible for requesting a WSA from the applicable water supplier before approving a project. The WSA is required to evaluate whether the total water supplies during a 20-year period will meet the projected water demand for a proposed project. While the lead agency must include the WSA in the environmental impact report (EIR), the lead agency is not required to accept the WSA’s conclusions. In evaluating the WSA, the lead agency may accept or disagree with the water supplier’s analysis and make an ultimate determination whether water supplies are sufficient based on the entire record.

Here, the County, as lead agency, had the opportunity to review and disagree with the District’s findings in the WSA. Citing *California Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464, the court found that, because the WSA was an interlocutory and preliminary step in the EIR process, it was not currently subject to judicial review. Instead, the court held that Golden Door must wait for the County to issue its final EIR before challenging the inadequacy of the WSA.

Golden Door argued that the court should allow its challenge because the WSA constituted a de facto amendment of the applicable District-wide water management plan. However, the court found that the WSA does not create a right or entitlement to water service. Instead, the WSA is solely an informational report for use in the CEQA process, and as such, did not constitute an amendment or authorize the District to take any other action.

Golden Door also argued that the WSA was reviewable because the County did not intend to reexamine or change its findings. Golden Door relied on statements made by County representatives and the County's draft EIR as evidence that the County would likely not change or independently evaluate the WSA. The court found that even assuming that the County did not intend to evaluate the WSA independently, the court would not preclude Golden Door from later challenging the County's acceptance of a flawed WSA report in the final EIR. Therefore, because the County had not yet reviewed the WSA or issued a final EIR incorporating the WSA, Golden Door had not yet exhausted its remedies under CEQA and the issue was not ripe for adjudication.

Challenges to the WSV Were Moot



Golden Door argued that the court should address its challenges to the rescinded WSV as an exception to the mootness doctrine, because the dispute was highly likely to recur. Specifically, because the reissued WSA was virtually identical to the rescinded WSV, Golden Door argued that its challenges were not moot and would have to be relitigated in the future, as a WSV is required for the Project. However, the court found that because the County had the power to review and disagree with the information presented in the WSA, it was speculative that the dispute would in fact recur. Finally, because Golden Door would have the opportunity to challenge the WSA as incorporated in a final EIR and the Project could not go forward without the District issuing a challengeable WSV, the court found that the issue would not evade review. Therefore, the controversy regarding the rescinded WSV was moot.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's judgment. The District's WSA was not reviewable separate from a final EIR.

- Opinion by Acting Presiding Justice Haller, with Justice Nares and Justice O'Rourke concurring.
- Trial Court: Superior Court of San Diego County, Case No. 37-2016-00037559-CU-WM-NC, Judge Ronald Frazier.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
5 <i>Inland Oversight Committee v. City of San Bernardino</i>		4 th	

[*Inland Oversight Committee v. City of San Bernardino*](#), California Court of Appeal, Fourth Appellate District, Division Two, Case No. E064836 (September 14, 2018).

- In the context of CEQA, the doctrine of res judicata applies if two actions involve the same episode of purported noncompliance.
- Adequacy of representation for privity purposes is measured by inference, in other words, examining whether the party in the suit that is asserted to have a preclusive effect had the same interest as the party to be precluded, and whether that party had a strong motive to assert that interest.
- The Water Code does not require a Water Supply Assessment if a proposed development is not subject to CEQA review.

Background for Appeal

In 1982, the City of San Bernardino (City) approved the Highland Hills Specific Plan 82-1 for a proposed residential development on a 541-acre site. The plan was later amended to allow for construction of low- and moderate-income multi-family residential units in an area where single-family units had originally been planned. Highland Hills Homeowners Association (HOA) challenged the change to the project, which resulted in a settlement agreement that was incorporated into a stipulated judgment in 1989. The settlement agreement noted that real party in interest First American Title Insurance Company (Developer) had prepared a “North Plan” that provided for up to 1,730 residential dwelling units and a golf course.

In 1992, HOA, City, and Developer’s predecessor in interest (Former Developer) agreed to an “Addendum” to the settlement agreement, which reduced the number of multi-family units permitted under the North Plan and required the developer to plant more than 1,000 new trees over the golf course. In 2001, the City Planning Commission approved a tentative tract map for the North Plan, which reduced the total number of residential units from 1,730 to 1,516. Later that year, HOA, the City, and the former developer agreed to a “Second Addendum,” whereby the parties agreed that the environmental impacts of the North Plan had been adequately reviewed pursuant to CEQA, thus “no subsequent or supplemental environmental impact report is required.”

Additionally, the Second Addendum introduced a new application process to facilitate the approval of any “minor modifications” to the project. Under this process, a City director reviewed modification requests to determine whether they constituted minor modifications, which are defined as those that “result in development which is equal to or less intense from the standpoint of environmental impacts under CEQA than development pursuant to the North Plan” pursuant to a number of factors. These factors include fewer residential dwelling units, less commercial leasable space, and more efficient mitigation measures/conditions. The Second Addendum defined this process as a ministerial act.

In 2014, the Developer applied for approval of modified construction plans pursuant to the Second Addendum (Modified North Plan). The City hired an independent environmental consultant to evaluate the Modified North Plan according to the criteria for minor modifications under the Second Addendum. The environmental report noted that the Modified North Plan would:

- Reduce the maximum total number of dwelling units
- Eliminate all previously contemplated commercial uses, including the golf course
- Substantially reduce both the total area disturbed by construction and the impact on wetlands, relative to the North Plan

The report concluded that the plan met each of the criteria for minor modifications.

The City's development director approved the Developer's application and, in June 2015, the Developer and the City filed a motion requesting that the trial court confirm that the proposed changes complied with the Second Addendum and that no further CEQA review was required. The trial court granted the motion in August 2015, finding that the proposed changes constituted a minor modification under the Second Addendum and did not require a supplemental or subsequent environmental impact report (EIR). In December 2017, the Court of Appeal affirmed the trial court's order in *Highland Hills Homeowners Association v. City of San Bernardino* (December 11, 2017, E064737) [nonpub. opn.] (Highland Hills).

Meanwhile, in 2015, Inland Oversight Committee (IOC), CREED-21, and HOA (collectively, Petitioners) filed a petition for writ of mandate asserting that the City's approval of the Developer's proposed changes to the project as minor modifications violated CEQA and the Water Code. Petitioners alleged that:

- The Modified North Plan required further CEQA review because of alleged new or more severe environmental impacts introduced by the changes to the project.
- The Modified North Plan should not have been approved without a Water Supply Assessment pursuant to Water Code Section 10910 et seq.

Applying the doctrine of res judicata, the trial court found the preclusive effect of *Highland Hills* barred Petitioners' CEQA claims. The trial court also held that the City did not violate the Water Code and sustained without leave to amend the demurrer to the petition filed by the City and the Developer, dismissing the petition and entering judgment in favor of the City and the Developer. Petitioners timely appealed. On appeal, the City and the Developer moved to dismiss IOC and CREED-21's appeals, while IOC and CREED-21 moved to strike portions of the City and Developer's motion to dismiss.

HOA's CEQA Claim Barred by Res Judicata

First, the court held that HOA's CEQA claim was barred by res judicata, explaining that:

- Causes of action in two lawsuits are the same for purposes of res judicata if they involve the same primary right.
- In the context of CEQA, the doctrine of res judicata does not apply if two actions involve the same general subject matter but involve distinct episodes of purported noncompliance.

The court observed that the episode of purported noncompliance at issue in HOA's CEQA claim was the same episode already addressed in *Highland Hills*. In both cases, HOA contended that the City violated CEQA by failing to conduct further environmental review of the Modified North Plan, instead approving the plan as a minor modification. Because HOA had already litigated the same claim in *Highland Hills* and lost, the court held that the doctrine of res judicata barred HOA from litigating the same claim again.

IOC and CREED-21 in Privity With HOA

Second, the court held that IOC and CREED-21 were in privity with HOA and that the doctrine of res judicata therefore barred their CEQA claims as well. The court explained that adequacy of representation for privity purposes is measured by inference, in other words, examining whether the party in the suit that is asserted to have a preclusive effect had the same interest as the party to be precluded, and whether that party had a strong motive to assert that interest.

The court noted that:

- Petitioners each have an interest in responsible land use and planning.
- Petitioners asserted a position identical to HOA's in *Highland Hills*, i.e., the modifications to the North Plan are not minor, but rather have serious potential environmental impacts requiring additional CEQA review.
- Nothing in the record suggested that HOA did not zealously litigate *Highland Hills*.

The court also found nothing in the record to support Petitioners' contention that HOA represented the private interests of homeowners, while IOC and CREED-21 represented the public interest. Therefore, the court concluded that HOA adequately represented IOC and CREED-21's interests in *Highland Hills* for purposes of the privity rule.

Failure to State a Claim Under the Water Code

Third, the court found no error in the trial court's determination that a Water Supply Assessment (WSA) was not required for the Modified North Plan. The court explained that the Water Code requires a WSA when a proposed development is subject to CEQA and is also a project within the meaning of Water Code Section 10912.

Relying on the finding from *Highland Hills* that the Modified North Plan was a minor modification under the Second Addendum that did not require supplemental or subsequent CEQA review, the court concluded that the preparation of a WSA was not required.

Mootness of Motion to Dismiss

Fourth, the court denied as moot the City and Developer's motion to dismiss on the basis that IOC and CREED-21 are "intentionally undercapitalized shell corporations being operated by a law firm, [Petitioners' counsel] Briggs Law Corporation, for the purpose of circumventing the fundamental procedural requirement of standing ..."



Petitioners opposed the City and Developer's motion and filed a motion of their own, seeking to strike portions of the motion to dismiss. Because Petitioners' appeal failed on the merits, the court denied the parties' pending motions as moot.

Disposition

The Court of Appeal affirmed the trial court's judgment and awarded the City their costs on appeal.

- Opinion by Justice Carol D. Codrington, with Justice Douglas P. Miller and Justice Richard T. Fields concurring.
- Trial Court: Superior Court of San Bernardino County, Case No. CIVDS1509296, Judge Gilbert G. Ochoa.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
6 <i>Salamone v. City of Whittier</i>		2 nd	

[Salamone v. City of Whittier](#), California Court of Appeal, Second Appellate District, Division Five, Case No. B280548 (June 5, 2018).

- The Historic Resources Commission's classification of Petitioner's building (Nixon House) as a historical resource did not raise a viable procedural due process claim.
- The trial court's characterization of the Nixon House as a presumptive historical resource was not a prejudicial error.

Background for Appeal

The Nixon House, built in 1928 in the City of Whittier (City), was purchased by President Richard Nixon's parents in 1945 and passed to President Nixon in 1965. In 2001, the City Council voted to reject a recommendation from the Historic Resources Commission (HRC) to place the Nixon House on the Local Official Register of Historic Resources.

Robert Salamone (Petitioner) purchased the home in 2005. That same year, he conducted an unpermitted demolition of the home's one-car garage, prompting notice from the City that any further addition, modification, or demolition to the Nixon House would require review and approval from the City's Planning Division. In November 2012, Petitioner applied for approval to demolish the Nixon House in order to develop a senior complex on the property. The City informed Petitioner that he would need to provide a historic resource evaluation before the City could process his request for a demolition permit, as required by City ordinance. Petitioner responded in June 2013, refusing to provide a historic resource evaluation and demanding the demolition permit.

Petitioner brought an action against the City in August 2013 for administrative mandate, alleging substantive and procedural due process violations. The City successfully demurred at the trial court. On appeal, Petitioner argued that the court erroneously interpreted and applied CEQA's definition of a historical resource.

Court's Classification as Presumptive Historical Resource Was Not Prejudicial

Petitioner argued that the trial court erred in characterizing the Nixon House as a presumptive historical resource under CEQA rather than a discretionary one, and therefore Petitioner should be given the chance to argue against the Nixon House's classification as a historical resource. The Court of Appeal disagreed.

The court determined that Petitioner's complaint could raise a procedural due process claim under CEQA only if:

- Petitioner was entitled to notice and a hearing on whether the Nixon House fell within *the CEQA definition* of a "historical resource"
- Petitioner could show legal entitlement to the sought-after decision

Here, Petitioner's sought-after decision was that the Nixon House was not a historical resource. On Petitioner's first contention, the court explained that Petitioner did not contend that if the Nixon House



were not a historical resource, it would not be subject to CEQA. On Petitioner's second contention, the court found that the HRC was likely to find that the Nixon House is in fact a historical resource (and, therefore, Petitioner could not show legal entitlement to his sought-after decision). As evidence, the court cited Petitioner's own expert who testified that the HRC's October 2000 vote cause caused the Nixon House to be deemed a "historical resource" under CEQA. Accordingly, Petitioner's claimed error was not prejudicial, and the court declined to address whether the trial court in fact erred in characterizing the Nixon House as a "presumptive" historical resource rather than a discretionary one.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's judgment and awarded the City its costs on appeal.

- Opinion by Acting Presiding Justice Kriegler, with Justice Baker concurring.
- Trial Court: Superior Court of Los Angeles County, Case No. VS024876, Judge Brian F. Gasdia.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
7 <i>LandWatch San Luis Obispo v. Cambria Community Services District</i>		2 nd	

[LandWatch San Luis Obispo County v. Cambria Community Services District](#), California Court of Appeal, Second Appellate District, Division Six, Case No. B281823 (June 28, 2018).

- Even if a petitioner has elected to prepare an administrative record, an agency may properly prepare the administrative record and appendix, and be awarded the costs of doing so, if there is an unreasonable delay in the petitioner's preparation of the record.

The trial court determined that the Cambria Community Services District (District) properly prepared the administrative record and appendix in the underlying case and awarded the District the costs associated with the preparation. LandWatch San Luis Obispo County (Petitioner) appealed on the grounds that it elected to prepare the record and the appendix itself, and thus was not responsible for the District's costs.

Background for Appeal

On January 30, 2014, the District approved an emergency water supply project (Project), which included a resolution finding that the Project was exempt from CEQA. On October 14, 2014, Petitioner filed a petition for writ of administrative mandate, alleging that the District failed to comply with CEQA in approving the Project. Petitioner also sent the District a request for all public documents relating to the approval of the Project, electing to prepare the administrative record itself, subject to the District's certification, under California Public Resources Code Section 21167.6(b)(2). The District provided the documents in November 2014.

In December 2014, the District notified Petitioner of additional documents to include in the record. Petitioner, however, did not request these documents until March 2015, requiring the District to re-gather the documents. The District produced the documents to Petitioner in April 2015.

In August 2015, Petitioner presented the District with a draft administrative record index. Upon review, the District informed Petitioner that the proposed index was both over-inclusive and under-inclusive because it included documents created after the January 30, 2014, Project approval date, and because it failed to include the resolution approving the Project. The District also informed Petitioner that to expedite the process of preparing the record, the District had prepared a new index and would certify the record immediately. The District certified the record the same day.

Petitioner then brought a motion to include post-approval documents in the record. With respect to that motion, the trial court held that, due to time delays, the District had acted appropriately in preparing and certifying the record, but ordered that the additional documents requested by Petitioner be included in a separate appendix to the record. However, Petitioner failed to provide the District with the desired additional documents. After nearly two months passed, the District prepared the supplemental appendix itself, completing the process on February 17, 2016.

Ultimately, the trial court denied the writ of mandate. In response, the District filed a memorandum of costs, seeking \$38,856.54 for preparation of the record and appendix. The trial court awarded the District \$21,160.46. Petitioner appealed the award of costs.

The District Acted Properly in Preparing the Administrative Record

Petitioner first argued that the District should not have taken it upon itself to prepare the administrative record because Petitioner had elected to prepare the record under California Public Resources Code Section 21167.6(b)(2). According to the court, however, while Petitioner gave timely notice of its decision to prepare the record, it did not prepare the record within the 60-day period that Section 21167.6(b)(1) requires. In fact, Petitioner did not even produce a draft administrative record index until nearly a year after making its election to prepare the record. Given this unreasonable delay, the Court of Appeal held that District acted properly in preparing the record, and the trial court was well within its discretion to award the District costs for doing so.

The District Acted Properly in Preparing the Supplemental Appendix



Petitioner next argued that the trial court erred in awarding the District costs for preparing the supplemental appendix. Petitioner claimed that the materials included in the supplemental appendix should never have been part of the administrative record and, therefore, the District was not entitled to the costs of preparing them. The court, however, reminded Petitioner that it was Petitioner that had previously argued, over the District's objection, to include these documents in the record. Thus, the District had properly been awarded costs for preparing the supplemental appendix.

Disposition

The Court of Appeal affirmed the trial court's judgment that the District properly prepared the administrative record and appendix, and that Petitioner must reimburse the District for the reasonable costs associated with that preparation.

- Opinion by Presiding Justice Arthur Gilbert, with Justice Steven Perren and Justice Martin Tangeman concurring.
- Trial Court: Superior Court of San Luis Obispo County, Case No. 14CVP-0258, Judge Ginger E. Garrett.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
8 <i>Save Lafayette Trees v. City of Lafayette</i>		1 st	

[Save Lafayette Trees v. City of Lafayette](#), California Court of Appeal, First Appellate District, Division Three, Case No. A154168 (October 23, 2018).

- If two statutes of limitation of equal authority apply to a claim brought pursuant to CEQA — one contained in a general state planning and zoning law and the other contained in a statute specific to CEQA — and the two cannot be reconciled, the more specific limitations period pursuant to CEQA prevails.

Save Lafayette Trees, Michael Dawson, and David Koters (together, Petitioners) filed a petition for writ of mandate challenging the City of Lafayette's (City's) approval of a letter agreement allowing a public utility company to remove trees without obtaining a permit. The City filed a demurrer, claiming that the petition was time-barred under the 90-day limitations period applicable to zoning and planning decisions under state law. The trial court agreed, sustaining the demurrer without leave to amend. Petitioners appealed. The Court of Appeals upheld the lower court decisions as to Petitioners' general challenge to the City's decision, concluding that pursuant to California Government Code Section 65009, any decision by a "legislative body" regarding a variance, a conditional use permit, or other permit provided for by a local zoning ordinance must be filed and served within 90 days of the decision, but reversed as to Petitioners' challenge pursuant to CEQA, concluding that a more specific limitations period promulgated pursuant to CEQA was controlling as to that claim.

Background for Appeal

On March 27, 2017, the City approved an agreement with a public utility company authorizing the company to remove up to 272 trees within its local natural gas pipeline right-of-way. Of the trees to be removed, approximately 216 were protected. Under the City's tree protection regulations, removal of protected trees required the public utility company to:

- Provide information about the project
- Obtain a tree removal permit
- Perform mitigation

The public utility company was willing to comply with the first and third conditions, but refused to seek a permit. The City conceded, authorizing the public utility company to remove the trees through a municipal provision that enabled the City to "allow the removal of a protected tree to protect the health, safety and general welfare of the community."

On June 26, 2017, Petitioners filed a challenge to the City's action. Petitioners alleged, among other things, that the City had failed to comply with CEQA before approving the agreement with the public utility company. The City demurred, arguing, among other things, that the petition was time-barred by Government Code Section 65009, a state law provision requiring that challenges to zoning and planning decisions be filed and served within 90 days of the challenged decision. Although the City acknowledged that the petition had been timely filed, the City argued that the claim was nonetheless barred because Petitioners did not serve the claim until after the 90-day deadline had passed. The trial court agreed and sustained the City's demurrer without leave to amend. Petitioners appealed.

Reconciling Conflicting Limitations Periods Applicable to Claims Brought Under CEQA

On appeal, Petitioners alleged that the 90-day limitations period contained in Government Code Section 65009, applicable to state planning and zoning decisions was not applicable to their claim under CEQA. Government Code Section 65009 provides that “no action or proceeding shall be maintained ... unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body’s decision.” The limitations period applies to an action brought “to determine the reasonableness, legality, or validity of any condition attached to a variance, conditional use permit, or any other permit.” Instead, Petitioners argued that a more specific CEQA limitations period contained in Public Resources Code Sections 21167(a) and 21167.6(a) applied to their challenge brought pursuant to CEQA. Public Resources Code Section 21167(a) provides that an action “alleging that a public agency is carrying out or has approved a project that may have a significant effect on the environment without having determined whether the project might have a significant effect on the environment shall be commenced within 180 days from the date of the public agency’s decision to carry out or approve the project.” Public Resources Code Section 21167.6(a) further requires that the public agency be served not later than 10 days after such cause of action is filed. Petitioners noted that, under the 180-day limitations period, their petition was timely filed and served.

Applying de novo review, the court determined that while the Government Code Section 65009 applied broadly to Petitioners’ substantive and procedural challenges to the City’s decision to authorize the tree removal pursuant to applicable planning and zoning law, the challenge pursuant to CEQA was not barred by the 90-day limitations period, despite the fact that both the CEQA limitations period and the 90-day limitations period were of equal authority and could both be applied to the relevant facts.



The court noted that, as a general rule, if two statutes relate to the same subject, the more specific of the two will prevail unless they can be reconciled. The court explained that, in order to reconcile Government Code Section 65009 and Public Resources Code Sections 21167(a) and 21167.6(a), they must be “construed in reference to each other so as to harmonize the two in such a way that neither become surplusage.” Here, the court determined that the two statutes could not be reconciled because there was no way to apply both limitations periods without rendering one statute superfluous. Since the two limitations periods could not be reconciled, the court concluded that the more specific period in Public Resources Code Sections 21167(a) and 21167.6(a) must prevail, and that to apply the 90-day limitations period would impermissibly shorten the limitations period provided pursuant to CEQA.

Disposition

Accordingly, the Court of Appeal upheld the lower court decisions as to Petitioners’ general challenge to the City’s decision, concluding that any decision by a “legislative body” regarding a variance, a conditional use permit, or other permit provided for by a local zoning ordinance must be filed and served within 90 days of the decision, but reversed the trial court’s judgment as to Petitioners’ CEQA challenge, concluding that Petitioners’ CEQA claim was not time-barred, since the longer statute of limitations applicable to such claims applied.

- Opinion by Justice Pollak, with Presiding Justice Siggins and Judge Ross of the Superior Court of California, County of San Francisco, sitting Pro Tem, concurring.
- Trial Court: Superior Court of Contra Costa County, Case No. MSN17-1142, Judge Steven K. Austin.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
9 <i>Small Property Owners of San Francisco Institute v. City and County of San Francisco</i>		1 st	

[Small Property Owners of San Francisco Institute v. City and County of San Francisco](#), California Court of Appeal, First Appellate District, Division Two, Case No. A145860 (April 11, 2018).

- Petitioner waived its Planning Code and CEQA claims for failure to exhaust its administrative remedies.
- The Ellis Act preempted the City and County's 10-year waiting period for alterations to non-conforming units if the owner had evicted a non-fault tenant.

A local property owners' organization (Petitioner) petitioned for writ of mandate seeking to invalidate the City and County of San Francisco's (City and County's) ordinance that limited the ability of owners of non-conforming housing units to alter those units if a non-fault eviction had occurred within the prior 10 years (Ordinance). Petitioner argued:

- The adoption of the Ordinance violated the Planning Code because the Board of Supervisors amended the Ordinance prior to adoption and those changes were not reviewed by the Planning Commission.
- The City and County's determination that the Ordinance was not a "project" subject to environmental review violated CEQA.
- The Ellis Act preempted the Ordinance.

Background for Appeal

The Planning Commission (Commission) held a hearing to review the Ordinance in September 2013 and voted to approve it. No public comment was offered at that hearing. The Board of Supervisor's (Board's) Land Use and Economic Development Committee (Committee) held a hearing to review the Ordinance on December 9, 2013, at which the Committee heard public comment on the Ordinance. The Board voted to approve the Ordinance at its December 10, 2013, meeting and passed the Ordinance unanimously on second reading on December 17, 2013. The mayor signed the Ordinance on December 26, 2013. Petitioner then filed a petition for writ of mandate seeking to invalidate the Ordinance. The trial court ruled in favor of the City and County, and Petitioner appealed.

Failure to Raise Planning Code Claim During Administrative Process

First, Petitioner argued that the City and County had violated the San Francisco Charter because the Board modified the Ordinance after the Commission approved it, and the Board did not present those modifications to the Commission for approval prior to adopting the Ordinance. Petitioner argued that it could not have exhausted its administrative remedies on this issue, because the violation did not occur until after the Board had adopted the Ordinance. In actions challenging the adoption of a zoning ordinance, the issues are typically limited to those raised before the close of the public hearing. This applies unless the court finds that a person exercising reasonable diligence could not have raised the issue at the hearing, or that the body conducting the hearing prevented the issue from being raised. Here, the court determined that Petitioner could have objected to the Board's failure to obtain Commission approval of the amended Ordinance at the December 9, 2013, Committee meeting and December 10,

2013, Board hearing. However, Petitioner failed to raise this issue. As such, the court ruled that Petitioner had waived its Planning Code claim for failure to exhaust its administrative remedies.

Failure to Raise CEQA Challenge During Administrative Process

Next, Petitioner claimed that the City and County had violated CEQA in determining that the Ordinance was not a project subject to environmental review. Petitioner argued that the exhaustion doctrine did not apply, because there was no public hearing or other opportunity for members of the public to raise objections to the determination, due to a defect in notice. The court was not persuaded, noting that Petitioner provided public comment on the Ordinance at the December 9, 2013, Committee meeting, which was clearly an opportunity for members of the public to raise objections to the Ordinance and its review process. Thus, the court ruled that Petitioner had waived its CEQA challenge for failure to exhaust its administrative remedies.

The Ellis Act Preempts the Ordinance



Finally, Petitioner claimed that the Ellis Act preempted the Ordinance, because the Ordinance penalizes the exercise of a property owner's right to evict a tenant as authorized by the Ellis Act. The Ellis Act prohibits local governments from requiring an owner of residential property to continue to offer accommodations for rent or lease. Courts have previously determined that the Ellis Act completely occupies the field of substantive eviction controls over landlords who wish to withdraw units from the rental market. Here, the court reviewed the effect of the Ordinance and determined that if a property owner exercises its rights under the Ellis Act to remove a unit from the rental market, the property owner would be met with a locally imposed barrier to making alterations to that unit. The court determined that the waiting period represented an impediment to the exercise of a property owner's rights, even though the waiting period would occur after the eviction. The court concluded that the Ellis Act conflicts with and preempts the 10-year waiting period for alterations conflicts.

Disposition

Accordingly, the Court of Appeal reversed the trial court's judgment and remanded the matter, with directions to the trial court to enter an order enjoining the City and County from enforcing the 10-year waiting period.

- Opinion by Justice Miller, with Presiding Justice Kline and Justice Richman concurring.
- Trial Court: San Francisco Superior Court, Case No. CPF14513453, Judge Teri Jackson.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
10 <i>Coston v. Stanislaus County</i>		5 th	

[Coston v. Stanislaus County](#), California Court of Appeal, Fifth Appellate District, Case No. F074209 (August 24, 2018).

- Procedural due process requirements are triggered only by governmental actions that result in significant or substantial deprivations of property.

In Stanislaus County (County), seven property owners (Petitioners) filed a petition for writ of mandate alleging that the County:

- Violated CEQA by issuing a well construction permit for an adjacent property without engaging in environmental review under CEQA
- Violated Petitioners' procedural due process rights by proceeding without a noticed hearing

Petitioners sought a permanent injunction preventing the real party in interest from operating the well that was constructed pursuant to the County-issued permit.

CEQA Review Was Required

In a discussion identical to the one in *Protecting Our Water & Environmental Resources v. Stanislaus County*, the court found that the County's procedure for permitting wells was discretionary and thus subject to CEQA's requirements.

Procedural Due Process Was Not Implicated

Petitioners also alleged that the County violated Petitioners' due process right to notice and an opportunity to be heard prior to a government's adjudicative decision depriving them of a significant property interest. Petitioners claimed that the "depth to water" at their wells had increased since the construction of the permitted well at issue, thus depriving them of a property interest. The court found that a discretionary and/or adjudicative government action is necessary but not sufficient to invoke procedural due process rights. Citing *Horn v. County of Ventura*¹, the court stated that property interest deprivation must also be significant or substantial. Because Petitioners did not offer any legal explanation as to why the property deprivation in this case was significant or substantial, the court rejected Petitioners' argument for the purposes of appellate relief.



Disposition

The Court of Appeal reversed the judgment of the trial court, finding that the well permit was discretionary and therefore subject to CEQA. In an Order Modifying Opinion and Denying Rehearing issued on September 18, 2018, the court clarified that Petitioners' pleading was entirely intact on remand, preserving the potential for Petitioners to litigate whether their deprivation of property was sufficiently significant or substantial to trigger procedural due process rights under *Horn*.

¹ (1979) 24 Cal.3d 605.

- Opinion by Justice Poochigian, with Acting Presiding Justice Franson and Justice Peña concurring.
- Trial Court: Superior Court of Stanislaus County, Case No. 2016561, Judge Roger M. Beauchesne.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
11 <i>Endangered Habitats League v. City of San Marcos</i>		4 th	

[*Endangered Habitats League, Inc. v. City of San Marcos*](#), California Court of Appeal, Fourth Appellate District, Division One, Case No. D072404 (May 3, 2018).

- An oral request for a hearing on the merits of a CEQA petition, followed by written notice to all parties, fulfills the objectives of CEQA's procedural requirement that a petitioner file a written request for a hearing, such that the substantial compliance doctrine applies.

The trial court dismissed the action based on its belief that the court was foreclosed from applying the substantial compliance doctrine to CEQA's procedural requirements. The Endangered Habitats League (Petitioner) had orally requested a hearing on the merits of its CEQA action, and provided timely written notice to the City of San Marcos (City) and the real parties in interest (Real Parties). Petitioner had additionally filed and served a declaration attesting to the request for hearing, but had failed to file a document entitled "request for a hearing." Petitioner appealed the dismissal.

Background for Appeal

On January 13, 2017, Petitioner challenged the City's approval of a housing project proposed by Real Parties. Petitioner filed a petition for writ of mandate alleging that the City failed to comply with CEQA because the environmental impacts of the project had not been properly analyzed. Under CEQA Section 21167.4(a), Petitioner had 90 days (until April 13) to request a hearing on the petition.

During the next few weeks, the parties engaged in initial discovery, unsuccessful settlement conferences, and other communications. Petitioner orally requested a hearing date with the court, and upon confirmation from the court, Petitioner emailed the other parties advising them of the requested hearing date, set for November 17, 2017. Immediately after, Petitioner's counsel filed and served a declaration on respondents attesting to the request for the November 17 hearing date. Petitioner's later filings also included the November 17 date. In addition, the court independently sent notice of the hearing to the parties and stated that a status conference would be held prior to the November 17 hearing. These communications occurred well within 90 days of Petitioner filing the petition.

On April 27 (after the 90-day period had expired), Real Parties moved to dismiss the action, stating that Petitioner failed to file and serve a written request for a hearing within the specified 90-day period as required under CEQA Section 21167.4(a). The court explained that the purpose of the statute was to expedite the resolution of CEQA matters and that Petitioner had thus substantially complied with this purpose. However, the court ultimately granted Real Parties' motion, citing precedent in which cases had been dismissed due to a lack of a written request for a hearing, but clarifying that it would otherwise have denied the motion to dismiss given that Petitioner had fulfilled the objectives of Section 21167.4. Petitioner appealed.

Substantial Compliance Is Sufficient if Statutory Objectives Are Met

On appeal, Petitioner argued that its actions satisfied the objectives of Section 21167.4 and that it had thus substantially complied with CEQA, despite not filing a document specifically entitled "request for a hearing." The substantial compliance doctrine governs when a party has complied with the objectives of a CEQA provision. The objectives of Section 21167.4 are to promote prompt resolution of CEQA matters and to provide judicial oversight and involvement in scheduling processes. Here, the Court of Appeal

found that by requesting a hearing as well as filing and providing written notice to all the parties involved within 90 days of filing the petition, Petitioner had fulfilled this statutory objective.

The Court of Appeal further found that Petitioner's actions provided Real Parties sufficient opportunity to request an earlier or different hearing date, and these actions also did not prevent the court from setting a different date for the hearing. Even though Petitioner did not file a specific written request for a hearing with the court, the Court of Appeal found that Petitioner's and the trial court's actions confirmed Petitioner's requested hearing date. Thus, the court and all parties received the same opportunities as a written request for hearing would have provided.



The Court of Appeal distinguished its holding from prior rulings by clarifying that in those cases, the notice of a hearing was given to the court only via telephone (and not attested to in a written declaration filed with the court), and written notice was not given to the other parties within the 90-day time frame. The Court of Appeal was careful to note that it did not disagree with the precedential opinions and was merely distinguishing the prior rulings from the present circumstances, confirming that written notice of a hearing request is required under CEQA.

Disposition

Accordingly, the Court of Appeal reversed the trial court's judgment and remanded the case to the trial court for further proceedings consistent with the Court of Appeal's decision.

- Opinion by Justice Aaron, with Acting Presiding Justice O'Rourke and Justice Guerrero concurring.
- Trial Court: Superior Court of San Diego County, No. 37-2017-00001434-CU-WM-NC, Judge Ronald F. Frazier.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
12 <i>Golden Door Properties v. County of San Diego</i>		4 th	

[*Golden Door Properties, LLC v. County of San Diego*](#), California Court of Appeal, Fourth Appellate District, Division One, Case No. D072406 (September 28, 2018).

- Under CEQA, thresholds of significance must be adopted by ordinance, resolution, rule, or regulation; developed through a public review process; and supported by substantial evidence.

Sierra Club and Golden Door Properties, LLC (Petitioners), represented by Latham & Watkins LLP, filed petitions challenging the County of San Diego's (County's) adoption of a document purporting to provide guidance on climate change analysis (2016 Guidance Document), alleging that:

- The County failed to comply with the procedural requirements of CEQA and the County's own CEQA guidelines for establishing a threshold of significance.
- The County Efficiency Metric included in the 2016 Guidance Document for CEQA review of greenhouse gas (GHG) impacts was not supported by substantial evidence.
- The 2016 Guidance Document impermissibly piecemealed environmental review.

The trial court agreed, granted a peremptory writ of mandate, and entered judgment prohibiting the County from using the 2016 Guidance Document and County Efficiency Metric in CEQA reviews. The County appealed.

Background for Appeal

In 2012, the County approved a Climate Action Plan (2012 CAP), which Sierra Club challenged. The trial court found that the 2012 CAP violated CEQA by failing to include enforceable GHG-emission reductions required by general plan mitigation measures and issued a writ of mandate, which the County appealed. In 2013, the County adopted Guidelines for Determining Significance for Climate Change (2013 Guidelines). Sierra Club filed a supplemental petition for writ of mandate challenging the 2013 Guidelines. In 2014, the Court of Appeal affirmed the trial court's writ of mandate. The trial court subsequently issued a supplemental writ of mandate (Supplemental Writ), directing the County to set aside the 2012 CAP and 2013 Guidelines. The trial court also ordered the County to schedule the preparation of a new CAP and guidelines for determining significance.

In 2016, the County published its 2016 Guidance Document without first undertaking any public review. This document recommended that project-level climate change analyses quantify GHG emissions and make significance determinations at 2020 and project buildout (if post-2020). The 2016 Guidance Document provided a County Efficiency Metric, which it described as "the recognized and recommended method" for a project to make impact significance determinations. The document specified numerical efficiency metrics for 2020 and beyond, and defined the 2020 County Efficiency Metric as 4.9 metric tons of CO₂ equivalent per service population per year.

2016 Guidance Document Established a Threshold of Significance

As an initial matter, the Court of Appeal rejected the County's argument that Petitioners' claims were facial challenges and were therefore unripe. The court found that the County Efficiency Metric was similar

to the recommended threshold supplied by guidelines in *California Building Industry Association v. Bay Area Air Quality Management District*, in that both were generally applicable thresholds of significance and were therefore ripe for review. The Court of Appeal determined that the County Efficiency Metric was generally applicable because it was the “recognized and recommended” method for making significance determinations, and therefore the matter was ripe.

The Court of Appeal affirmed the trial court’s determination that the 2016 Guidance Document established a threshold of significance. CEQA defines a threshold of significance as “an identifiable quantitative, qualitative, or performance level” of an environmental effect used to determine whether the effect is significant. The County argued that because the County Efficiency Metric was recommended but not required, it established a “methodology” rather than a threshold of significance. The court rejected this argument, finding that the County Efficiency Metric was a single number that established an “identifiable and quantitative” level above which a project’s GHG impact would be significant and below which would be less than significant, and therefore constituted a threshold of significance under CEQA. The Court of Appeal also rejected the County’s arguments that the 2016 Guidance Document could not establish a threshold of significance because it required that emissions comply with AB 32 and because it was less explicit than the 2013 Guidelines.

2016 Guidance Document Violates CEQA and County CEQA Guidelines

The County admitted that its 2016 Guidance Document was not formally adopted subject to a public review process. Therefore, the Court of Appeal concluded that the County’s publication of this document violated CEQA’s requirement that thresholds of significance for general use must be formally adopted by ordinance, resolution, rule, or regulation, and developed through a public review process. The court concluded that the 2016 Guidance Document also violated the County’s CEQA guidelines, which required public circulation and review before adoption. The Court of Appeal also found that the 2016 Guidance Document violated CEQA because the General Plan required the County to revise its significance guidelines based on the CAP, yet there was no valid CAP in effect when the County published the 2016 Guidance Document and adopted a threshold of significance.

County Efficiency Metric Not Supported by Substantial Evidence

In addition, the Court of Appeal concluded that the 2016 Guidance Document violated CEQA’s requirement that thresholds of significance be supported by substantial evidence. The court found that the County Efficiency Metric relied on statewide service population and GHG inventory data without any explanation of why this data was appropriate for use in San Diego County projects. Additionally, the County Efficiency Metric allowed the threshold to be applied to most project types, but did not account for variations between different types of development, nor did it explain why its per-person limit would be appropriately evenly applied across project types. As such, without substantial evidence explaining why the statewide GHG reduction levels would be proper in this context, the County failed to comply with CEQA.

Impermissible Piecemealing and Violation of Prior Court Orders



The Court of Appeal also concluded that publication of the 2016 Guidance Document without the adoption of a CAP resulted in a piecemeal environmental review and violated the Supplemental Writ and the Court of Appeal’s 2014 opinion. In its 2014 decision, the Court of Appeal concluded that the CAP and thresholds of significance based on the CAP were one single project subject to environmental review. Therefore, the County could not adopt a threshold of significance in the absence of a valid CAP pursuant to the Supplemental Writ and the prior appellate decision. Yet, when the County published its 2016 Guidance Document, it had not completed a valid CAP or performed a CEQA review. The court rejected the County’s argument that it was in compliance because it was developing a CAP and thresholds of significance according to the schedule required by the Supplemental Writ because the 2016 Guidance Document established a generally applicable threshold of significance. Therefore, the 2016 Guidance Document violated the trial court’s previous writs as affirmed by the Court of Appeals’ 2014 ruling.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's peremptory writ of mandate and judgment.

- Opinion by Justice Huffman, with Presiding Justice McConnell and Justice Nares concurring.
- Trial Court: Superior Court of San Diego County, Case No. 37-2016-00037402-CU-TT-CTL, Judge Timothy B. Taylor.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
13 <i>Heron Bay Homeowners Association v. City of San Leandro</i>		1 ST	

[*Heron Bay Homeowners Association v. City of San Leandro*](#), California Court of Appeal, First Appellate District, Division Four, Case No. A143985 (January 12, 2018).

- The financial burden of enforcement that a homeowners' association faced made an award appropriate under CCP Section 1021.5.
- A successful CEQA litigant is not disqualified from an award of attorneys' fees if the financial benefit at stake in the litigation was uncertain compared to a substantial financial burden.

Heron Bay Homeowners Association (Petitioner) had filed a petition for writ of mandate seeking to invalidate the City of San Leandro's (City's) approval of Halus Power Systems' (Halus') proposed project to install a single 100-foot-tall wind turbine on Halus' property for renewable power generation and on-site research and development (Project). Petitioner also sought to compel the City to prepare an environmental impact report (EIR) instead of the mitigated negative declaration (MND) the City had initially prepared. Petitioner argued that the Project as mitigated would have significant environmental impacts on views, birds and their habitats, aircraft navigational radar, noise and vibration levels, and property values. The trial court found that substantial evidence supported a fair argument that the Project as mitigated would have significant environmental impacts and directed the City to set aside its approvals until the City prepared and approved an EIR. Halus ultimately decided not to proceed with the Project.

Background for Appeal

Following the entry of judgment, Petitioner moved for an award of attorneys' fees in the amount of US\$483,321 under California Code of Civil Procedure (CCP) Section 1021.5. The trial court determined that the value of the suit to the petitioner was approximately US\$5.8 million, and reasonably anticipated legal costs should have totaled approximately US\$240,000. The trial court also noted that CCP Section 1021.5 was intended to address the problem of affordability in public interest litigation, and pointed out that a lawsuit aimed at avoiding financial loss (such as an anticipated harm to property values) may be especially hard to finance. Balancing these findings, the trial court awarded the petitioner US\$181,471.70 in attorneys' fees. The City and Halus appealed the award of attorneys' fees.

Financial Burden of CEQA Enforcement Rendered Fees Appropriate

The City disputed that Petitioner was eligible for attorneys' fees under CCP Section 1021.5, which requires a plaintiff to establish that:

- The suit resulted in enforcement of an important right affecting the public interest
- A significant benefit was conferred on the public or a large class of persons
- The financial burden of enforcement justifies the award

The City did not dispute the first two requirements, arguing only that Petitioner did not satisfy the third requirement for several reasons.

First, the City argued that the trial court erred in applying apportionment principles to grant the partial fee award and claimed that the trial court could consider apportionment when determining the amount of the fee award only after concluding a party's financial interest was insufficient to disqualify it from receiving any fee award. The City further contended that Petitioner did not face a sufficiently substantial financial burden compared to the potential benefit at stake in the litigation. The Court of Appeal explained that, if litigants stand to gain a substantial financial benefit as compared to the cost of a lawsuit, CCP Section 1021.5 may not apply. Here, membership in the homeowners' association was mandatory, each member had a vote, and only a few properties in the development were likely to be within view of the Project. As such, many members likely did not have sufficient individual financial motivation to retain counsel for CEQA litigation absent the possibility of CCP Section 1021.5 fees. In addition, because Petitioner retained counsel partially on a contingent fee basis, the benefit Petitioner sought was not "immediately bankable" and, thus, could not be used to pay counsel. The court agreed with Petitioner, concluding that a majority of members did indeed face a substantial financial burden compared to the potential benefits of litigation. Thus, the court found that, although the trial court did not expressly state a finding on the financial burden element before discussing apportionment, the record supports an implied finding that Petitioner had sufficient incentive to incur some, but not all, of the costs of litigation.

Second, the City argued that Petitioner was ineligible for attorneys' fees because Petitioner acted purely out of self-interest. A pecuniary interest in the outcome of the litigation is not disqualifying. Rather, the relevant inquiry is whether the financial burden placed on the party is disproportionate to its personal stake in the lawsuit. Here, the members of Petitioner who submitted comments during the public comment period addressed not only property values, but also impacts on wildlife, aesthetics, health, and noise levels. Therefore, the court rejected the City's argument, finding that Petitioner had demonstrated public interest motivations and was not acting solely out of a desire to avoid a loss in property values.



Third, the City argued that the trial court contradicted itself by concluding that Petitioner's "financial incentive" was "mitigated by the uncertain value of the benefit sought," because the trial court assigned a value of US\$5.8 million to Petitioner's avoided property value loss. The Court of Appeal acknowledged that a court's reliance on an arbitrary estimate in evaluating the extent of a party's personal stake in litigation is questionable, and that the trial court here "undoubtedly erred" in concluding that a subjective standard applied. However, the Court of Appeal found that the trial court's error did not affect the question of whether Petitioner's financial incentive was so large and so certain that it precluded any award. Because the City cited no credible valuation of the projected loss, the Court of Appeal could not agree that Petitioner's financial stake made an award of attorneys' fees inappropriate.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's ruling and awarded Petitioner its costs on appeal, including attorneys' fees, in an amount to be determined by the trial court.

- Opinion by Justice Maria P. Rivera with Presiding Justice Ignazio J. Ruvolo and Justice Jon B. Streeter concurring.
- Trial Court: Superior Court of Alameda County, Case No. RG13677840, Judge Evelio M. Grillo.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
14 <i>John R. Lawson Rock & Oil v. State Air Resources Control Board</i>		5 th	

[*John R. Lawson Rock & Oil, Inc. v. State Air Resources Board*](#), California Court of Appeal, Fifth Appellate District, Case No. F074003 (January 31, 2018).

- A regulatory advisory committing an agency to a particular course of action constituted project approval prior to conclusion of environmental review, in violation of CEQA.
- A baseline determination does not need to account for future potential impacts if doing so would yield an illusory comparison.
- A negative declaration is inappropriate in the face of a fair argument that proposed regulations might have a significant impact on the environment.

Background for Appeal

In 2010, a California state regulatory scheme designed to reduce emissions of diesel particulate matter, oxides from nitrogen, and greenhouse gases from large diesel vehicles (Truck and Bus Regulation) became effective. In October 2013, the State Air Resources Board (Board) received information that the Truck and Bus Regulation would render at least 20,000 California trucks non-compliant. In response, the Board's staff expressed an intent to issue a regulatory advisory that would provide fleets affected by the regulation flexibility in meeting the regulation's requirements (Regulatory Advisory). In November 2013, the Board issued the Regulatory Advisory, describing the steps the Board would take to assist non-compliant vehicle owners. In the Regulatory Advisory, the Board indicated that it was considering extensions on deadlines and would not prosecute individuals for non-compliance until the Board proposed and adopted modified regulations.

On March 5, 2014, the Board released its proposed modifications and Initial Statement of Reasons for Proposed Rulemaking, providing recommendations to non-compliant vehicle owners. On April 24, 2014, the Board adopted the proposed modifications. On November 20, 2014, the Board adopted the final regulation order for the modified regulations. John R. Lawson Rock & Oil, Inc. and a related interest group (Respondents) subsequently challenged the modified regulations' adoption.

The Board Granted Premature Project Approval

Respondents argued the Board violated CEQA by granting project approval prior to the conclusion of environmental review. The trial court agreed, concluding that issuing the Regulatory Advisory constituted approval of a project, triggering CEQA review. The Court of Appeal agreed, but limited the trial court's holding to note that while the Board was exempt from CEQA's procedural requirements as a certified regulatory program, it was not exempt from CEQA's substantive requirements. The Court of Appeal held that "project approval" effectively occurred when the Board issued the Regulatory Advisory, without the required environmental review. The court determined that the approval effectively "furthered a project in a manner that foreclosed alternative or mitigation measures that would ordinarily be part of CEQA review," and thus constituted premature approval in violation of *Save Tara v. City of West Hollywood*². Specifically, the court determined that the Regulatory Advisory effectively precluded any potential for the Board to pursue any action that did not modify the regulatory scheme before the Board had completed its CEQA-

² (2008) 45 Cal.4th 116.

mandated environmental review. Accordingly, the court ruled that the Board's actions violated CEQA's substantive requirements.

The Board Properly Adopted a Baseline Using the Current Environment

On appeal, Respondents also argued that the Board used a baseline that was inconsistent with CEQA because it did not account for future potential environmental conditions. The Court of Appeal disagreed, holding that a baseline determination does not need to account for future potential impacts if doing so would yield an illusory comparison. The court ruled that the Board's decision to use a baseline calculation ignoring speculative future reductions based on expected implementations was proper because the Board's baseline properly considered the current environmental conditions. The court reasoned that a baseline determination does not need to address future potential conditions if doing so would result in an environmental comparison that would be illusory. As such, the Board was within its discretion to adopt a baseline using the current environment without considering future effects of the regulations.

Further, the court disagreed with Respondents' argument that a baseline must assume future potential conditions, holding that a standard is sufficient for CEQA if it evaluates the current environmental conditions. Thus, the court found that the Board's decision to measure its baseline using then-current outputs was not a violation of CEQA.

The Board Failed to Prepare the Functional Equivalent of an EIR

However, the Court of Appeal held that the Board violated CEQA when it failed to acknowledge arguments that adoption of the regulations may have a significant effect on the environment. The Board's decision to forego the functional equivalent of an environmental impact report (EIR) and issue the functional equivalent of a negative declaration violated CEQA because the Board failed to react to evidence suggesting there would be an environmental impact. Applying the fair argument standard, the court concluded there was sufficient evidence in the record to support a fair argument that the proposed regulations may have a significant effect on the environment. Therefore, the Board erred by preparing the functional equivalent of a negative declaration rather than the functional equivalent of an EIR.



Specifically, Respondents presented evidence demonstrating that nitrogen, particulate matter, and greenhouse gases would increase in California under the proposed regulations when compared to the then-existing regulations. Because the Board failed to acknowledge this evidence and prepare the functional equivalent of an EIR, the court determined that the Board violated CEQA.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's decision, remanding with instructions to comply with CEQA as the Board exercises its discretion moving forward.

- Opinion by Justice Detjen, with Presiding Justice Levy and Justice Poochigian concurring.
- Trial Court: Superior Court of Fresno County, Case No. 14CECG01494, Judge Mark Snauffer.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
15 <i>La Mirada Avenue Neighborhood Association of Hollywood v. City of Los Angeles</i>		2 nd	

[La Mirada Avenue Neighborhood Association of Hollywood v. City of Los Angeles](#), California Court of Appeal, Second Appellate District, Division Two, Case No. B282137 (May 3, 2018).

- Under California Code of Civil Procedure Section 1021.5, a trial court may award attorneys' fees to a successful party that acts as the catalyst to alter a defendant's behavior.
- A successful party confers a significant benefit on the general public if it enforces an important right affecting the public interest, and that enforcement benefits a large number of individuals.
- A successful party is not precluded from seeking attorneys' fees if, after obtaining a judgment that a construction project violates the zoning laws then in existence, the losing party later gets the zoning laws changed.

La Mirada Avenue Neighborhood Association of Hollywood (La Mirada) and Citizens Coalition Los Angeles (Citizens) (collectively, Petitioners) filed separate petitions for writ of mandate challenging the City of Los Angeles' (City's) grant of eight variances under the Los Angeles Municipal Code to real party in interest Target Corporation that allowed Target to move forward with the construction of a retail store (Project) in the Hollywood area. The trial court partially granted those petitions, concluding that six of the eight variances violated the Municipal Code. More specifically, the trial court held that the variances did not comply with the area's Station Neighborhood Area Plan (SNAP). The trial court also authorized Petitioners to seek attorneys' fees. Both Target and La Mirada appealed the judgment.

While the appeals were pending, the Los Angeles City Council amended the SNAP to create a new subarea, which included the Project's proposed location and allowed for the construction of large retail stores like the Project without need for the previously granted variances. The Court of Appeal then dismissed the appeals as moot but left the original judgment intact. Petitioners then filed new petitions for writ of mandate, challenging the Project's validity under the newly amended SNAP. The trial court vacated the City's approval of the Project under the newly amended SNAP. Target's appeal of that judgment is pending before the Court of Appeal in a related case, *Citizens Coalition Los Angeles v. City of Los Angeles*, Case No. B282142.

Background for Appeal

After Petitioners' first appeal was dismissed on mootness grounds, Petitioners moved for attorneys' fees pursuant to California Code of Civil Procedure Section 1021.5 as prevailing parties on their challenge to the SNAP variances. The trial court awarded La Mirada's attorneys' fees totaling \$793,817.50 and Citizens' attorneys' fees totaling \$180,320. Target and the City appealed the grant of attorneys' fees.

Eligibility for Attorneys' Fees Under Section 1021.5

Successful Party

Target argued that the trial court erred in ruling that Petitioners were a "successful party" in the original action. The Court of Appeal explained that under Section 1021.5, a party is successful if it "achieves its objectives." Per the Court of Appeal, the definition is broad. A party need not succeed on all of its claims, obtain final judgment in its favor, or personally benefit from its success. Rather, the court explained that

success is measured by the “impact of the action,” and a party may be successful if the lawsuit serves as a “catalyst that motivate[s] the defendant to alter its behavior.”

The Court of Appeal found that the trial court did not abuse its discretion in concluding Petitioners were successful for the following reasons:

- Six of the eight variances were set aside for noncompliance with the SNAP.
- The lawsuit “served as a catalyst that motivated the City ... to amend the SNAP” to create a new subarea specifically to make the Project lawful.

The court stated that: “[a] party is successful when, as here, its lawsuit directly prompts a legislative fix.”

Significant Benefit

Target also argued that Petitioners’ action did not confer a significant benefit on the general public or a large class of persons. The court explained that whether a successful party’s action has conferred a significant benefit on the public is a function of “(1) the significance of the benefit, and (2) the size of the class receiving [the] benefit.” The court stated that “a benefit need not be monetary to be significant.” Rather, a party may secure a nonpecuniary benefit to the public, including the benefit of the proper enforcement of the law, if it can “show that the law being enforced furthers a significant policy.”

Here, the court found that the standard was clearly met because Petitioners’ lawsuit resulted in the following:

- The City adhered to the Municipal Code’s legal requirements for granting variances, when the California Supreme Court has consistently recognized the importance of preserving the integrity of zoning laws as an important public policy.
- A large group of individuals received benefits, as all residents of the City of Los Angeles “benefit from the trial court’s ruling that holds the City Council’s zoning decisions to the letter and spirit of the Municipal Code.”

Thus, the Court of Appeal found that the trial court did not abuse its discretion in holding that Petitioners’ lawsuit conferred a significant benefit on the general public.

Impact of New Zoning Law

Target lastly argued that Petitioners were not successful parties and did not confer a benefit on the general public because the validity of the Project under the amended SNAP zoning law was still pending. Target claimed that Petitioners’ objective was to stop the Project from ever being built and that the City may still prevail in obtaining a ruling that the Project is valid under the new zoning law.

The court found that this argument was both factually inaccurate and legally untenable. First, the court explained that Petitioners’ stated goal in filing the writ petitions was to set aside and invalidate the eight variances granted by the City and to enjoin further construction of the Project contingent on the validity of the eight variances. The court stated that “[a]t no point did [Petitioners] allege that their writ petitions were aimed at stopping the Project forevermore.”

Second, the court explained that success under Section 1021.5 “does not require a showing that the successful party put the entire dispute to rest for once and all.” In fact, the code authorizes “interim attorney fee awards” for successes conferring significant benefits before a matter is finalized. In this case, the court explained that since the trial court’s judgment that the SNAP variances violated the Municipal Code was left intact after the first appeal, the judgment is more final than the typical interim ruling. The judgment can be considered “interim only against the backdrop of the broader litigation between the parties, which continues only because the City amended the zoning laws and thereby promoted a new round of petitions challenging the Project” during the appeal. Further, the court explained, a court may

only grant writ relief after applying the law in existence at the time of its decision. Target's argument, on the other hand, would require parties to succeed under the law in existence at time and "as it might be amended in the future." The court, however, declined "to define success as requiring one to achieve the impossible."

Amount of Fees

In the unpublished portion of the opinion, the Court of Appeal upheld the amount of fees awarded under Section 1021.5, finding that the trial court properly:



- Calculated the "lodestar" figure
- Exercised its discretion in determining whether the award should be adjusted based on Petitioners' degree of success on all claims brought
- Applied a multiplier to the base award

Disposition

The Court of Appeal unanimously affirmed the trial court's orders awarding attorneys' fees.

- Opinion by Justice Hoffstadt, with Justice Ashmann-Gerst and Justice Chavez concurring.
- Trial Court: Los Angeles County Superior Court, Case Nos. BS140889, BS140930, Judge Richard L. Fruin, Jr.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
16 <i>Protecting Our Water & Environmental Resources v. Stanislaus County</i>		5 th	

[*Protecting Our Water & Environmental Resources v. Stanislaus County*](#), California Court of Appeal, Fifth Appellate District, Case No. F073634 (August 24, 2018).

- The County's process for granting well permits was discretionary under CEQA because the County retained the ability to decide the location and spacing of individual wells.
- An agency's lack of authority to enforce mitigation measures or compel substantial physical changes does not excuse the agency from CEQA, as the agency may make a finding in the environmental review document that such measures are legally infeasible.
- The existence of a comparable environmental review process does not excuse an agency from conducting CEQA review.

Protecting Our Water and Environmental Resources and California Sportfishing Protection Alliance (Petitioners) petitioned for writ of mandate alleging that Stanislaus County (County) violated CEQA through its practice of issuing well construction permits without engaging in environmental review under CEQA or determining whether approval would have significant adverse environmental impacts. Petitioners also sought to enjoin the County from approving well construction permits pending a modification of the County's policy to comply with CEQA. The trial court concluded that the County's approval was ministerial and, thus, exempt from CEQA. The Court of Appeal reversed, concluding that the County's issuance of well construction permits was discretionary because the County retained discretion to determine whether a proposed well was placed an adequate distance from a source of contamination.

Background for Appeal

Beginning in 1973, the County reviewed requests for well construction permits pursuant to provisions of the County's Municipal Code (County Code), which the County periodically amended. One amendment modified the County's procedure for determining the necessary distance between a proposed well and nearby sources of contamination. The amendment included general spacing guidelines, but provided that other distances could be approved if the County determined, based on the individual facts and circumstances, that such spacing provided "adequate" distance between the well and sources of contamination.

When the County adopted the CEQA Guidelines and Procedures in 1983, the County determined that the issuance of well construction permits was not subject to the requirements of CEQA, so long as the applicant did not request a variance. In 2014, the County again modified the County Code to prohibit permits for well construction that would result in either the unsustainable extraction of groundwater, or the export of water from the County. As a result of this modification, the County began engaging in a two-step process for reviewing applications for well construction permits; first, the County reviewed permits for compliance with the modified County Code, and second, the County conducted CEQA review only if a variance was requested.

Petitioners filed a petition for writ of mandate, alleging that the County's pattern and practice of approving non-variance well construction permits without conducting environmental review under CEQA or determining whether such permits might have significant adverse environmental effects violated CEQA.

The trial court found in favor of the County, concluding that the issuance of non-variance well construction permits was ministerial and, thus, not subject to CEQA. Petitioners appealed.

The County Exercised Its Discretion in Spacing Wells From Contamination Sources

Petitioners alleged that provisions of the County Code related to well spacing were not exempt from CEQA because the provisions contained discretionary standards. Although a presumption of correctness applied to the County's determination that the approval of non-variance well construction permits was a ministerial act, the court determined that the provisions of the County Code clearly allowed for the application of discretion. A decision is ministerial only if it involves fixed standards or objective measurements. In contrast, if a decision rests on a generalized standard or is dependent upon agency judgment, the decision is discretionary. The court concluded that the standard articulated in the County Code requiring that the spacing of wells be "adequate" involved the application of subjective judgment and was inherently discretionary.

The County's Discretion Was Sufficiently Effective

The County argued that even if the standard delineated in the County Code was discretionary, CEQA review should not be required because the County lacked the ability to address impacts that might be identified through environmental review. The court disagreed. If the County lacked the legal authority to impose particular mitigation measures identified in the review process, the County could make a finding in the environmental review document that such mitigation measures were legally infeasible. The County's lack of authority to impose every identified mitigation measure did not support dispensing with CEQA review altogether. The court explained that the pertinent question was whether the discretion vested in the agency gave the agency the power to shape a project in a manner responsive to the environmental concerns revealed by environmental review, and determined that the County did possess the legal authority to act upon the results of environmental analysis, if only by denying the permit.

The County's Discretion Was Sufficiently Substantial

The County also argued that the level of discretion exercised was not sufficiently substantial to qualify as "discretionary" for the purposes of CEQA because the County was empowered only to require relatively minimal changes in the spacing of proposed wells. The court rejected this argument. The County was the arbiter of adequacy under the County Code, and although the County could require only relatively minimal physical modifications, the County's exercise of its discretion was not insubstantial because the County could prevent contamination of groundwater.

Similar Environmental Review Does Not Excuse a Project From CEQA Review

Finally, the County argued that CEQA review was unnecessary because the County's current permitting standards were designed to address the very issues that would be revealed by environmental review under CEQA and because groundwater depletion was addressed by a separate provision of the County Code. In other words, the County argued that its existing review process was comparable to CEQA review. The court disagreed, reasoning that CEQA does not contain an equivalency exception. An existing environmental review process similar to CEQA did not excuse the County from CEQA review nor did the regulation of groundwater depletion preclude CEQA review related to groundwater contamination.

Other Provisions Were Ministerial



Petitioners also alleged that a provision of the County Code that required the installation of protective devices that "effectively" prevent the entrance of foreign matter into wells was discretionary. The court rejected Petitioners' argument on the basis that the "effectively" standard was similar to the County's requirement that such devices function as intended. The determination of whether such a device functioned as intended was an objective standard.

Disposition

Accordingly, the Court of Appeal reversed the judgment of the trial court, finding that the County's procedure for permitting domestic wells was discretionary and therefore subject to CEQA.

- Opinion by Acting Presiding Justice Poochigian, with Justice Franson and Justice Peña concurring.
- Trial Court: Superior Court of Stanislaus County, Case No. 2006153, Judge Roger M. Beauchesne.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
17 <i>Save Adelaida v. County of San Luis Obispo</i>		2 nd	

[Save Adelaida v. County of San Luis Obispo](#), California Court of Appeal, Second Appellate District, Division Six, Case No. B279285 (May 31, 2018).

- A low threshold for requiring an EIR exists when a fair argument can be made that a project may have a significant environmental impact, even when contrary evidence exists.
- An EIR is necessary when evidence regarding a project's impact contradicts the contents of an MND.

Background for Appeal

Real party in interest Willow Creek Newco, LLC (Willow Creek) owns a 127-acre ranch zoned for agricultural use in the County of San Luis Obispo (County). Following Willow Creek's application for a minor use permit to construct several buildings and hold events on its property (Project), the County prepared an initial study, determined that an environmental impact report (EIR) was not required, and recommended a mitigated negative declaration (MND). Neighbors of the property objected to the Project and claimed that the traffic, noise, increased water use, wastewater, and cumulative impacts of the Project required an EIR. They appealed the MND recommendation to the County's Board of Supervisors (Board), which held a hearing and upheld the decision. In response, opponents of the Project, including Save Adelaida (Petitioners), filed a petition for writ of mandate to require an EIR. The trial court issued a writ that required the County to set aside the Project's approval pending preparation of an EIR, but determined that the EIR did not need to analyze wastewater. Willow Creek appealed the trial court's decision to invalidate the approval of the minor use permit, and Petitioners appealed the trial court's determination that the EIR need not analyze wastewater.

Traffic, Noise, Increased Water Use, and Cumulative Impacts Require an EIR

On appeal, Willow Creek challenged the trial court's decision on the grounds that there was no substantial evidence to support an EIR based on the Project's traffic, noise, increased water use, and cumulative impacts.

Traffic

Neighbors testified to the Board regarding the curvy, two-lane road leading to the Project site, noting its blind hills and curves and recent accidents and traffic fatalities. An expert report submitted by Petitioners found the road to be too narrow to support the Project. The court therefore held that the evidence presented sufficiently established that the road was hazardous and "substandard" and that a fair argument existed that the Project would have a significant environmental impact based on traffic.

Noise

Petitioners produced an expert report demonstrating that noise levels associated with the Project would exceed the County's standards. Relying on this report, the court held that an EIR was needed to consider both temporary and periodic increases in ambient noise levels, and to consider whether the project met the maximum sound levels established by the County's ordinance.

Increased Water Use

Willow Creek claimed that a well pump test conducted on a single day in 2014 showed that adequate water supply existed. The court, however, found this claim conclusory as a “snapshot” in time and credited evidence produced by Petitioners that demonstrated that insufficient water supply existed in the area. As such, the court held that substantial evidence supported a fair argument that an EIR was required to address increased water use.

Cumulative Impacts

Finally, with regard to the cumulative impacts of the Project, Willow Creek argued that fee mitigation programs were sufficient to address cumulative impacts to public services, including fire and emergency services. However, the court found testimony by the County fire chief and residents calling into question the adequacy of this measure persuasive. The court also found that properties that are converted for tourist retail sales and event purposes do significantly impact environmental factors such as traffic, noise, fire and emergency services, and water use, and that Willow Creek’s project would have cumulative effects. Thus, the court concluded there was a fair argument that an EIR was required to address these concerns.

Wastewater Disposal Insufficiently Addressed by MND



Petitioners challenged the trial court’s finding that the MND sufficiently addressed the Project’s wastewater disposal. The court rejected Petitioners’ first argument that the MND impermissibly delays decision-making by requiring that the Project meet all wastewater regulations prior to construction, because requiring compliance with environmental regulations is a common and reasonable mitigation measure. The court, however, found Petitioners’ second argument regarding inconsistencies in the record more persuasive. The MND stated that the Project would use on-site systems to dispose of wastewater, but a County staff report stated that portable restrooms would also be used during events. Thus, the court found that an EIR was necessary to clarify the discrepancy.

Disposition

Accordingly, the Court of Appeal affirmed the trial court’s decision to overturn the project approval but reversed the trial court’s finding that the EIR need not analyze wastewater.

- Opinion by Presiding Justice Gilbert, with Justice Yegan and Justice Perren concurring.
- Trial Court: Superior Court of San Luis Obispo County, Case No. 15CVP-0197, Judge Ginger E. Garrett.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
18 <i>Alliance of Concerned Citizens Organized for Responsible Development v. City of San Juan Bautista</i>		6 th	

[*Alliance of Concerned Citizens Organized for Responsible Development v. City of San Juan Bautista et al.*](#), California Court of Appeal, Sixth Appellate District, Case No. H044410 (November 26, 2018).

- A decision labeled “interlocutory” nevertheless may be final for purposes of appeal if it is in fact a final determination of the parties’ rights.
- A trial court’s decision granting a peremptory writ of mandate on one issue while finding for the defendants on all other issues raised in the petition is a final judgment.
- When arguing for an EIR instead of an MND on appeal, petitioners bear the burden of identifying in the record substantial evidence of a fair argument that the project may have a significant effect on the environment that would not be mitigated.

Alliance of Concerned Citizens Organized for Responsible Development (Petitioner) had filed a partially successful writ of mandate, arguing that the City of San Bautista (City) violated CEQA by preparing a mitigated negative declaration (MND) instead of an environmental impact report (EIR) related to traffic and noise impacts associated with a proposed mixed-use development project. The trial court rejected Petitioner’s claim related to traffic impacts, but issued a peremptory writ of mandate instructing the City to reconsider its analysis regarding noise impacts. Following the City’s filing of a return to the writ, the trial court held that the City’s new noise analysis now complied with CEQA and upheld the City’s issuance of an MND.

Background for Appeal

The real party in interest proposed to construct a gas station, convenience store, and fast-food restaurant (Project) in the City. In November 2014, the City Council adopted an MND and approved the Project, subject to the conditions and mitigation measures imposed by its Planning Commission. Petitioner then filed a petition for writ of mandate and complaint for injunctive relief against the City to challenge the approval, alleging the City violated CEQA by not preparing an EIR because construction and operation of the Project would cause significant noise and traffic impacts.

After hearings held on the petition in February 2016, the trial court issued a decision in March 2016 labeled “Peremptory Writ of Mandate of Interlocutory Remand.” In it, the court ruled in favor of the City regarding the traffic impacts, but issued a peremptory writ of mandate directing the City to undertake further studies and proceedings to evaluate the Project’s noise impacts on the environment and, if appropriate and feasible, adopt mitigation measures. The writ ordered the City to file a return to the writ no later than October 10, 2016. Petitioner did not appeal the decision at the time.

The City conducted a new noise analysis, issued a new MND, and approved the Project in October 2016. The City then filed a supplemental return to the writ and requested entry of final judgment. Petitioner filed its opposition, arguing the supplemental return did not demonstrate compliance with CEQA or the peremptory writ. In a December 2016 decision, the court found that the City’s supplemental return demonstrated compliance with the peremptory writ and CEQA. Petitioner then appealed the December 2016 decision.

The March 2016 Decision Was a Final Judgment

The threshold issue that the Court of Appeal needed to consider was whether the March 2016 decision or the December 2016 decision was the final judgment. If the March 2016 decision was the final judgment, Petitioner would have lost its opportunity to appeal the decision relating to the traffic impacts.

The court discussed the “one final judgment” rule, under which an appeal may be taken only from the final judgment in an entire action, explaining that “where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory.”

Petitioner argued that the March 2016 decision was an interlocutory remand order from which it could not appeal. It cited both the label — “Peremptory Writ of Mandate of Interlocutory Remand” — and language within the decision itself, which stated that “[n]othing contained herein shall be construed as a final Judgment for purposes of appellate review by any party to this action.” However, the Court of Appeal rejected those arguments, finding that the March 2016 decision was a final judgment due to its substance and effect. The March 2016 decision disposed of all CEQA and non-CEQA issues raised by the petition and only left for future determination whether respondents complied with the peremptory writ. Therefore, by not appealing within 180 days, Petitioner missed its “one shot” to appeal the March 2016 decision, including the trial court’s conclusion that the City’s findings regarding traffic impacts did not violate CEQA.

The Court of Appeal held that the December 2016 decision was not a final judgment, but a post-judgment order discharging the peremptory writ, which is appealable. Therefore, the only cognizable contention the Court of Appeal could consider was whether, due to the Project’s potential noise impacts, preparation of an EIR was necessary to comply with the peremptory writ.

The City Was Not Required to Prepare an EIR

The issue the Court of Appeal could consider on appeal was whether the City complied with the peremptory writ to address the Project’s noise impacts on the environment. Specifically, the Court of Appeal considered whether, due to the potential noise impacts, preparation of an EIR was necessary to comply with the peremptory writ.

The court stated that if an agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency must prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect. However, the court explained, where no evidentiary hearing was required by law, the court will only consider whether an agency’s decision to adopt an MND, rather than prepare an EIR, was a prejudicial abuse of discretion.

Here, Petitioner argued that the Project would create significant, unmitigated noise impacts and that, consequently, an EIR was required under CEQA. The Court of Appeal’s inquiry was focused on whether Petitioner had made a fair argument to that effect. Petitioner pointed to supposed deficiencies in the 2014 MND and noise study. Petitioner argued that those documents and emails relating to them show that the City and its consultants recognized that the Project could have significant cumulative impacts relating to noise.

The Court of Appeal rejected this argument because “Petitioner is fighting an old battle.” The March 2016 peremptory writ instructed the City to reconsider its noise analysis. The City did so by undertaking a new noise study in April 2016. When issuing its new MND, the City relied on this noise study instead of the 2014 noise study, which Petitioner had argued was deficient. As the Court of Appeal noted, Petitioner’s “comments criticized a noise study that has been superseded.” Petitioner’s only criticism with the new noise study and MND was that some noise impacts remained speculative and uncertain.

The Court of Appeal held that Petitioner did not direct the court to “any evidence in the record showing that the noise mitigation measures identified in the [2016] MND would be infeasible or ineffective.”



Petitioner bore the burden of identifying in the record substantial evidence of a fair argument that the Project may have a significant effect on the environment, and Petitioner did not carry its burden.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's judgment.

- Opinion by Acting Presiding Justice Elia, with Justice Bamattre-Manoukian and Justice Mihara concurring.
- Trial Court: San Benito County Superior Court, Case No. CU-14-00166, Judge Steven R. Sanders.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
19 <i>Atherton Cove Property Owners Association v. San Joaquin Area Flood Control Agency</i>		3 rd	

[*Atherton Cove Property Owners Association v. San Joaquin Area Flood Control Agency*](#), California Court of Appeal, Third Appellate District, Case No. C085520 (November 29, 2018).

- The amount of detail required by an EIR is limited to that which is “necessary or at least useful for the public and agency to understand the project,” and the court will not fault an EIR merely because it “could be explained more thoroughly.”
- Recirculation of an EIR is required if new information arises that changes the EIR in a way that deprives the public of a meaningful opportunity to comment on a substantial adverse environmental effect or a mitigation measure that project proponents have declined to implement.
- An agency need not make a feasibility determination regarding project alternatives when choosing to pursue the project that it has determined to be the environmentally superior one.

Atherton Cove Property Owners Association (Petitioner) filed a petition that challenged the denial of its mandamus petition, which sought to set aside the certification of an environmental impact report (EIR) by the San Joaquin Area Flood Control Agency (Agency). Petitioner claimed: (1) the EIR’s analysis was deficient; (2) the EIR should have been recirculated in light of “new” information; and (3) the EIR’s findings did not support rejecting a particular project alternative.

Background for Appeal

Atherton Cove is upriver of the Smith Canal, a backwater slough roughly parallel to the Stockton Deep Water Ship Channel, which connects Stockton’s Yosemite Lake to the San Joaquin River. Levees there did not meet flood protection norms set by the Federal Emergency Management Agency (FEMA), and consequently some 8,000 properties were at risk of flooding, with 5,000 in a flood hazard area and 3,000 more proposed to be added.

The court considered two relevant alternatives to address the levees’ shortcomings: (1) the Smith Canal Gate Project (Project), which would gate off the cove and canal, and would narrow the cove opening from about 625 feet to 50 feet, along with other ancillary changes; and (2) the Petitioner-favored “floodwall alternative,” which involved erecting a floodwall to bolster the northern levee and connect it to a FEMA-accredited levee. Petitioner’s main concern with the Project was that it might impede the river’s ability to flush the cove to remove invasive water hyacinth and freshen the water. The water hyacinth at issue is a non-native plant that is rootless, floats on the water, and can grow into large mats. It can physically hinder boating, and also block sunlight and reduce dissolved oxygen in the water.

The Agency analyzed the alternatives and circulated the draft EIR. FEMA then sent the Agency a letter that summarized its understanding of the Project’s purpose and requested additional information from the Agency. At the November 2015 hearing, Petitioner submitted a letter with attachments pointing to alleged problems with the EIR and its circulation. The Agency certified the EIR and approved the Project. Petitioner filed a mandamus petition, which the trial court denied. Petitioner appealed.

Adequacy of the EIR as an Informational Document

The court found no substantial failure of the EIR’s analysis as posited by Petitioner. In teeing up its analysis, the court emphasized its deference to an agency’s substantive judgments, stating that courts cannot “substitute their own opinions as to what constitutes wise public policy. The court does not pass

upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document."

Petitioner argued the EIR was inadequate because it: (1) did not adequately analyze water hyacinth issues; (2) mischaracterized hyacinth control as part of the Project itself rather than as mitigation for Project impacts; and (3) failed to properly address several biological impacts. Petitioner's overarching concern was that narrowing the cove opening as proposed by the Project would reduce river flushing and allow hyacinth mats to proliferate. The EIR stated that debris removal, which included removal of hyacinth mats, would be done regularly as determined by visual monitoring, and that during the growing season, mechanical harvesting would be conducted using an aquatic weed harvester, to keep the hyacinth at existing levels. The EIR determined that while eradication of water hyacinth was unlikely, annual control in the study area was feasible.

Adequacy of Analysis

The court found that the EIR provided sufficient detail regarding water hyacinth management. Petitioner compared the EIR to an example of a mechanical harvesting management plan produced by a private homeowners association, stating that the harvesting plan provided more detail than the EIR as to why, when, where, and how mechanical harvesting would occur, and argued the EIR should contain similar detail. The court rejected this argument, stating that "[t]he fact that a private homeowners association obtained more detailed analysis of mechanical harvesting for its purposes does not dictate the level of detail required of a public EIR." The court continued, "[A]ny portion of any project *could* be explained more thoroughly," and "[t]he fact the EIR did not go into greater detail is unimportant absent a showing based on the administrative record that greater detail was necessary or at least useful for the public and the Agency to understand the project."

Mischaracterization

The court found the EIR did not mischaracterize hyacinth control as part of the Project itself rather than as a mitigation for the Project. The Department of Boating and Waterways (DBW) implemented an aquatic weed control program focused on controlling hyacinth. DBW published a draft EIR for that program in 2009. The hyacinth management proposed by the Project is a continuation of DBW's program.

Petitioner criticized the court's decision to view the DBW EIR's existing hyacinth control program as part of the baseline conditions, rather than as a mitigation measure. The court determined that Petitioner failed to carry its burden: "Assuming there was any mischaracterization in this case, [Petitioner] has not explained how it obscured analysis by the Agency or understanding and input by the public of the issues surrounding water hyacinth control."

Biological Impacts

Petitioner claimed the EIR failed to adequately address dissolved oxygen, methylmercury, cyanobacteria, and fish predation impacts from the Project, based largely on a technical report Petitioner presented. Notably, Petitioner characterized its claims as asserting a "categorical omission" in the EIR — triggering a less deferential *de novo* review — as opposed to a challenge to the adequacy of the EIR's discussion, which would be subject to review for substantial evidence.

The court noted that Petitioner's claimed dissolved oxygen, methylmercury, and cyanobacteria impacts would occur only if the water flows were diminished, which the EIR's flow modeling contradicted. While Petitioner's expert report disagreed with the EIR's flow modeling, the court concluded Petitioner's reliance on its own expert's view was insufficient: "[A] disagreement among experts does not establish a deficiency in the EIR."

With respect to fish predation, Petitioner alleged the EIR failed to discuss the Project's operational impacts on fish. While the EIR did not explicitly state that the project would not have significant operational impacts on fish, the EIR set out thresholds of significance for fish impacts, and explained that the Project would "remove invasive plants as part of operations and maintenance which would decrease

predatory fish (e.g., black bass) habitat in the project area.” The court found that these passages indicated the Agency found no significant operational impacts on fish from predation. The court noted that even if it were to conclude the EIR falls short because of a lack of an explicit statement, it would be immaterial, because there is no presumption that an error is prejudicial. Petitioner bore the burden of demonstrating both error and prejudice, and “[t]he record shows that any omission about the operational impacts on fish predation did not thwart the twin goals of public participation and the Agency’s understanding of the project.”

FEMA Letter and Recirculation

Petitioner contends a 2015 FEMA letter contained “new” information that required recirculation of the EIR. The letter summarized the understood purpose of the Project as being to reduce the flood hazard along the Smith Canal. The letter also listed data submitted to FEMA in a 2011 conditional letter of map revision (CLOMR) request, and outlined further information FEMA wanted from the Agency, including the operation and maintenance plans not yet formally adopted and information about “interior flooding.” In response to Petitioner’s request for recirculation, the court stated that “recirculation of an EIR is intended to be an exception, rather than a general rule,” requiring significant new information be presented to an agency to warrant it. The court explained that a decision not to recirculate an EIR must be supported by substantial evidence in the record.

Petitioner argued the letter was commenting on a report that formed the basis of the EIR’s discussion of interior flooding, and interpreted the letter as challenging assumptions in that report. The court found the 2015 FEMA letter to be part of an ongoing correspondence that “did not provide any information about the proposed project *to the Agency*; it requested information *from the Agency*.” The FEMA letter did not purport to challenge the EIR’s analysis of interior flooding, and FEMA’s letter was simply an expression of wanting more information about interior flooding for its own flood mapping purposes. The court concluded that even if the report discussed in the EIR was deemed inadequate for FEMA’s purposes, it did not indicate that FEMA’s letter disclosed an under-analyzed impact for purposes of CEQA. Moreover, the court explained that “it is implied from [an] agency’s decision to certify the EIR without recirculating it” that the new information was not significant, and concluded that nothing in Petitioner’s briefing demonstrated otherwise.

Floodwall Alternative



Petitioner contended the Agency’s adoption of the Project and rejection of the floodwall alternative was erroneous. CEQA requires an EIR to describe reasonable and potentially feasible alternatives to a proposed project, as well as a no-project alternative. Here, the EIR evaluated the Project, the floodwall alternative, an additional alternative involving dual gated walls, and a no-project alternative. The EIR found the Project to be the environmentally superior alternative. Petitioner contends the Agency’s alternative infeasibility findings were inadequate, but because the Agency found the Project alternative to be environmentally superior, it had no need to make a feasibility finding regarding the floodwall alternative. The Agency had adequate reason to reject the floodwall alternative, and it had no obligation to make a floodwall alternative feasibility finding because it chose the environmentally superior alternative.

Disposition

The Court of Appeal affirmed the trial court’s judgment, and awarded the Agency’s costs on appeal.

- Opinion by Justice Duarte, with Acting Presiding Justice Mauro and Justice Hoch concurring.
- Trial Court: Superior Court of San Joaquin County, Case No. STK-CV-UWM-2015-0011847, Judge Elizabeth Humphreys.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
20 <i>Beverlywood Homes Association v. City of Los Angeles</i>		2 nd	

[*Beverlywood Homes Association v. City of Los Angeles*](#), California Court of Appeal, Second Appellate District, Division Eight, Case No. B280620 (November 30, 2018).

- Unsupported argument does not constitute substantial evidence.
- Disputes between experts are not for courts to resolve; a court’s role is to determine if an agency’s decision is supported by substantial evidence.
- New information that does not show a “substantial increase in the severity of an environmental impact” is not significant and does not require recirculation of an EIR.

In 2015, the City of Los Angeles (City) approved an alternative to a proposed modified project and certified the final subsequent environmental impact report (SEIR), which allowed for the construction of an office tower. The Beverlywood Homes Association and office tower owners (collectively, Petitioners) filed a petition challenging the City’s approval, alleging that the SEIR was deficient because:

- The SEIR failed to discuss growth-inducing impacts
- The traffic study was inconsistent and contradictory
- The GHG emissions analysis was defective
- The City was required to recirculate the SEIR
- The SEIR’s analysis of alternatives was inadequate

The trial court denied the petition for a writ of mandamus, and Petitioners appealed. The Court of Appeal affirmed the denial of the petition. Although Petitioners made a number of arguments based on the Century City North specific plan and the City’s Municipal Code, which the Court of Appeal discussed at length, they are not summarized here.

Background for Appeal

In 2006, the City approved a residential project and subsequently entered into a development agreement with the real party in interest (Real Party). In 2011, Real Party proposed a modification to allow for the construction of an office tower. In 2014, the City Planning Commission approved the “enhanced retail alternative” and certified the final SEIR. Petitioners appealed this approval to the City Council. In January 2015, the City Council denied the appeal and approved the enhanced retail alternative. Petitioners brought suit challenging the City’s approval, asserting that the SEIR was inadequate in five respects. The trial court denied the petition for writ of mandamus, and Petitioners timely appealed.

SEIR Adequately Analyzed Growth-Inducing Impacts

The Court of Appeal determined that the SEIR adequately discussed how the proposed project would contribute to direct and indirect economic growth in the surrounding area and satisfied CEQA’s requirement to discuss the growth-inducing impact of the proposed project. In doing so, the court rejected

Petitioners' argument that the SEIR failed to discuss the potential for growth related to approval of the project's alternative vehicle trip generation factor, which Petitioners asserted removed a "significant obstacle to future development" and would potentially result in "exponential growth." The court also rejected Petitioners' argument that approval of the project would set a precedent that might cause growth beyond limits envisioned in the specific plan, noting that the scenario described by Petitioners was unsupported by the record and bore "no basis in reality."

Traffic Study Supported by Substantial Evidence

The court held that substantial evidence supported the accuracy and consistency of the traffic study, rejecting several specific arguments by Petitioners. First, Petitioners contended that traffic data was collected at buildings with high vacancy rates and outside of generally accepted times. The court rejected these arguments, finding they were either contradicted or unsupported by the record. Next, Petitioners argued that the economic adjustment factor used in the SEIR to account for data collected during a recession was too low. The court rejected this argument, finding it ignored the analysis and substantial evidence supporting the factor and failed under the substantial evidence rule. Petitioners also argued that the traffic study assumed that the project would contain a mix of tenants who tended to travel outside of typical peak hours, but the SEIR did not limit the proposed project to these tenant uses. The court rejected this argument, finding that the traffic study was based on counts at comparable buildings rather than assumptions, and that Petitioners failed to support their argument with evidence.

The court also found that in studying neighborhood traffic intrusion, the City applied a long-standing threshold of significance consistent with state and local CEQA guidelines, and Petitioners failed to cite evidence that this threshold was inappropriate. Thus, the court rejected Petitioners' assertion that the threshold of significance used by the City foreclosed it from finding a significant traffic impact on local residential streets. The court also found Petitioners' argument that the City failed to acknowledge cumulative impacts from past projects to be unsupported.

GHG Analysis Supported by Substantial Evidence

The Court of Appeal determined that the greenhouse gas (GHG) analysis was supported by substantial evidence, rejecting Petitioners' arguments that the SEIR's analysis was flawed because their consultant came to a different conclusion. The court characterized Petitioners' arguments as "a dispute between experts" that were not for the court to resolve.

First, Petitioners argued that the City's GHG analysis rounded numbers "in a manner favorable to Real Party." The court rejected this argument, citing a memorandum in the record responding to each of Petitioners' arguments in detail and explaining that good engineering judgment showed rounding to two significant digits was appropriate under the circumstances. The court also rejected Petitioners' argument that the City's GHG analysis omitted two classes of emissions, citing the memorandum that explained that they were not omitted. Third, Petitioners argued that the City's analysis "did not include a business-as-usual (BAU) scenario against which project emissions are compared to determine environmental impact." The court similarly rejected this argument, citing the memorandum's detailed explanation of the BAU scenario, including the assumptions and factors involved. Fourth, Petitioners argued that the SEIR did not require the project to meet or exceed the 20% lighting and water efficiency standards assumed in the GHG analysis. In rejecting this argument, the court cited the memorandum's explanations regarding lighting that the SEIR required the project to exceed building standard requirements by 20% as well as to use high-efficiency lighting to achieve a LEED Platinum rating. As to water, the court explained that the memorandum provided a detailed explanation of the factors used to achieve a 20% efficiency, and this explanation was sufficient.

Recirculation of the SEIR Not Required

The Court of Appeal held that the final SEIR did not show "a substantial increase in the severity" of the project's traffic impact, and therefore did not constitute significant new information requiring recirculation of the SEIR. Petitioners contended that recirculation of the SEIR was required because the final SEIR provided supplemental traffic analyses showing a "significant impact at one street intersection that had

not been significantly impacted in the draft SEIR.” The court determined that although the final SEIR’s supplemental traffic analyses did show a significant impact at one intersection for the proposed project under particular conditions, it was due to a very small change in traffic, which was not a “substantial increase in the severity” of the traffic impact. The court further explained that recirculation was not required because the significant impact occurred in the proposed project, but not in the enhanced retail alternative approved by the City. The court also noted that Petitioners failed to provide an explanation or information supporting their claim.

SEIR Considered a Reasonable Range of Alternatives



Last, the Court of Appeal held that the SEIR satisfied CEQA’s requirement of considering a reasonable range of alternatives. Petitioners argued that the SEIR failed to evaluate “a specific plan-compliant alternative,” meaning an alternative that used a default vehicle trip generation factor provided by the specific plan. The court rejected this argument, finding that the City’s approval of an alternative vehicle trip generation factor was fully compliant with the specific plan. The court also noted that the SEIR provided an extensive analysis of nine alternatives, including an alternative very similar to the one suggested by Petitioners.

Disposition

Accordingly, the Court of Appeal affirmed the trial court’s judgment denying Petitioners’ petition for a writ of mandamus and upholding the City’s approval of the project.

- Opinion by Justice Grimes, with Presiding Justice Bigelow and Justice Dunning concurring.
- Trial Court: Superior Court of Los Angeles County, Case No. BS154253, Judge John A. Torribio.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
21 <i>Citizens Against the 24th Street Widening Project v. City of Bakersfield</i>		5 th	

[*Citizens Against the 24th Street Widening Project v. City of Bakersfield*](#), California Court of Appeal, Fifth Appellate District, Case No. F074693 (July 2, 2018).

- So long as a project considers in detail a range of reasonable alternatives, other alternatives may be eliminated from detailed consideration if they would fail to meet the basic project objectives.
- There is no harm in assessing and dismissing a potentially unnecessary alternative.
- An EIR need not compare the effects of individual project components against a no-component baseline.

Background for Appeal

In 2002, the City of Bakersfield (City) assessed a traffic study of the region and selected a proposal among 20 alternatives in order to address mobility issues. In 2010, the Kern Council of Governments adopted the 2011 Regional Transportation Plan for the area, and a draft environmental impact report (EIR) was prepared shortly thereafter. In response to the draft EIR, residents requested the construction of six cul-de-sacs, which the City approved as a *separate* project with a negative declaration. The City then prepared a final EIR (2013 FEIR) that included the installation of an additional cul-de-sac. Citizens Against the 24th Street Widening Project (Petitioner) filed a suit challenging the 2013 FEIR on the grounds that it violated CEQA. The trial court concluded that the separation of the six cul-de-sacs into a separate project was improper piecemealing under CEQA and that the 2013 FEIR failed to adequately assess eight potentially feasible alternatives. Accordingly, the court issued a writ against the City, which subsequently decertified the 2013 FEIR.

In order to comply with the court's ruling, the City resumed environmental review and released a revised final EIR in 2016 (R-FEIR). This R-FEIR considered 10 alternatives that were all eventually eliminated. The City filed a return to the court claiming that the 2016 R-EIR remedied the deficiencies previously identified by the court. Despite Petitioner's challenge, the court upheld the R-FEIR. Petitioner appealed the ruling on multiple grounds.

The City's Assessment of Alternatives Was Proper

First, Petitioner argued that the R-FEIR's discussion of alternatives was inadequate because it dismissed several alternatives for non-environmental reasons. Citing CEQA Guidelines Section 15126.6(c), the Court of Appeal rejected this argument, explaining that "so long as the EIR considers in detail a range of reasonable alternatives, other alternatives may be eliminated from detailed consideration because they would fail to meet most of the basic project objectives."

Petitioner further alleged that two alternatives proposed were "'merely' different ways to design the [project] and were not true alternatives under CEQA." The court also rejected this argument, explaining that "the fact that alternatives to a component of a transportation project differ 'merely' in their design does not render them inappropriate. To the contrary, altering the design of a transportation project is one of the primary ways to adjust its environmental impact."

Similarly, Petitioner challenged the inclusion of two alternatives for “obviously” having greater environmental impacts. The challenge failed, however, as the court concluded that it is not inappropriate to consider an alternative “simply because one of its environmental drawbacks is obvious.” The court added that even a “possibly unnecessary alternative” may rightly be considered and rejected because “[a]t worst, the EIR’s brief consideration” would be “superfluous.”

Petitioner generally attacked the EIR’s alternatives analysis, arguing that the entire purpose of the analysis is to consider “environmentally superior alternatives.” While the court agreed that such a position is the “goal of the alternatives analysis,” it concluded that the analysis is sufficient if it reveals that “there are no environmentally superior alternatives that will accomplish most of the project objectives.”

The Hierarchy of Objectives Was Proper

Next, Petitioner faulted the R-FEIR for establishing a hierarchy of project objectives because there was no evidence that the City’s staff consulted with members of the City Council regarding the hierarchy. Petitioner was concerned that delegating the task to staff was irreconcilable with the policy of fostering electoral accountability. The court disagreed, explaining that “the city council ultimately adopted [staff’s] analysis as its own when it certified the EIR.” Therefore, the “voting public is free to attribute that analysis to the councilmembers supporting certification and may choose to make electoral decisions accordingly.”

In light of the screening standards applied by CEQA Guidelines Section 15126.6(c) to the proposed alternatives, Petitioner argued that the threshold requirements must be applied to the project itself as well. The court found that the guidelines’ requirement that EIRs state “the objectives sought by the proposed project” sufficiently addressed Petitioner’s concern.

The EIR Did Not Have to Address Purely Economic or Social Impacts

Petitioner also argued that the R-FEIR should have addressed the impacts associated with home purchases that were involved in the project, including an increase in crime. In response, the court clarified that “while an EIR must discuss direct and indirect physical changes to the environment, purely economic or social changes are not environmental impacts. Crime is a social impact.”

The Factual Basis for the EIR Was Not Outdated

Petitioner claimed that the City relied on outdated information when it prepared the R-FEIR. Unconvinced, the court explained that the process requires EIRs to rely on models that are not “up-to-the-minute current at the time of certification.” Therefore, “the mere lapse of time cannot be enough to show the EIR’s reliance on a model was improper or need to be updated.”

No Need for Comparison With a No-Component Baseline

Petitioner also claimed that the R-FEIR’s analysis was insufficient because it did not include both a with cul-de-sac and without-cul-de-sac analysis. The court explained, however, that although an EIR must analyze the impacts of the sum of its components and a “no project” alternative, it need not “compare the project with a particular *component* versus the project without that component.”

Incorporation by Reference Is Not Required



Finally, Petitioner argued that the R-FEIR failed as an informational document because it did not incorporate by reference certain cited documents. The court disagreed, reasoning that an EIR may, but need not, incorporate documents by reference. If an EIR does not incorporate a document by reference, the information about the document set forth in the EIR will still be considered in finding whether the EIR is sufficient as an informational document.

Disposition

Accordingly, the Court of Appeal affirmed the trial court’s judgment that the City’s 2016 revised FEIR complied with the court’s previously issued writ directed against the City’s 2013 FEIR.

- Opinion by Justice Poochigian, with Presiding Justice Hill and Justice Meehan concurring.
- Trial Court: Superior Court of Kern County, Case No. S1500CV281556, Judge Kenneth C. Twisselman II.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
22 <i>Citizens Coalition Los Angeles v. City of Los Angeles</i>		2 nd	

[*Citizens Coalition Los Angeles v. City of Los Angeles*](#), California Court of Appeal, Second Appellate District, Division Two, Case No. B283480 (August 23, 2018).

- A new city ordinance that amends a prior specific plan that was already analyzed in an EIR may be analyzed through an addendum, rather than renewed CEQA analysis for a new project, when substantial evidence supports the finding that the amendment would not have any additional reasonably foreseeable environmental consequences beyond the effects anticipated by the initial specific plan EIR.

Citizens Coalition Los Angeles and La Mirada Avenue Neighborhood Association of Hollywood (Petitioners) petitioned for writ of mandate, alleging the City of Los Angeles (City) violated CEQA by producing an addendum to an environmental impact report (EIR) for a Target Superstore plan in lieu of authoring a subsequent EIR for what Petitioners considered a new project. The trial court agreed, finding the addition of a new city ordinance that changed the law in ways relevant to the original Target Superstore plan constituted an independent project requiring additional CEQA analysis. The City and Target appealed.

Background for Appeal

Target applied to the City to build a Target Superstore located within a Station Neighborhood Area Plan (SNAP). At the time Target proposed the Superstore, SNAP had five subzones, which included Subareas A through E. The proposed Superstore was to be located in Subarea C, but the City's commissioned and prepared EIR determined that the proposed Superstore did not comply with all of Subarea C's requirements. The City then granted eight variances from the SNAP that, taken together, authorized the Superstore to be built as proposed.

Petitioners filed separate petitions for writ of mandate against the City, naming Target as the real party in interest. They alleged the City's EIR was deficient and therefore violated CEQA, and that the eight variances were not supported by substantial evidence and thus violated the Los Angeles Municipal Code. The trial court found the EIR to be sufficient, but that six of the eight variances were not supported by substantial evidence, and ordered all Superstore construction to cease. Target appealed, and Petitioners cross-appealed.

While these appeals were pending, the City enacted Los Angeles Ordinance 184,414 (Ordinance). The Ordinance created a new SNAP subzone, Subarea F, which altered the building requirements such that no variances would be required for the Target construction to comply with Subarea F's requirements; it also designated the Target Superstore location as included in Subarea F. In light of the Ordinance, a different division of the Court of Appeal dismissed the pending appeals as moot, but left the trial court's order that all Superstore construction be halted intact.

Upon enactment of the Ordinance, the City prepared an addendum to its previously certified EIR, which defined the "revised project" as:

- The amendment of SNAP that created Subarea F
- All construction activities still required to complete the Target Superstore

The City concluded that the revised project required no major changes to the initial EIR because it did not involve any new, significant environmental effects nor any substantial increase in the severity of previously identified significant effects. Accordingly, the City approved the addendum.

Petitioners then filed two further petitions for writ of mandate based on their interpretation of the Ordinance as a project independent from the Superstore. The trial court viewed the Ordinance as altering the entitlements vehicle for Superstore approval, constituting a changed circumstance requiring the City to perform an initial study to determine whether another EIR should be prepared. The City and Target timely appealed.

Was There a CEQA Violation?

The Court of Appeal broke down the analysis of whether the City had violated CEQA by answering three questions: First, what does the Ordinance do? Second, which provision(s) of CEQA apply to the Ordinance? And third, did the City comply with those applicable provisions?

What does the Ordinance do?

The parties' views and corresponding analysis differed down to their opinion of what the Ordinance actually does. Petitioners viewed the Ordinance as creating a free-floating subzone meant to attract commercial development — a project separate and distinct from the construction of the Target Superstore. The City viewed the Ordinance as simply creating a new Subarea F and placing the Superstore in it — an act intertwined with the already evaluated Target Superstore construction plan. Ultimately, the court looked to the plain language of the Ordinance to make the determination, and found that the Ordinance unambiguously:

- Created Subarea F, a new subzone within SNAP for large commercial development
- Moved the parcel of land where the Target Superstore was being built into that new subzone

Which provision(s) of CEQA apply to the Ordinance?

To decide which CEQA provisions applied, the court analyzed whether the Ordinance was an amendment to a project for which there had been prior CEQA review, thus making a Public Resources Code (PRC) Section 21166 addendum applicable, or an entirely new project, which would call for the initiation of the three-step CEQA analysis. The court concluded that although the Ordinance and Target Superstore plan pertained to different levels of generality (one being a specific development, the other a more generalized program), that distinction did not render an addendum analysis inapplicable. The primary consideration for whether PRC Section 21166 applies is whether the previous EIR retains any relevance in light of proposed changes. Here, the previous EIR carried significant continued relevance, as its analysis was directly applicable to the remaining Superstore construction plan. The environmental impact of the Superstore as a large commercial development placed in Subarea F was by its very nature an examination of the environmental impact arising from Subarea F's potential to encourage other large commercial development. Thus, the court found analysis under PRC Section 21166 to be appropriate.

Did the City comply with PRC Section 21166?



PRC Section 21166 provides that when there has been prior CEQA review, no subsequent or supplemental EIR is required unless there have been substantial changes in the project or in its circumstances, or if there is new information previously unavailable that would require major revisions to the initial EIR. The court found the existing EIR encapsulated all of the reasonably foreseeable environmentally significant impacts of the updated project. Petitioners argued the updated project required additional CEQA analysis, alleging the City intended further Subarea F developments, and that the creation of Subarea F created incentives for retailers to build large projects. The court dismissed these arguments reasoning that however strong the new incentive to build may be, that incentive did not make additional building certain. As such, the City had complied with PRC Section 21166 and the revised project did not require further CEQA review.

Disposition

Accordingly, the Court of Appeal reversed the trial court's judgment that the City had failed to comply with CEQA, and Target and the City were entitled to their costs of appeal.

- Opinion by Justice Hoffstadt, with Acting Presiding Justice Ashmann-Grest and Justice Chavez concurring.
- Trial Court: Superior Court of Los Angeles County, Case Nos. BS162678, BS162710, Judge Richard L. Fruin, Jr.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
23 <i>Citizens for Open and Public Participation v. City of Montebello</i>		2 nd	

[*Citizens for Open and Public Participation v. City of Montebello*](#), California Court of Appeal, Second Appellate District, Division One, Case No. B277060 (January 31, 2018).

- The trial court properly struck portions of the petitioner’s opening brief that were inconsistent with the petition, in which the petitioner had filed no statement of issues, and when the local rules required the briefing to be consistent with the statement of issues.
- A petitioner challenging an action as violating the Brown Act must show prejudice.
- A city’s determination that a project is consistent with its general plan carries a strong presumption of regularity that a project opponent can overcome only by showing that the city abused its discretion.

Background for Appeal

In March 2009, the City of Montebello (City) first published a draft environmental impact report (EIR) concerning a residential development project (Project), and then recirculated its draft EIR in September 2014. The final EIR was published in April 2015. The City certified the final EIR on June 10, 2015, and obtained various permits later that month, allowing the Project developer to begin construction on the Project. Citizens for Open and Public Participation (Petitioner) filed a petition for writ of mandate and complaint challenging the Project and the City’s certification. The City and developer answered the petition, and the City filed a notice of certification of the administrative record on the same day. This filing triggered CEQA’s statutory 30-day deadline for Petitioner to file a statement of the issues it intended to raise in its opening brief. Petitioner did not file this statement, and failed to file its opening brief by the court-ordered deadline.

The trial court denied the City’s and developer’s request to dismiss the case, but ordered Petitioner to limit its opening brief to the issues raised in the Petitioner’s amended petition. When Petitioner filed its opening brief, Petitioner included arguments not raised in the amended petition. The City and developer moved to strike those portions of the brief, which the trial court granted. The court ultimately denied the petition and entered judgment in favor of the City. Petitioner appealed.

Motion to Strike Portions of Opening Brief

Petitioner argued that the trial court abused its discretion by striking portions of Petitioner’s opening brief. The petition is supposed to limit and frame the issues heard at trial, thus CEQA requires petitioners to file a statement of issues that the petitioner intends to raise in any brief or at any hearing or trial within 30 days of the filing of the administrative record.

In this case, Petitioner not only failed to comply with CEQA’s 30-day rule, but it also expanded on the set of claims originally brought in the amended petition. Thus, the Court of Appeal held that the trial court had authority to strike the portions of the brief that were outside the scope of the petition. The opening brief was therefore properly limited to claims that the City failed to adequately analyze the Project’s significant adverse environmental impacts.

Nonetheless, the court declined to address the merits of the City's and the developer's contentions that Petitioner's CEQA claims be dismissed because Petitioner failed to satisfy certain statutory prerequisites for relief under CEQA. Because the trial court did not err in striking portions of Petitioner's opening brief addressing its CEQA claims, and because Petitioner did not assert any other CEQA claims on appeal, the issues the City and the developer raised were moot.

Compliance With the Brown Act

Petitioner claimed the City violated the Brown Act by providing notice that a public meeting concerning the Project would take place at a certain location, when the meeting in fact took place elsewhere. Under the Brown Act, a local agency must, at least 72 hours before a regular meeting, post an agenda that specifies the time and place of the meeting. However, a violation of the Brown Act will not render an agency's action null and void if the action substantially complied with the statute. In addition, a petitioner must show prejudice.

Here, the court determined that the City did not violate the Brown Act, even though the City's online calendar page incorrectly stated the location of the meeting. Only one member of the public was unable to attend due to the mistake, and that person was able to attend the City's second hearing on the Project and express her views. Further, nothing in the record suggested the City Council would have taken a different action on the Project if it had heard that person's views at the earlier meeting. Thus, no prejudice resulted from the City's error. Absent a showing of prejudice, the court need not decide whether the misleading information violated the Brown Act or whether the City substantially complied with the statute. The trial court properly determined that there was no violation of the Brown Act.

Compliance With the Planning and Zoning Law

Finally, Petitioner argued the City violated the Planning and Zoning Law because the Project was inconsistent with the City's general plan. A local agency's determination that a project is consistent with its general plan is afforded great deference. Here, the court determined that the City's approval of the Project did not violate the Planning and Zoning Law, as the administrative record showed that the City properly evaluated the Project with respect to the general plan's goals. The final EIR provided that the Project would neither preclude the City from developing affordable housing elsewhere in the City, nor impair the City's other special programs designed to assist the elderly and handicapped persons with housing. Thus, the City did not abuse its discretion in determining that the Project was "in agreement or harmony" with the general plan.

Disposition

Accordingly, the Court of Appeal affirmed the trial court and upheld the City's approval of the Project.

- Opinion by Presiding Justice Rothschild, with Justice Chaney and Justice Johnson concurring.
- Trial Court: Superior Court of Los Angeles County, Case No. BS156922, Judge John A. Torribio.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
24 <i>Covina Residents for Responsible Development v. City of Covina</i>		2 nd	

[*Covina Residents for Responsible Development v. City of Covina*](#), California Court of Appeal, Second Appellate District, Division Seven, Case No. B279590 (February 28, 2018).

- An EIR must address secondary parking impacts caused by traffic congestion, but parking impacts, in and of themselves, are exempt from CEQA review.
- An agency is permitted to tier from a specific plan EIR if (1) the proposed action falls under an exemption, or (2) potential project impacts have been adequately analyzed and mitigated in the specific plan EIR.
- In determining whether to approve a tentative map for a project, local agencies must make findings showing the proposed map's compatibility with objectives, policies, and programs in the specific plan, but need not show perfect conformity.

Covina Residents for Responsible Development (Petitioner) petitioned for a writ of mandate, arguing that the City of Covina (City):

- Improperly approved the Project without preparing an EIR
- Improperly tiered the MND that the City adopted from the TCSP EIR
- Violated the Subdivision Map Act by failing to make the necessary findings for approval of the Project, or in the alternative, making findings that were not supported by substantial evidence in the record
- Violated due process by failing to respond to last-minute revisions in the Project

The trial court and the Court of Appeal both rejected these arguments and denied the petition.

Background for Appeal

In December 2012, the developer for a 68-unit mixed-use infill project (Project) submitted an application to the City for the Project. After nearly a year of revising the Project to accommodate recommendations of City staff, the City circulated an initial study on November 20, 2013, and proposed a mitigated negative declaration (MND) describing measures to mitigate potentially significant environmental impacts. On February 18, 2014, staff recommended the City Council adopt the MND and approve the Project, which at that time included a request for 19 transit-related parking credits. At the City's direction, the developer revised the Project to eliminate the parking deficit. On March 4, 2014, the City Council approved the revised Project and adopted the MND. The Petitioner then filed an action seeking to invalidate the City's approval of the Project. The trial court denied the petition, and the Petitioner appealed, asserting all but the due process claim.

Parking Impacts Exempt From CEQA Review

First, Petitioner argued the City was required to prepare an EIR due to the Project's significant parking impacts. Although an EIR is required to evaluate all significant impacts on the environment from a

proposed project, CEQA specifically provides that parking impacts of a residential or mixed-use residential project on an infill site within a transit priority area are not considered significant impacts on the environment. Thus, they are exempt from CEQA review.

Here, the Project's parking impacts were exempt from CEQA because the Project was located on an infill site and within a transit priority area. Prior to the enactment of the Public Resources Code Section 21099 exemption, case law conflicted regarding the extent to which parking shortages should be analyzed under CEQA. The court observed that through the enactment of Section 21099, the Legislature endorsed the approach in *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002), 102 Cal.App.4th 658. In *San Franciscans*, the court found that parking deficits were not significant environmental impacts in an urban context. As such, in this case, the court held that CEQA review must address secondary environmental impacts associated with traffic congestion from parking shortages — such as air quality, noise, and safety. However, parking impacts in and of themselves are exempt from CEQA review for urban infill projects near transit hubs. Because Petitioner failed to demonstrate evidence of secondary environmental impacts associated with the Project's allegedly inadequate parking, and instead only provided evidence of social and commercial concerns for downtown businesses, the court held that a CEQA review was not required.

MND Tiering From a Specific Plan EIR

Second, Petitioner challenged the MND's reliance on the Town Center Specific Plan (TCSP) EIR's analysis of traffic impacts from the alleged parking shortage. An agency is permitted to tier, or use the analysis from another EIR, if either of the below conditions are satisfied:

- The proposed action falls under an exemption.
- The potential project impacts have been adequately analyzed and mitigated under that EIR.

In this case, the court held that the City properly tiered because it met both conditions. First, the Project's parking impacts were exempt under Section 21099. Second, the court found that the Petitioner provided no evidence that the TCSP EIR was inadequate. Because the Project complied with the TCSP's parking requirements and Petitioner had not demonstrated the inadequacy of the traffic analysis or the City's project-specific trip analysis, the court held that the record contained no evidence to support Petitioner's assertion that the Project had impacts that the TCSP EIR had not contemplated. Thus, the City properly tiered its review from the TCSP EIR.

Specific Plan Consistency



Third, Petitioner argued that the City's findings that the Project's tentative map was consistent with the TCSP traffic circulation elements and parking standards were not supported by substantial evidence. The California Government Code requires local agencies to make a series of findings related to the consistency of the proposed map and design of a project with the applicable general or specific plan. Here, the court determined that the City Council made and adopted the necessary findings at its March 4, 2014, meeting. Petitioner did not identify any evidence suggesting the Project was not compatible with the policies in the TCSP, and the MND analyzed and concluded that the Project would not conflict with the TCSP's public transit policies and programs. Thus, the court found that the Project's map was fully consistent with the goals and policies set forth in the TCSP.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's judgment and upheld the City's approval of the Project.

- Opinion by Presiding Justice Dennis M. Perluss, with Justice John Segal and Justice Kerry R. Bensinger concurring.
- Trial Court: Superior Court of Los Angeles County, Case No. BS147861, Judge Amy D. Hogue.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
25 <i>East Sacramento Partnership for a Livable City v. City of Sacramento</i>		3 rd	

[*East Sacramento Partnership for a Livable City v. City of Sacramento*](#), California Court of Appeal, Third Appellate District, Case No. C085551 (December 27, 2018).

- An order regarding the adequacy of a return to a peremptory writ of mandate relates to the enforcement of a judgment rather than a final judgment and is therefore appealable.
- An agency's adoption of a threshold of significance requires the exercise of reasoned judgment, and where such reasoning is not apparent from the facts and circumstances the agency's reasoning must be disclosed.
- An argument raised for the first time in a reply brief will not be considered unless good reason can be shown for the failure to present it earlier.

East Sacramento Partnerships for a Livable City (Petitioner) filed an appeal challenging the trial court's order discharging a peremptory writ of mandate in favor of the City of Sacramento (City). The trial court denied Petitioner's motion for reconsideration of the discharge order, finding that a revised environmental impact report (EIR) satisfied the requirements of a writ of mandate issued against the City following a prior appeal by Petitioner. In the prior appeal, the Court of Appeal had determined that the City's reliance upon a threshold of significance for traffic impacts in its EIR was not supported by substantial evidence. After the appeal, the City revised and re-certified its EIR, but did not perform additional testing, and filed a return to the writ in the trial court. The trial court approved the revised EIR and discharged the peremptory writ of mandate. On appeal by Petitioner, the court applied substantial evidence review and concluded that while Petitioner's appeal was timely, the City's revised EIR provided sufficient explanation and substantial evidence supporting its determination of the challenged threshold of significance and therefore upheld the trial court's decision.

Background for Appeal

In 2014, the City drafted an EIR for a 328-unit residential infill development (Project) to be constructed by real party in interest Encore McKinley Village, LLC (Encore). The EIR identified traffic impacts as the primary issue for the Project and analyzed traffic impacts using the level of service (LOS) methodology. The EIR found no significant traffic impacts, based on a mobility element policy in the City's 2030 General Plan, which allowed for flexible LOS standards. Based on this mobility element policy, the City determined that the traffic impacts associated with the Project were below threshold levels. The City certified the EIR and approved the Project.

Petitioners filed a petition for writ of mandate challenging the City's approval of the Project, alleging that the approval violated CEQA on various grounds. The trial court denied the petition, and Petitioner appealed. On appeal, the Court of Appeal determined that the mobility element policy of the 2030 General Plan did not, standing alone, constitute substantial evidence that traffic impacts associated with the Project were insignificant. Accordingly, the Court of Appeal reversed the lower court's denial of Petitioner's petition for writ of mandate.

On remand, the trial court entered judgment in favor of Petitioner and issued a peremptory writ of mandate setting aside certification of the Project's EIR and related approval of the Project. The trial court also ordered the City to bring the EIR sections dealing with traffic impacts into compliance with CEQA.

In response, the City circulated a revised draft EIR (revised EIR) that explained that the City permitted a lower LOS in high-density areas of the City in order to promote residential infill developments in the interest of reducing per capita vehicle miles traveled (VMT) and greenhouse gas (GHG) emissions. In developing this policy, the City had determined that allowing a higher LOS during peak hours in high-density areas served to reduce VMT and promote alternative methods of transportation; the City also determined that requiring a lower LOS necessitated road widening, which resulted in increased VMT and accompanying increased GHG emissions. Following this analysis, the City determined that lower LOS was acceptable during peak hours within the urbanized high-density areas of the City so long as the proposed project also provided improvements to other parts of the citywide transportation system.

The revised EIR included an appendix that:

- Cited research demonstrating that dense urban land use was associated with decreased per capita VMT, while greater roadway capacity increased VMT
- Listed mitigation measures and improvements that Encore had committed to provide to the City's transportation system
- Explained that the City's flexible LOS policy, designed to promote infill developments, was consistent with California Legislation designed to reduce vehicle emissions
- Noted that: 1) the California Legislature had directed the Office of Planning and Research to revise CEQA guidelines to establish new criteria for determining the significance of transportation impacts other than LOS; and 2) draft guidelines declared VMT as the most appropriate measure of transportation impacts on the environment.

The revised EIR also provided modeling for the Project demonstrating that VMT for the residents of the Project was projected to be 9% to 24% lower than the City's per capita average. The revised EIR further explained that the flexible LOS policy was not merely based on the 2030 General Plan, but on a determination that increased congestion associated with the Project would not result in a substantial or potentially substantial adverse change in the physical condition of the area associated with the Project.

The City provided the revised EIR and accompanying appendix to the Court with its return to the writ, and the trial court issued an order discharging the peremptory writ of mandate. Petitioner moved for reconsideration of the order, alleging that the revised EIR remained deficient because the City had not undertaken any new analysis of the traffic impacts. The trial court reasoned that the City's explanation that application of the flexible LOS policy reduced VMT and GHG emissions, supported by the evidence provided in the appendix, was sufficient to meet the requirement of the writ and denied the motion for reconsideration. Petitioner appealed.

The Trial Court's Order Was an Appealable Enforcement of Judgment

As a preliminary matter, the City and Encore (together, Respondents) alleged that the appeal was untimely because Petitioner filed its motion to appeal beyond the 60-day limitation period. Petitioner argued that its appeal was nonetheless timely because the 60-day period tolled while the trial court considered its motion for reconsideration. Respondents claimed that, because the order discharging the writ was a final judgment, the motion for reconsideration could not toll the limitations period because it was not a valid order.

The court rejected Respondents' arguments, finding that "where an order after an appealable judgment simply leaves the judgment intact and neither adds to nor subtracts from, the order is not appealable, but where the order relates to enforcement of a judgment, it is appealable." The court reasoned that an order regarding the adequacy of a return to a petition for writ of mandate was one that related to the enforcement of a judgment and was therefore appealable. Having concluded that the order discharging the peremptory writ was appealable, the court concluded that Petitioner's notice of appeal was timely.

The City's Determination That the LOS Standard Should Apply Was Supported by Substantial Evidence

Petitioner alleged that the revised EIR remained deficient because the City merely provided an explanation of its use of the flexible LOS standard, rather than engaging in additional analysis of traffic impacts. The court explained that where the basis of a finding is not clear from the facts and circumstances, an unsubstantiated conclusion that an impact is not significant is insufficient without supporting information or analysis. The court noted that the City's use of the flexible LOS standard as a threshold of significance for traffic impacts in its original EIR had not been supported by substantial evidence because the City had used the flexible LOS standard as an automatic determinate without explanation. The court reasoned that the City had corrected this error in the revised EIR by providing a reasoned explanation, supported by substantial evidence, as to why the higher LOS in higher density areas should not be considered a significant impact.

The court noted that ordinances, plans, policies, and regulations adopted by an agency can guide the agency in setting thresholds of significance in an EIR. The court further noted that in applying substantial evidence review, the court owed deference to the agency's factual conclusions; the fact that "different inferences or conclusions could be drawn, or that different methods of gathering and compiling statistics could have been employed, is not determinative". The court concluded that the explanation and evidence provided by the City in the revised EIR was sufficient and that additional analysis of the alleged reductions in VMT and GHG emissions at the Project site were not required.

A New Argument Raised in a Petitioner's Reply Brief Will Not Be Considered

Finally, Petitioner alleged that the City had previously found similar traffic impacts to be significant, pointing to the master EIR for the City's 2030 General Plan, which found that traffic increases (which were less severe than those modeled at the Project site) were "significant and unavoidable." Respondents moved to strike this argument because it was first raised in Petitioner's reply brief. Petitioner argued that the argument was not new but was raised in response to the argument that substantial evidence supported the finding of no significant impact. The court agreed with Respondents and declined to consider Petitioner's argument, concluding that it was a new argument first raised in its reply brief without a demonstration that it could not have presented earlier.



The court explained that an argument is "new" if it does more than elaborate on issues raised in the opening brief or rebut arguments made by respondents in the reply. The court noted that the evidence cited by Petitioner in making this argument had been considered in the original appeal and thus was clearly known to Petitioner.

Disposition

Accordingly, the Court of Appeal affirmed the judgment of the trial court, concluding that it had properly discharged the peremptory writ of mandate.

- Opinion by Justice Duarte, with Presiding Justice Raye and Justice Murray concurring.
- Trial Court: Sacramento County Superior Court , Case No. 34-2014-80001851-CU-WM-GDS, Judge Timothy Frawley.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
26 <i>Friends of Riverside's Hills v. City of Riverside</i>		4 th	

[*Friends of Riverside's Hills v. City of Riverside*](#), California Court of Appeal, Fourth Appellate District, Division Two, Case No. E068350 (August 10, 2018).

- Claims of possible future violation of permit conditions of approval are not grounds for asserting a land-use violation that warrants the preparation of an EIR.

The trial court rejected the arguments of Friends of Riverside's Hills (Petitioner) that the City of Riverside (City) improperly issued a negative declaration and was required to prepare an environmental impact report (EIR), and abused its discretion by approving a residential development permit to build six single-family homes on an 11-acre parcel (Project) that violates the City's land-use provisions.

Background for Appeal

In November 2013, the Project developer submitted an application to the City for a permit to build six single-family homes on a parcel of undeveloped land within the City's "Residential Conservation Zone." In May 2015, the City of Riverside Planning Commission voted to approve the permit application, subject to certain conditions of approval, and to issue a negative declaration. In December 2016, the City voted to grant the permit application, subject to conditions. The City also determined that the Project did not pose a significant environmental impact based on the findings in the City's initial study, and voted to adopt the negative declaration. Petitioner filed an action seeking to invalidate the City's negative declaration and permit approval and to require the City to prepare an EIR. The trial court denied the petition, and Petitioner appealed.

CEQA Review of Municipal Code Land-Use Violations

Petitioner argued that the City was required to prepare an EIR because the Project violated land-use provisions of the City's municipal code, including the developer's failure to cluster the proposed lots in a manner that develops less steep portions of the site and retains natural features; the proposed excessive grading of the site; and the developer's failure to obtain a variance for the lots smaller than two acres. The court held that the record contained no evidence of any land-use violations, and thus, there was no substantial evidence in the record to support a fair argument of significant environmental impact, which would trigger the preparation of an EIR. With respect to the clustering of proposed lots, the court held that Petitioner's interpretation of the municipal code was incorrect, because the criterion required consideration of multiple factors for lot placement, not only slope. Further, Petitioner's claims that the Project failed to cluster and proposed excessive grading were speculative, because compliance with the conditions of approval could only be determined from the lot placement reflected in the final tract map submittal and grading permit application, which would occur in the future. So long as the development complies with the permit conditions, the development would not violate the City's land-use provisions. With respect to obtaining a variance for each proposed lot, the court held that Petitioner misapplied the municipal code and that the developer was not required to obtain a variance.

The City Did Not Abuse Its Discretion

Petitioner then argued that the City abused its discretion by approving a permit for a project that failed to provide substantial evidence that the average natural slopes of the lots were between 15% and 30%, and

by deferring the selection of density bonus superior design elements — as required to obtain a density bonus — to the grading permit stage.



The court held that the trial court correctly denied Petitioner's abuse of discretion claim on both grounds. First, the City cited maps depicting natural slopes between 15.2% and 27.3%, which constituted substantial evidence that the average natural slopes were between 15% and 30%. Second, the court concluded that deferment of density bonus design plans was proper because the municipal code does not require permit applicants to select these design elements prior to permit approval.

Disposition

The Court of Appeal affirmed the trial court's judgment upholding the City's approval of the Project.

- Opinion by Justice Slough, with Acting Presiding Justice McKinster and Justice Miller concurring.
- Trial Court: Superior Court of Riverside County, Case No. RIC1600523, Judge Sharon J. Waters.

EIRs

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
27 <i>Friends of the Santa Clara River v. County of Los Angeles</i>		2 nd	

[*Friends of the Santa Clara River v. County of Los Angeles*](#), California Court of Appeal, Second Appellate District, Division Five, Case No. B282421 (May 11, 2018).

- A trial court has the legal authority to partially decertify an EIR while leaving all project approvals in place.
- A limited writ is a valid exercise of a trial court's equitable powers under Public Resources Code Section 21168.9.

Background for Appeal

This case arises from a series of cases challenging the proposed Newhall Ranch project in Los Angeles County (County). In a separate case, *Center for Biological Diversity v. Department of Fish & Wildlife (2015)*ⁱ (*CBD*), the California Supreme Court held that the EIR for the project violated CEQA because the finding that greenhouse gas (GHG) impacts were less than significant was not based on substantial evidence. In the cases that were the subject of this appeal — *Friends of the Santa Clara River v. County of Los Angeles*ⁱⁱ and *Native Plant Society v. County of Los Angeles*ⁱⁱⁱ — the trial court in both cases initially denied petitions challenging the EIR for the project, but that decision was ultimately reversed in light of the California Supreme Court's decision in *CBD*. On remand, the trial court in both cases filed judgments and writs of mandate directing the County to:

- Void certification of portions of the EIR examining GHG admissions
- Suspend project activity until the GHG discussion was revised
- Suspend the County's CEQA Findings and Statement of Overriding Considerations and the Mitigation Monitoring and Report Plan (collectively, CEQA Conditions)

The remaining approvals were not affected. The petitioners in each case (Petitioners) appealed the respective judgments, which were combined into a single appeal.

At issue on appeal was whether the limited writ remedy imposed by the trial court was authorized under CEQA. Petitioners argued that:

- The court's writ of mandate violated CEQA because Public Resources Code (PRC) Section 21168.9 does not permit a trial court to direct an agency to correct part of a final EIR while leaving all project approvals in place.
- Even if such a remedy were permissible, it would be an abuse of discretion to order the remedy in this case.

The court rejected both arguments.

Limited Writ of Mandate May Leave Project Approvals in Place

The Court of Appeal considered *de novo* whether PRC Section 21168.9 authorizes the limited writ remedy. Petitioners argued that the trial court lacked legal authority to partially decertify the EIR while leaving all project approvals in place, and that the trial court's order impermissibly directs the County to provide a post hoc rationalization of its decision to approve the project. Rejecting this argument, the court reasoned that the statutory language of PRC Section 21168.9 supports an interpretation that a trial court may implement a targeted remedy that does not necessarily include invalidating all project approvals.

Additionally, Petitioners argued that a limited writ that leaves all project approvals in place violates CEQA because changes to the EIR required under the writ would have no effect on the project approvals already adopted. The court found that the trial court contemplated the possibility that compliance might trigger additional changes, and it did not ignore the possibility of the County engaging in post hoc rationalizations. The trial court's order gives the County authority to change the approvals if the changes to the EIR or CEQA Conditions warrant such a change. If Petitioners believed that the updated portions of the EIR and CEQA Conditions trigger required revisions of the approvals, they could propose changes to the County. And if the County refuses the proposed changes, Petitioners could oppose discharge of the court's writ of mandate, which would be in accord with the CEQA process. The court reasoned CEQA is focused on the process, not the ultimate decision, and PRC Section 21168.9 prohibits a court from directing an agency to exercise its discretion in any particular way. Thus, the trial court had legal authority to partially decertify the EIR while leaving the remaining approvals in place.

Trial Court's Limited Mandate Was Not an Abuse of Discretion

The Court of Appeal considered whether the trial court properly exercised its equitable powers in developing the remedy in this case, reviewing for abuse of discretion. Petitioners argued that the trial court's limited writ of mandate was an abuse of the court's discretion under PRC Section 21168.9. The court found that a trial court issuing a limited writ of mandate must make three findings:

- The portion or specific project activity or activities are severable.
- Severance will not prejudice complete and full compliance with this division.
- The court has not found the remainder of the project to be in noncompliance with this division.

Additionally, per *Center for Biological Diversity v. California Department of Fish & Wildlife (2017)*^{iv} (*CBD III*), if a court finds that it will not prejudice full compliance with CEQA to leave some project approvals in place, it must leave them unaffected.

First, Petitioners argued there was no evidence to support the trial court's determination that the GHG significance portions of the EIR were severable from the rest of the EIR and the project approvals, particularly because GHG emissions are referenced in various parts of the EIR such that it is unclear which portions the court has decertified. The court disagreed, finding that the trial court's order decertified the portions of the EIR that were the focus of the California Supreme Court's reasoning in *CBD III*, and that Petitioners could raise their concerns during the EIR revision process.

Next, Petitioners argued that severing portions of the EIR from the project approvals impermissibly allows the County to engage in a post hoc rationalization of the approvals, which would prejudice complete and full compliance. The court rejected this argument for the same reason that it rejected Petitioners' post hoc rationalization arguments.



Finally, the project approvals were previously found compliant twice by this same court, and the court found it "entirely reasonable" that the trial court could conclude that GHG significance was severable and curable in a manner that would not prejudice full compliance with CEQA. Therefore, the court found that the trial court's limited writs of mandate were not an abuse of the trial court's discretion.

Disposition

Accordingly, the Court of Appeal affirmed the judgments and writs of mandate in both cases.

- Opinion by Acting Presiding Justice Kriegler, with Justice Baker and Justice Kim concurring.
- Trial Court: Superior Court of Los Angeles County, Case Nos. BS136549, BS138001, Judge John A. Torribio.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
28 <i>High Sierra Rural Alliance v. County of Plumas</i>		3 rd	

[*High Sierra Rural Alliance v. County of Plumas*](#), California Court of Appeal, Third Appellate District, Case No. C082315 (October 19, 2018).

- A general plan does not violate the Timberland Act by providing for approval of structures on timberland production zoned properties — which the County of Plumas considered ministerial under CEQA — after a finding of necessity is made.
- A programmatic EIR must analyze the reasonably foreseeable consequences of a general plan update and is not required to analyze an unlikely, worst-case scenario.

Background for Appeal

In 2011, the County of Plumas (County) completed a general plan update directing most future growth to defined “Planning Areas.” The general plan update included policies aimed at protecting agricultural and ranching lands by not allowing land divisions intended for residential use in areas not expressly designated for residential development.

The County prepared an environmental impact report (EIR) to analyze the impacts associated with the general plan update. While the EIR acknowledged that some development would occur outside of the Planning Areas based on historic development patterns, projected population growth, and restrictive new policies, the County assumed that most of the growth would be focused within the Planning Areas.

In December 2013, the County passed resolutions certifying the final EIR, adopting the general plan update, making findings of fact, and adopting a statement of overriding considerations. High Sierra Rural Alliance (Petitioner) filed a petition for writ of mandate and complaint alleging that:

- The general plan update violated the Timberland Act by determining that residences must be treated as compatible uses within the County’s timberland production zone.
- The general plan update conflicted with the Timberland Act because it allows residences to be permitted by ministerial action within the timberland production zone.
- The EIR failed to assess the impacts associated with development outside of the Planning Areas.
- The County violated CEQA by failing to recirculate the EIR when new information became available after the close of public comment.

Timberland Act Claims

The Timberland Act imposes mandatory restrictions on parcels placed into a timberland production zone. These properties should be primarily used for timberland production activities, and development is generally discouraged. The Timberland Act does authorize the development of residences or structures within timberland production zones if they are found to be necessary for the management of land zoned for timberland production.

First, the court held that policies included within the County’s general plan update related to timberland use did not violate the Timberland Act. The court determined that Petitioner had failed to identify any

policy in the general plan update that would allow the development of structures on property within a timberland production zone in violation of the Timberland Act. Instead, the court agreed with the County that the Timberland Act's requirement to allow for a structure on property within a timberland production zone was compelled by statute and a redundant discussion of the Timberland Act's requirements was unnecessary.

Second, the court ruled that the general plan update did not violate the Timberland Act by allowing structures on timberland production zoned properties through a process that is considered ministerial for the purposes of CEQA, so long as the structure is necessary for the parcel's management. Petitioner contended that the County exercises discretionary authority when making these findings, so the individual approval of structures on timberland production zoned properties required CEQA review. The court rejected this argument, holding that "the finding that a residence or structure is necessary for the management of a timberland production zoned parcel is not an exercise of discretion as used in the CEQA context" because the County lacked authority to deny or condition the project once it made the finding that the structure was necessary.

CEQA Claims

The court rejected Petitioner's claim that the general plan update authorized rural sprawl and that the EIR violated CEQA by failing to analyze residential development outside of the Planning Areas. While the general plan update authorized limited development outside of the Planning Areas, the EIR did not analyze impacts associated with suburban growth outside of those areas. The court noted that the County's EIR is only required to study reasonably foreseeable consequences of the general plan update, not an unlikely, worst-case scenario.



Finally, the court ruled that the County was not required to recirculate the EIR because the draft EIR did not contain building intensity standards. The court rejected Petitioner's argument that the addition of these standards in the final EIR required recirculation to allow public comment, noting that the building intensity standards added new restrictions to development. The court concluded that inclusion of the building intensity standards in the final EIR did not constitute the addition of new significant information requiring recirculation.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's judgment denying Petitioner's petition for writ of mandate and upholding the County's approval of the general plan update and certification of the associated EIR.

- Opinion by Justice Hoch, with Acting Presiding Justice Blease and Justice Murray concurring.
- Trial Court: Plumas County Superior Court, Case No. CV1400009, Judge Stephen Benson.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
29 <i>Jensen v. City of Santa Rosa</i>		1 st	

[*Jensen v. City of Santa Rosa*](#), California Court of Appeal, First Appellate District, Division Four, Case No. A144782 (May 1, 2018).

- The presentation of a non-expert analysis using a vague and difficult-to-grasp methodology cannot be regarded as a legitimate factual or scientific basis and will not satisfy the requirements of substantial evidence to support a fair argument.

Two neighbors (Petitioners) of a proposed project to turn a defunct hospital into a facility that would house homeless and at-risk young adults, and provide counseling, education, and job training (Project) had filed an unsuccessful petition for writ of administrative mandate seeking to overturn the City of Santa Rosa's (City's) negative declaration and to compel the City to perform an environmental impact report (EIR). Petitioners had challenged the City's decision under CEQA alleging that, among other things, noise impacts from the Project were sufficient to require the preparation of an EIR.

Background for Appeal

In addition to offering housing, the Project would offer outdoor recreational activities including pottery throwing, basketball, and gardening. The Project was bordered by residential housing to the south and west. To the south, the Project site was separated from single-family homes by a parking lot, a wooden fence, and mature foliage. In 2013, the Project's sponsors applied for a conditional use permit, rezoning, and design review. The City held two public meetings to allow for public input, and then prepared a draft Initial Study / Negative Declaration finding no significant effects on the environment. After a 20-day public comment period, the City prepared a revised Initial Study / Negative Declaration. In 2014, the City adopted the Negative Declaration at a public hearing, and recommended implementing the necessary rezoning and other changes required to enable the Project to progress. Petitioners appealed to the City Council, which unanimously denied the appeal. Petitioners then filed a petition for writ of administrative mandate, which the trial court denied and Petitioners timely appealed.

Petitioners Presented Insufficient Evidence to Support a Fair Argument

On appeal, Petitioners argued that an EIR was required because significant noise pollution would result from the south parking lot and the resident's outdoor activities. The court first noted that an EIR must be prepared if substantial evidence supports a "fair argument" that a project may entail significant environmental effects, even if there is also substantial evidence that such an effect will not occur.

During the approval process, the City had commissioned a study from an acoustics expert (Expert) to determine whether noise effects from the Project would be significant, thus requiring an EIR. The Expert determined that noise effects would be significant in three circumstances, two of which the court found relevant. Effects would be significant if either of the below applied:

- They would expose persons to or generate noise levels in excess of applicable noise standards in the City's noise ordinance
- Operation of, or traffic generated by, the Project would substantially increase noise levels

The City's noise ordinance set base ambient noise levels for residential neighborhoods at 60 decibels (dB), including the neighborhood in which the Project was situated. The Expert explained that even if noise effects did not violate the noise ordinance, a significant impact could still occur if, as a result of the Project, noise levels exceeded existing levels by 5 dB or more. To determine whether the noise effects of the Project were significant, the Expert took readings at specific locations around the property, which he used to create a combined average baseline dB for both day and night. He then determined how much noise various activities at these locations would produce, and compared the two sets of numbers. The Expert concluded that neither the outdoor activities, nor the south parking lot, would cause significant noise impacts.

Petitioners argued that the Expert's analysis of the Project should be rejected. They claimed that they could demonstrate significant impacts using a methodology the Expert employed in his analysis of a 24-hour convenience store and gas station. They alleged that the City's noise ordinance should be understood as a maximum, rather than a baseline, and that any increase was potentially significant. Then, using the existing noise levels as a baseline, Petitioners used the highest estimate for increased noise effects from the prior study and assumed that the noise levels would increase by that amount. This methodology revealed an increase of more than 5 dB, which, according to Petitioners, proved that an EIR was required.



The court rejected this argument and found no substantial evidence supporting a fair argument that there would be a significant noise impact. As a preliminary matter, the court noted that Petitioners' calculations had not been included in their filings in the lower court and could be rejected on that basis alone. The court was also unconvinced by Petitioners' use of data from the prior study, and noted that it was difficult to regard Petitioners' methodology and findings as legitimate when neither had been evaluated by an expert. The court noted that Petitioners appeared to be using the highest possible values for potential noise generation, rather than an average — as the Expert had done in both studies. Finally, the court noted that regardless of the illegitimacy of Petitioners' methodology, the identified noise effects did not violate the City's noise ordinance.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's judgment. The court upheld the City's decision to issue a negative declaration, allowing the Project to progress without an EIR.

- Opinion by Acting Presiding Justice Jon B. Streeeter, with Justice Timothy A. Reardon and Justice Ethan P. Schulman concurring.
- Trial Court: Superior Court of Sonoma County, Case No. SCV255347, Judge Elliot Lee Daum.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
30 <i>Keep the Code v. County of Mendocino</i>		1 st	

[Keep the Code v. County of Mendocino](#), California Court of Appeal, First Appellate District, Division Three, Case No. A140857 (November 30, 2018).

- Project alternatives may be rejected as infeasible in the EIR only on the basis of findings supported by substantial evidence.
- An EIR for a project that includes a zoning ordinance amendment should focus on secondary effects expected to follow from the amendment but need not be as detailed as EIRs for the specific projects that may follow. The extent to which the original EIR must discuss effects of such future actions will depend on whether the future actions are a reasonably foreseeable consequence of the initial project and whether the future actions will be so significant that they will likely change the scope or nature of the initial project or its environmental effects.

Background for Appeal

In 2005, Northern Aggregates, Inc. (Applicant) applied for a renewed and modified use permit and approval of a quarry reclamation plan, and later combined this application with a request to amend the zoning ordinance to allow for the onsite construction of asphalt and concrete batch plants to process aggregate extracted from the Harris Quarry. In light of public comments received on the draft environmental impact report (DEIR), Applicant revised its application and proposed a scaled-back version of the project, which was approved by the County of Mendocino (County) in 2010.

After approval, Keep the Code, Inc. (Petitioner) filed a petition for writ of mandate and complaint for injunctive and declaratory relief, seeking, among other things, to compel the County to vacate its decisions. The trial court determined that the County proceeded in the manner required by law and that its decisions were supported by substantial evidence in the record, with the exception of the environmental impact report's (EIR's) analysis of project alternative 4 (extended quarry and temporary asphalt processing facility) and project alternative 5 (redesign of the project relative to nighttime activities and construction of a partial highway interchange at the project's access driveway). The court granted the petition and directed the County to set aside its decisions and the related use permit approvals and reclamation plan, and to undertake further review and reconsider its decisions on project alternatives 4 and 5. Both Petitioner and Applicant timely appealed.

EIR Properly Analyzed Mineral Processing Combined District Cumulative Impacts

Petitioner argued that the EIR omitted any analysis of the County zoning code amendments' potential impacts beyond the site-specific impacts at Harris Quarry and, accordingly, improperly deferred the cumulative impacts analysis relating to the Mineral Processing Combined District (MPCD). The court explained that a zoning ordinance amendment EIR must include an analysis of the environmental impacts of future expansion or other actions that are "a reasonably foreseeable consequence of the initial project" and which will be "significant in that it will likely change the scope or nature of the initial project or its environmental effects."

The court found that the recirculated draft environmental impact report (RDEIR) "served its purpose as a disclosure document, by informing decision makers and the public of the potential environmental impacts." The court found no deficiency in the EIR's analysis of cumulative impacts associated with the

MPCD because the County found it unlikely that other existing quarries would seek rezoning under the MPCD and that any future effects would themselves require analysis under CEQA.

Applicant's Project Objectives Were Properly Adopted by the County

Petitioner contended that the County violated CEQA because it did not “vet” Applicant's objectives for the project. The court stated that “CEQA does not restrict an agency's discretion to identify and pursue a particular project designed to meet a particular set of objectives,” noting that the EIR correctly acknowledged that the objectives for the quarry expansion were properly the Applicant's. The court also noted that the County considered and independently approved the objectives set forth in the EIR, concluding that “no more was required under CEQA.”

EIR Considered a Reasonable Range of Alternatives, but Two Were Improperly Rejected

Petitioner argued that the EIR “failed to include a reasonable range of alternatives” and improperly rejected two alternatives as infeasible. The court disagreed that the range of alternatives was unreasonable, holding that the seven alternatives were “reasonable and appropriate under the circumstances.” However, the court agreed that the County improperly rejected two alternatives as infeasible, explaining that an alternative cannot be dismissed just because it does not meet all project objectives, and noting that decreased profitability renders an alternative infeasible only if costs are sufficiently severe as to render it impractical to proceed with the project.

County Properly Relied on the Water Supply Assessment

Petitioner contended that the County failed to proceed as required under CEQA because the County relied on the Water Supply Assessment (WSA) prepared by an expert consultant hired by Applicant. The court rejected this argument, explaining that analyses and reports may be submitted by a project applicant and independently reviewed by the lead agency.

EIR's Analysis of Daily Air Pollutant Emissions Was Not Preserved for Review and Did Not Result in Prejudicial Error

Petitioner argued that the air quality impacts analysis was inadequate because it did not analyze maximum daily emissions for project pollutants. Petitioner maintained that the EIR's daily emissions estimates were based on 247 total daily vehicle trips in July, while the transportation analysis specified that 412 daily truck trips could occur under peak October conditions.

First, the court explained that, because Petitioner did not previously raise this issue to the County, Petitioner could not bring this challenge on appeal. Second, the court concluded that the County did not abuse its discretion by considering the greenhouse gas (GHG) emission impacts based on average daily truck trips as opposed to maximum daily truck trips, because the average accounts for both peak production periods and slower periods.

County's Failure to Adopt Conditions of Approval Setting Daily Limits on Asphalt Production Was Reasonable

Petitioner asserted that the County improperly failed to adopt approval conditions setting daily limits on asphalt production, arguing that “the EIR was required to evaluate, and the County was required to include as a specified condition of approval of the use permit, either a total daily or annual production limit of the proposed asphalt plant.”

The court explained that the RDEIR placed limits on the hourly and annual production of the asphalt plant. Additionally, the court accepted Applicant's reasoning that construction demands fluctuate throughout the year, and therefore the County's decision not to set maximum daily limits was reasonable due to the need for flexibility in asphalt production to accommodate seasonal changes.

EIR's Traffic Safety Impact Mitigation Was Adequate

Petitioner challenged the traffic impact analysis on the ground that one of the mitigation measures impermissibly deferred mitigation, lacked objective criteria, failed to commit either the County or Applicant to mitigation of any unsafe operation conditions that might occur in the future, and illusorily relied on Applicant's fair share payments.

The court rejected Petitioner's argument, adopting the trial court's reasoning that the EIR appropriately committed the County and Caltrans to addressing traffic issues as they arise, and concluding that "speculation that Cal[t]rans and the Department of Transportation may not agree on what constitutes 'unsafe traffic operations' does not render the measure ... legally unenforceable." Additionally, the court explained that Applicant's fair share payments were not illusory because improvements to specific road segments had been planned.

EIR's GHG Emissions Analysis Complied With CEQA

Petitioner argued that the EIR's air quality analysis was improper because it relied on the Bay Area Air Quality Management District's numerical threshold of significance for GHG emissions, which the Mendocino County Air Quality Management District (MCAQMD) had not itself adopted. The court rejected this argument and held the County acted within its discretion in relying on the EIR's air quality analysis because the MCAQMD had not adopted its own numerical threshold of significance at the time the project was under review, explaining that CEQA Guidelines Section 15064.4, which governs GHG emissions analyses, "was not intended to closely restrict agency discretion in choosing a method for assessing [GHG] emissions." Petitioner also argued that the County's reliance on the numerical threshold of significance was improper because the memorandum setting forth the threshold standard was never made available to the public and was not included in the administrative record. The court rejected this argument, noting that the County EIR consultant indicated in the RDEIR and in response to written comments that the memorandum and the threshold standard were publicly available.

Petitioner next argued that the EIR's conclusion that project GHG impacts would be reduced to a less-than-significant level violated CEQA because (1) one of the GHG mitigation measures improperly delegated the issue of performance standards to Applicant, and (2) the EIR did not explain how the mitigation measure would reduce GHG emissions below the EIR thresholds or meet Assembly Bill No. 32's GHG reduction goals. The court rejected this argument, explaining that Applicant "is bound to comply with the approved mitigation measure" and citing the detailed requirements of the mitigation measure considered by the trial court. Moreover, the court explained that "the details of exactly how mitigation will be achieved under the identified measures can be deferred pending completion of a future study."

NOx Emissions Impacts Were Appropriately Determined as Significant and Unavoidable

Petitioner argued that the County violated CEQA by failing to adopt a feasible mitigation measure involving the reduction of asphalt plant production by approximately 50% for the first six to seven years of the permit. Specifically, Petitioner argued that this was a feasible mitigation measure, not a project alternative, which must have been adopted despite the fact that it would not reduce the significant impact to less-than-significant levels.

The court disagreed, explaining that the RDEIR appropriately determined that the substantial reduction constituted a project alternative and concluded that it was not improper for that alternative not to have been independently evaluated because "[a]n EIR need not consider every conceivable alternative to a project."

Sufficient Evidence Supported Certain EIR Assumptions, Findings, and Conclusions

Finally, Petitioner challenged evidence supporting certain EIR findings, assumptions, and conclusions concerning analyses of vehicle miles traveled and GHG emissions. The court explained that a substantial evidence challenge to an EIR requires the appellant to "set forth evidence favorable to the other side and



show why it is lacking.” While Petitioner weighed “competing technical data and arguments” and cited evidence in the record supporting conclusions contrary to those reached by the County, the court stated that the question is only whether there is substantial evidence to support the County’s conclusion. The court declined to independently review the administrative record to assess support for Petitioner’s positions, concluding that Petitioner failed to carry its burden.

Disposition

Accordingly, the Court of Appeal affirmed the trial court’s judgment and ordered the parties to bear their own costs on appeal.

- Opinion by Justice Jenkins, with Acting Presiding Justice Pollak and Justice Ross concurring.
- Trial Court: Superior Court of Mendocino County, Case No. SCUKCVPT1260196, Judge Cindee F. Mayfield.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
31 <i>Responsible Development for Water Tank Hill v. County of San Mateo</i>		1 st	

[*Responsible Development for Water Tank Hill v. County of San Mateo*](#), California Court of Appeal, First Appellate District, Division Four, Case No. A150883 (May 18, 2018).

- An EIR’s analysis of noise impact should be site-specific and should consider qualitative factors as well as technical factors
- When an EIR finds, based on substantial evidence, that an impact would be less than significant, further mitigation is not required.
- An agency may rely on statewide emissions-reduction goals when determining mitigation measures to reduce a project’s significant GHG impacts.

Background for Appeal

After several rounds of public comment, the San Mateo County Planning Commission (Commission) approved a proposed housing development (Project). The County Board of Supervisors denied an appeal of the approval and upheld the Commission’s decision. Responsible Development for Water Tank Hill (Petitioner) then filed a petition for writ of mandate seeking to set aside the Project approvals as inadequate under CEQA. Petitioner argued that the approvals were inadequate because:

- The EIR failed to adequately analyze impacts.
- The County failed to adopt feasible mitigation measures.
- The County’s findings were not supported by substantial evidence.
- The County failed to recirculate the final EIR after making changes that constituted significant new information.

The trial court rejected Petitioner’s specific challenges to the County of San Mateo’s (County’s) environmental analysis of air quality, aesthetics, hydrology, and noise, finding the County had properly analyzed the potential environmental impacts of the Project and that the County’s determinations were supported by substantial evidence. Petitioner appealed the decision with respect to air quality and noise.

County’s Noise Analysis Was Appropriately Site-Specific and Comprehensive

Petitioner argued that the final environmental impact report (EIR) was inadequate because noise levels during construction would sometimes exceed 60 decibels adjusted for frequency, and would remain a significant impact, even with mitigation. Petitioner argued that in determining whether construction noise impacts are significant, the County was required to apply the same 60 decibel standard it had used to assess whether an exterior land use activity generates excessive noise.

Citing *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners of the City of Oakland* (2001) 91 Cal.App.4th 1344, 1380–1381, the court noted that “CEQA requires the lead agency to use a ‘site-sensitive threshold of significance for noise,’ and recognizes that ‘[a]n ironclad definition of significant effect is not always possible because the significance of an activity may vary with the setting.

For example, an activity which may not be significant in an urban area may be significant in a rural area.” The County’s analysis took a multifaceted approach, incorporating various standards included in local ordinances, as well as other factors, to determine that mitigation would reduce the Project’s potential noise impacts to a less-than-significant level. Thus, the court found that the substantial evidence supported the County’s determination and that focusing on a fixed 60-decibel standard, as demanded by Petitioner, was “myopic.”

No Further Mitigation Was Required for Air Quality Impacts

Petitioner claimed that the final EIR’s analysis of the Project construction’s air quality impacts was flawed. First, Petitioner argued that the final EIR was inadequate because it did not require San Mateo Real Estate, Inc. (Developer) to use “Tier 4 construction equipment,” which Petitioner described as a “feasible and commonplace mitigation measure necessary to bring emissions down to levels safe for local residents.” Under CEQA, public agencies must not approve a Project without requiring feasible mitigation measures that would substantially lessen the Project’s significant environmental effects. Here, the court found that the final EIR adequately explained that the mitigation measures in place, which required Tier 2 construction equipment, would already reduce the air quality impacts to a less-than-significant level. Petitioner presented no evidence disputing that finding. Therefore, the court found that Petitioner’s argument was without merit and no further mitigation was required.

Additionally, Petitioner argued that the County violated CEQA by ignoring the adverse impact of diesel particulate matter (DPM). But the court explained that the final EIR had used the state-approved emissions estimator model, CalEEMod, to thoroughly analyze the potential impacts from DPM. The final EIR acknowledged that DPM can have serious health effects, but determined that emissions would not exceed thresholds set by the Bay Area Air Quality Management District and were therefore less than significant.

County Properly Relied on Statewide Metrics in Creating GHG Mitigation Measure

Petitioner relied on *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204 (CBD) to argue that the County’s use of a mitigation measure modeled on statewide emissions reduction goals was improper. In *CBD*, a statewide greenhouse gas (GHG) emissions reduction goal was improperly used to determine that a project’s emissions were less than significant and required no mitigation.



Here, the court distinguished *CBD* on two grounds. First, the court noted that *CBD* dealt with the emissions from operation of a “massive development project,” whereas here, Petitioner challenged the analysis of mitigation for only the construction-related emissions of the much smaller Project (19 single-family homes). Second, in contrast to the lead agency in *CBD*, the County assumed that the GHG impact would be significant. The County then imposed mitigation on the Project for construction emissions, including purchasing carbon dioxide emissions-reduction credits to fully offset the Project’s construction emissions. Petitioner did not provide any reason or authority for challenging the sufficiency of the mitigation measure. Therefore, the substantial evidence supported the County’s determination.

Disposition

Accordingly, the Court of Appeal affirmed the trial court’s judgment. The County’s environmental analysis was proper and its findings were supported by substantial evidence.

- Opinion by Judge Smith, with Acting Presiding Justice Streeter and Justice Reardon concurring.
- Trial Court: San Mateo County Superior Court, Case No. CIV537745, Judge George Miram.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
32 <i>San Franciscans for Livable Neighborhoods v. City & County of San Francisco</i>		1 st	

[*San Franciscans for Livable Neighborhoods v. City & County of San Francisco*](#), California Court of Appeal, First Appellate District, Division Four, Case No. A141138 (August 22, 2018).

- An EIR’s use of future conditions in establishing a baseline is proper when the baseline is not hypothetical and analysis is based on observation of existing conditions.
- An EIR does not need to consider every conceivable alternative, only those that are “feasible.”

San Franciscans for Livable Neighborhoods, an unincorporated association of several neighborhood associations (Petitioner), filed a petition for writ of mandate seeking to invalidate the City and County of San Francisco’s (City’s) program environmental impact report (EIR) for General Plan Housing Element updates, alleging that the City:

- Used improper baselines to analyze impacts
- Failed to disclose various potential impacts
- Failed to adequately consider feasible alternatives that would reduce significant impacts

The trial court found that the City’s EIR complied with CEQA in most respects, with the exception of the EIR’s analysis of alternatives and consequent findings regarding potentially feasible mitigation. In affirming the trial court’s ruling, the Court of Appeal’s holding was broader, finding that the EIR fully complied with CEQA’s requirements.

Background for Appeal

Pursuant to California’s Housing Element Law (Gov. Code §§ 65580 *et seq.*) requiring local governments to adopt a “housing element” as a component of their General Plan, and the revision requirements therein, the City revised its housing element in 2004. The 2004 Housing Element updated the 1990 Residence Element. The City declared that the 2004 Housing Element would have no significant adverse environmental impacts and issued a negative declaration. In a prior, different litigation, Petitioner successfully challenged the City’s decision to proceed by negative declaration, and the City was ordered to prepare an EIR.

By the time the City began preparing the EIR for the 2004 Housing Element, preparation for the 2009 Housing Element was already underway. The 2009 Housing Element was intended to be a “policy framework” for the City to meet its housing goals. Therefore, the 2009 Housing Element did not specify areas of increased height or density, suggest specific controls for individual neighborhoods, implement changes to the Zoning Map or Planning Code, or direct funding for housing development. Instead, the 2009 Housing Element focused on strategies for implementing its core “housing values.”

Due to the overlap in preparing the 2004 and 2009 Housing Elements, the City combined the environmental review for both projects and prepared a program EIR (Housing Element EIR). In certifying the Housing Element EIR, the City determined that the 2009 Housing Element would have a single, significant, unavoidable environmental impact on transit. The 2009 Housing Element was adopted by the

City on June 29, 2011. On August 4, 2011, Petitioner filed a petition for writ of mandate challenging the Housing Element EIR.

The trial court found that the Housing Element EIR complied with CEQA with the exception of its analysis of alternatives and consequent findings regarding potentially feasible mitigation. Petitioner appealed.

The City's Baseline Conditions Were Proper

Petitioner challenged the City's use of:

- Population projections as a baseline for traffic and water impacts
- Maximum allowable density and height requirements as a baseline for land use and aesthetic impacts

The Court of Appeal rejected all of Petitioner's arguments.

Baseline for Traffic and Water Impacts

Petitioner claimed that the Housing Element EIR improperly used hypothetical conditions in the year 2025 as a baseline for measuring traffic and water impacts. The Court of Appeal disagreed.

The court noted that while the Housing Element EIR compared expected traffic impacts in the year 2025, the Housing Element EIR also contained information about existing traffic conditions, including actual, observed traffic in 60 intersections. Further, the Housing Element EIR included a chart comparing existing traffic conditions with projected traffic.

Similarly, with respect to potential water impacts, the court noted that the Housing Element EIR identified existing water demand and analyzed whether 2009 Housing Element policies would result in the need for additional water beyond that provided by existing entitlements and resources. As part of its analysis, the Housing Element EIR provided a comparison of 2030 growth projections contained in the 2005 Urban Water Management Plan and the City's 2009 Housing Element growth projections. In light of the EIR's explanation that the 2009 Housing Element did not propose any new development, the Court found that the EIR properly concluded that the 2009 Housing Element would not result in an increase in water demand beyond the expected amount.

In sum, the court found that the City was within its discretion to adopt a baseline calculation forecasting traffic and water impacts in 2025, rather than comparing the existing conditions with and without the 2009 Housing Element. The court agreed with the City that the projected traffic and water supply impacts would occur as a result of projected population growth, with or without the 2009 Housing Element, but took care to note that the City did not simply decline to study impacts by stating that growth was inevitable. Rather, the City engaged in a considerable discussion of projected growth and analyzed the traffic and water supply impacts based on those projections, in compliance with CEQA.

Baseline for Land Use and Aesthetic Impacts

The court also rejected Petitioner's argument that the City improperly relied on maximum allowable density and height requirements in its baseline analysis for land use and aesthetic impacts. The court noted that, contrary to Petitioner's contentions, the Housing Element EIR compared changes in the housing element to the existing environment, including existing height limits, densities, and land uses. Thus, the court found that the City's baseline complied with CEQA.

The City's Analysis of Environmental Impacts Was Sufficient

Petitioner alleged that the Housing Element EIR improperly concluded that the housing element would have a less than significant impact by failing to:

- Provide substantial evidence to support the determination that potential impacts on land use and visual resources would be “eliminated”
- Disclose potentially significant traffic impacts of three cumulative projects
- React to new information regarding long-term water supply impacts that became available after circulation of the draft EIR
- Adequately analyze the impacts of serving regional goals

The court rejected all of Petitioner’s claims.

Land Use and Visual Resources

Petitioner argued that the Housing Element EIR failed to provide substantial evidence that potential land use and visual resources impacts would be “eliminated.” The court pointed out that “elimination of potential impacts” is not CEQA’s standard. Rather, the court found that the Housing Element EIR reasonably assessed potential land use and aesthetic resources impacts, in light of the fact that the 2009 Housing Element did not change allowable land uses or increase allowable building heights. The court determined that, in light of these facts, the Housing Element EIR reasonably concluded that the 2009 Housing Element would not have a substantial impact on visual resources or neighborhood character.

Cumulative Traffic Projects

Petitioner alleged that the Housing Element EIR failed to disclose potentially significant traffic impacts from three in-the-pipeline projects. The court noted that the projects were included in the Housing Element EIR’s cumulative 2025 traffic conditions, and thus were not ignored by the City.

Long-Term Water Supply

Petitioner alleged that the Housing Element EIR failed to disclose water supply uncertainty and failed to adequately analyze long-term water supply impacts. The court found that the Housing Element EIR reasonably relied on the San Francisco Public Utility Company’s 2009 Water Supply Availability Study, which concluded that demand from population increases through 2030 would not exceed water supply. The court found that the Housing Element EIR’s analysis of water supply impacts was appropriate for a general plan or program EIR because it provided decision-makers with sufficient analysis to consider the environmental consequences of the revisions. The court noted that, in cases where uncertainties inherent in long-term land use and water planning make it impossible to confidently identify future water sources, an EIR will satisfy CEQA by acknowledging the degree of uncertainty involved, discussing reasonably foreseeable alternatives, and disclosing the foreseeable environmental effects of alternatives and mitigation measures.

Further, the court held that the disclosure of significant new information after publication of the final Housing Element EIR, but prior to certification, which indicated the possibility of a water deficit originally anticipated after 2030 arriving as soon as 2013, did not require recirculation of the EIR. The court noted that the EIR had already acknowledged the possibility of water shortages and options to address shortfalls, including water rationing. A later report disagreeing with the conclusion that water supply impacts would not be significant was not significant new information requiring recirculation.

Regional Housing Goals

Petitioner claimed that the housing element would induce a substantial population increase and significant increase in new housing, resulting in land use conflicts. In response, the court reiterated that the housing element is a growth-accommodating plan, not a growth-inducing plan. Additionally, the Housing Element EIR identified the impacts of housing element policies encouraging residential development along transit corridors. Accordingly, the court upheld the Housing Element EIR’s

determination that impacts related to land use conflicts were less than significant and rejected Petitioner's contention that the Housing Element EIR failed to analyze the impacts of serving regional housing goals.

The City Considered a Reasonable Range of Project Alternatives

Petitioner argued that the Housing Development EIR failed to consider a range of reasonable alternatives in accordance with CEQA, because the Housing Development EIR considered only two alternatives: a proposed project and a "no project" alternative. The court explicitly rejected Petitioner's argument that analyzing only two alternatives should, as a matter of law, be deemed inadequate. The court pointed out that an EIR does not need to consider every conceivable alternative, only those that are "feasible." In addition, the court disagreed with Petitioner's factual contention that only two alternatives were analyzed, noting that the Housing Development EIR analyzed three alternatives: the project, the 2004 Housing Element, and the 2009 Housing Element.

The court held that Petitioner failed to meet its burden of demonstrating that the selected alternatives did not amount to a reasonable range, and that Petitioner did not show that a particular potentially feasible alternative was excluded. The court also found that the Housing Development EIR provided the City's decision-makers with sufficient information about feasible project alternatives. Accordingly, the court held that the City's choice of alternatives was not manifestly unreasonable, and therefore the City did not abuse its discretion.

Feasibility of Mitigation Measures

The court held that CEQA does not require evaluation of a proposed mitigation measure if substantial evidence supports an EIR's determination that the proposed mitigation measure is infeasible. Here, Petitioner proposed mitigation measures that would:

- Impose impact fees to fund transit improvements
- Limit residential capacity along transit lines with insufficient capacity in order to reduce the housing element's potential significant impact on transit



The court found that the City was justified in choosing not to impose those measures due to funding uncertainty and failure to achieve project objectives.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's judgment upholding the EIR.

- Opinion by Justice Reardon, with Acting Presiding Justice Streeter and Justice Smith concurring.
- Trial Court: Superior Court of San Francisco City and County, Case No. CGC-11-513077, Judge Terri L. Jackson.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
33 <i>Save Our Heritage Organisation v. City of San Diego</i>		4 th	

[*Save Our Heritage Organisation v. City of San Diego*](#), California Court of Appeal, Fourth Appellate District, Division One, Case No. D073064 (October 24, 2018).

- CEQA Guidelines Section 15164, which permits a lead agency to prepare an addendum to an EIR, is consistent with and not in conflict with CEQA’s environmental review requirements.
- A lead agency is not required to make new CEQA findings concerning the significant impacts of a project as part of an addendum to an EIR.

In 2016, the City of San Diego (City) adopted an addendum to a previously adopted environmental impact report (EIR) concerning a restoration project in Balboa Park (Project). The addendum analyzed the potential impacts of modifications to the Project that were required to bring the Project into compliance with several environmental and safety standards. Save Our Heritage Organisation (Petitioner) appealed the trial court’s denial of its petition challenging the adoption of the addendum on the grounds that the addendum process is inconsistent with CEQA itself, and the City failed to make any findings under CEQA concerning any additional significant and unavoidable impacts of the Project as modified. The Court of Appeal affirmed the trial court’s denial of the petition on both grounds.

Background for Appeal

In 2012, the City approved the Project to ameliorate vehicle and pedestrian conflicts in Balboa Park. The Project generally proposed to remove vehicular access and parking from certain areas of Balboa Park, to construct a new bridge and access road, and then to construct a new underground parking structure. Petitioner opposed the Project on multiple grounds, including the Project’s impacts on the environment, land use, and historical resources in the Park. The trial court granted the petition and directed the City to rescind its approval of the Project. In 2015, the Court of Appeal reversed, finding that the City had not abused its discretion in approving the Project.

In 2016, the City prepared and approved an addendum to the EIR for the Project, addressing a number of modifications required to bring the Project within building and transportation code standards. After examining the potential impacts of the Project, as modified, the addendum concluded there were no substantial changes to the Project or other circumstances requiring major revisions to the EIR. Petitioner challenged the City’s approval of the addendum, asserting that the use of the addendum process violated CEQA itself and that the City had failed to make any findings concerning the additional significant and unavoidable adverse impacts of the modified Project. The trial court denied the petition, and Petitioner appealed.

Validity of the Addendum Guidelines

First, the court held that CEQA Guidelines Section 15164, which authorizes the addendum process, is consistent with CEQA as “the other side of the coin” of further environmental review under Public Resources Code Section 21166. CEQA Guidelines Section 15164 provides that if a lead agency makes changes to a project for which an EIR has already been prepared, the agency can prepare an addendum to that EIR unless further environmental review is required under Public Resources Code Section 21166. As such, although the Public Resources Code does not expressly authorize the addendum process,

CEQA Guidelines Section 15164 fills a gap in CEQA for projects with a previously certified EIR that require relatively insubstantial revisions.

Further, the court found that CEQA Guidelines Section 15164 is consistent with Public Resources Code Section 21166 because Section 15164 requires an agency to substantiate and explain its reasons in the addendum for determining why project revisions do not require further environmental review. In addition, the court noted that the absence of a public review requirement in the addendum process reflects the nature of an addendum as a document “describing project revisions too insubstantial in their effect to require subsequent environmental review.” Thus, the lack of public review does not render CEQA Guidelines Section 15164 inconsistent with CEQA.

Finally, the court noted that since CEQA Guidelines Section 15164 was first promulgated in 1983, the California Legislature has not modified CEQA to eliminate the addendum process, suggesting the process is consistent with legislative intent. The addendum process reasonably implements Public Resources Code Section 21166’s objective of “balancing the consideration of environmental consequences in public decisionmaking with interests in finality and efficiency,” and therefore rejected Petitioner’s challenge to the addendum process.

Compliance With CEQA Guidelines Section 21081



In addition, the court held that the City did not violate CEQA by failing to make new findings under CEQA Guidelines Section 21081. New findings are not required in connection with the approval of an addendum to an EIR because the addendum process may only be used when there are no new significant environmental impacts. Here, the court held that the “unavoidable adverse impacts” described in the addendum were exactly the same as those described in the EIR for the Project, and thus the City was not required to make new findings.

Disposition

Accordingly, the Court of Appeal affirmed the trial court’s judgment denying Petitioner’s petition for a writ of mandamus and upholding the City’s approval of the addendum.

- Opinion by Presiding Justice McConnell, with Justice Benke and Justice Dato concurring.
- Trial Court: Superior Court of San Diego County, Case No. 37-2016-00045022-CU-TT-CTL, Judge Gregory W. Pollack.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
34 <i>Sunset Coalition v. City of Los Angeles</i>		2 nd	

[*Sunset Coalition v. City of Los Angeles*](#), California Court of Appeal, Second Appellate District, Division Five, Case No. B279644 (February 26, 2018).

- A municipality's interpretation of its code and ordinances is accorded judicial deference.
- An EIR is not required to incorporate information that becomes available after the release of a final EIR, particularly if the EIR already adequately informs the agencies and public about the potential impacts of a project.
- An EIR need not be recirculated for public comment when new information discloses no new or substantial increases in environmental impacts and the public has been adequately informed about the potential impacts of a project.

Background for Appeal

On October 17, 2011, the Archer School for Girls in Brentwood (Archer) applied to the City of Los Angeles (City) for a site plan review and vesting conditional use permit (CUP) for the construction of three new buildings and an underground parking structure (Project). The City published its draft environmental impact report (EIR) on February 27, 2014, and circulated it for an extended 61-day public comment period. The final EIR was released on November 13, 2014. Based on public comments, Archer refined the scope of the Project and adopted a three-year construction period. Following the final EIR's release, the City prepared six errata. The errata were released from December 2014 to August 2015. The City of Los Angeles Planning Commission (Commission) approved the Project in April 2015, and citizen groups and homeowners' associations (Petitioners) appealed the approval to the City Council. Following a public hearing and recommendation of approval by the City Council's Planning and Land Use Management Committee, in August 2015, the City Council certified the EIR and errata and approved the Project, which included the issuance of a vesting CUP. Petitioners filed a petition for writ of mandate seeking to invalidate the City's certification of the final EIR and approval of the Project.

Petitioners argued that the City:

- Violated its municipal code and charter by approving deviations from floor area and height limits through a CUP instead of a variance
- Violated CEQA by not using a public agency's updated guidance on age-specific health risk assessments when analyzing toxic air contaminant impacts
- Was required to recirculate the EIR after Archer agreed to compress the construction schedule from 75 months to 36 months in response to public comments and after OEHHA issued updated health risk assessment guidance

The trial court ruled in favor of the City, and Petitioners appealed.

The EIR Adequately Analyzed the Toxic Air Contaminant Impact

First, Petitioners argued that the City violated CEQA by inadequately analyzing toxic air contaminants. An EIR is required to evaluate potential impacts only to the extent it is reasonably feasible to do so. Agencies are not required to conduct every recommended test or perform all the requested analyses. The guiding question is whether the document is sufficiently informative.

In evaluating the potential health risks from toxic air contaminants, the City argued that the South Coast Air Quality Management District (SCAQMD) CEQA guidance did not require a health risk assessment for short-term construction. Still, the City performed such an assessment using SCAQMD's 2005 risk assessment procedures, which incorporated the Office of Environmental Health Hazard Assessment's (OEHHA's) guidance from 2003 (2003 Guidance). Based on its assessment, the City determined that the risks associated with the air contaminants were below the applicable significance threshold. Petitioners argued that the City should have used OEHHA's more recent guidance document (2015 Guidance) in evaluating the health risks. In rejecting Petitioners' argument, the court explained that the 2015 Guidance had not been adopted by OEHHA until almost four months after completion of the final EIR and had not yet been evaluated by SCAQMD. Moreover, Archer agreed to prepare an updated health risk assessment based on the 2015 Guidance, and this condition was added to the final EIR. The court ultimately found that use of the 2003 Guidance in the EIR's health risk assessment adequately informed the decision-makers and the public about the potential risks associated with the construction of the Project.

The City Was Not Required to Recirculate the EIR

Second, Petitioners argued that the City was required to recirculate the EIR on the grounds that:

- A three-year construction schedule presented new impacts.
- The release of the 2015 Guidance represented significant new information.

When significant new information is added to an EIR after completion of the public comment period, but prior to certification, the public agency must recirculate the EIR. Recirculation is not required if the new information merely clarifies or amplifies or makes insignificant modifications to an already adequate EIR.

In this case, the court found that the three-year schedule presented no new impacts. CEQA evaluates construction-related impacts based on a "peak day" framework, and the errata to the final EIR explained that the peak construction days would remain the same under a three-year construction schedule. In addition, both the draft and final EIRs analyzed potential impacts under an accelerated schedule. The court also found that the 2015 Guidance had still not been evaluated by SCAQMD or incorporated by the City. Nor would its use create a "considerably different" result than the health risk assessment already performed by the City. Furthermore, the errata to the final EIR required an updated health risk assessment. Thus, the court determined that the City's determination that neither the compressed construction nor the 2015 Guidance required recirculation was supported by substantial evidence.

The Project Complied With Los Angeles Municipal Code Floor and Height Restrictions

Third, Petitioners argued that the City violated its municipal code by approving a project that exceeded the Los Angeles Municipal Code's (LAMC's) floor and height limits for certain residential zones. In a pertinent part, LAMC Section 12.07.01.C.5 states that "the maximum residential floor area contained in all buildings" shall conform to certain standards and limitations. However, the City made specific findings to clarify that the residential floor area limits do not apply to non-residential uses, and the City's interpretation of its own ordinance is accorded deference. As a result, the court explained that because Archer did not propose any residential buildings, the Project was not subject to residential floor area limitations, and the proposed floor area was well beneath the generally applicable limits.

Petitioners then argued that portions of the Project exceeded the applicable height limit in LAMC Section 12.21.1, which provides that "no building or structure shall exceed 36 feet in height[.]" The court found

that, due to the sloping nature of the site's natural topography, the City had determined the portions of the Project in question would only appear between 28 and 32 feet in height — well below the limitation.

Further, the court found that even if the Project exceeded the floor area and height limitations, the City had the authority under LAMC Section 12.24.F to permit these modifications through the issuance of a CUP. Petitioners argued that Section 12.24.F should not control over the floor area and height restriction ordinances, because those ordinances had been established later in time than Section 12.24.F. However, because there were no inconsistencies between the sections of the municipal code, the court explained that the general principles of statutory interpretation did not require a determination that the later-enacted ordinances supersede Section 12.24.F.



Finally, Petitioners argued that a variance, in addition to a CUP, was required. Reiterating some of its previous findings, the court found that no variance was required, because the floor area was within the allowable nonresidential limit, and the Commission has the sole authority to determine height and area regulations for CUPs under its jurisdiction. Thus, the City's approval of the CUP complied with LAMC floor area and height restrictions.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's judgment. The City's approval of the Project stands.

- Opinion by Justice Raphael, with Acting Presiding Justice Kriegler and Justice Baker concurring.
- Trial Court: Superior Court of Los Angeles County, Case No. BS157811, Judge Mary Strobel.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
35 <i>Visalia Retail v. City of Visalia</i>		5 th	

[Visalia Retail v. City of Visalia](#), California Court of Appeal, Fifth Appellate District, Case No. F074118 (January 4, 2018).

- An EIR need not study urban decay unless the record includes substantial evidence from which a fair argument can be made that the potential economic consequences of a project are of such a magnitude so as to cause physical changes in the environment.
- A court cannot disturb a general plan for internal inconsistency unless a reasonable person could not conclude that the plan is internally consistent.
- When a local agency holds one properly noticed public hearing for a general plan amendment, additional meetings where public comment is permitted are not subject to the California Planning and Zoning Law's 10 days' notice requirement.

A retail property development company (Petitioner) had filed an unsuccessful petition for writ of mandate seeking to invalidate the City of Visalia's (City's) certification of a final environmental impact report (EIR) and the City's adoption of the 2030 General Plan Update (General Plan Update). Petitioner argued that:

- The City failed to analyze the potential for a land use policy capping the size of tenants in neighborhood commercial areas to 40,000 square feet to lead to urban decay.
- The General Plan Update was internally inconsistent.
- The City failed to issue proper notice of the public hearing at which the final EIR was certified.

The court rejected all three arguments.

Background for Appeal

On August 27, 2014, the City gave notice that it would hold a public hearing on the final EIR and General Plan Update on September 8, 2014. The City held the public hearing on September 8, as scheduled, but adjourned the meeting to October 6, at which it took additional public comments. On October 14, 2014, the City Council held a special meeting at which it certified the final EIR and adopted the General Plan Update. Petitioner filed a petition for writ of mandate seeking to invalidate the City's certification of the final EIR and adoption of the General Plan Update. The trial court ruled in favor of the City, and Petitioner appealed.

Insufficient Evidence to Necessitate the Study of Urban Decay

First, Petitioners argued that the City's failure to analyze the potential for capping the size of tenants in neighborhood commercial areas to 40,000 square feet (Land Use Policy) to cause a phenomenon called urban decay — often associated with business closures and multiple long-term vacancies — violated CEQA. An EIR is required to evaluate all significant effects on the environment from a proposed project. However, an EIR typically need not evaluate economic or social effects of a project unless they may lead to physical changes to the environment. As such, an EIR is not required to evaluate urban decay unless there is substantial evidence supporting a fair argument that the project may cause physical urban decay.

In this case, Petitioner had relied on an experienced local commercial real estate agent's report (Report) opining that the Land Use Policy would cause anchor vacancies and/or lower-traffic anchors, reduce rental income landlords use for maintenance and improvements, and create a downward spiral of physical deterioration. The court determined that support for the Report was largely conjecture and failed to show that the magnitude of any adverse economic effect may lead to a substantial impact on the environment. As a result, Petitioner failed to produce sufficient evidence supporting a fair argument that the Land Use Policy may cause a significant effect on the environment, rather than purely economic effects. Thus, the court found that the City's EIR was not required to consider urban decay.

Internal Consistency of the General Plan

Next, Petitioner claimed the Land Use Policy would frustrate another policy from the City's General Plan that promotes infill development by impeding development in neighborhood commercial sites, some of which are surrounded by urbanized development. The court explained that it cannot disturb a general plan based on internal consistency unless, based on the evidence before the City Council, a reasonable person could not conclude that the plan is internally consistent. According to the court, determining the proper means of encouraging infill development or market flexibility is a policy question for political bodies, not a legal question for the courts. The court then stated that a reasonable person could conclude that the Land Use Policy is consistent with the stated goals of the general plan.

General Plan Amendment Notice Requirement Compliance



Finally, Petitioner claimed the City violated the Planning and Zoning Law by failing to provide at least 10 days' notice for the October 14, 2014 meeting. The court explained that the Planning and Zoning Law requires only one public hearing before a city may amend a general plan. The court held that the duly noticed September 8 and October 6 meetings satisfied this requirement. As such, the October 14 meeting, for which the City did not provide 10 days' notice, was not subject to the notice requirements of the Planning and Zoning Law, although public comment was permitted.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's judgment. The City's General Plan Update, including the Land Use Policy at issue, will stand.

- Opinion by Acting Presiding Justice Poochigian, with Justice Detjen and Justice Black concurring.
- Trial Court: Superior Court of Tulare County, Case No. VCU258614, Judge Bret D. Hillman.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
36 4140 E. Hammer Lane, LLC v. County of San Joaquin		3 rd	

[4140 E. Hammer Lane, LLC v. County of San Joaquin](#), California Court of Appeal, Third Appellate District, Case No. CO84422 (March 2, 2018).

- The administrative exhaustion requirement for standing to challenge an agency’s action is satisfied if the petitioner raises issues during public comment with sufficient specificity that the agency can respond, even if the petitioner’s communication states that it “does not necessarily oppose” the project.
- An initial study must evaluate the entirety of a project, even if it is a county’s policy to split up environmental review into phases, or if underlying aspects of the project are on hold until general plan and zoning code amendments are adopted.
- Failure to include the entirety of a project in an initial study is presumptively prejudicial because it frustrates an agency’s ability to make an informed decision.

4140 E. Hammer Lane, LLC (Petitioner) appealed the trial court’s denial of its petition for writ of mandate directing the County of San Joaquin (County) and its Board of Supervisors (Board) to vacate its approval of amendments to its general plan and zoning ordinance relative to a certain parcel of real property, and its approval of a negative declaration relative to those amendments. Petitioner argued:

- Petitioner has standing to file suit even though it did not object to the general plan amendment and zoning ordinance amendment.
- The County erred in its definition of the project.
- The County’s error was presumptively prejudicial.

Background for Appeal

Real party in interest SCG Properties, LLC (SCG) applied to the County to amend its land use regulation of two parcels totaling 14.9 acres just south of Petitioner’s property. SCG sought to change the general plan map designation for the parcels from low-density residential to general commercial, and to amend the zoning ordinance for the same parcels from agricultural urban reserve to general commercial (collectively, the Project). The County prepared an initial study, and recommended the Project be approved with a negative declaration.

However, the Project’s description referenced an “underlying project” described as “the construction of a gasoline sales-combination, eating establishment-convenience, and eating establishment-full service.” The initial study also referenced “underlying projects,” describing them as “a gas station, mini mart, fast-food restaurant, and a full-service restaurant.” SCG had already submitted an application for a minor subdivision to subdivide the existing parcel, along with a site approval application for the underlying projects, but those applications were “on hold pending approval of [the Project’s] application.”

At the Board’s hearing on the Project, Petitioner submitted a letter stating that Petitioner “do[es] not necessarily oppose the development of the Project,” but does have various concerns about “the potentially significant physical effect” the Project may have on its own property, including increased traffic,

public services access, noise impacts, and alcohol sales near a school. The Board approved the Project, finding it would not have a significant effect on the environment, and that a negative declaration was appropriate to address environmental impacts. Petitioner petitioned the trial court for a writ of mandate directing the County and the Board to vacate and set aside the negative declaration and approval of the Project. The trial court denied the petition, finding that:

- Petitioner lacked standing based on failure to object to the general plan and zoning ordinance amendments.
- Substantial evidence supported the Board's decision to approve the Project and accept a negative declaration.

Petitioner appealed.

Petitioner Was Able to Challenge the County's Decision

The Court of Appeal found the trial court erred when determining that Petitioner lacked standing because it did not object to the project as it was defined by the County. Petitioner sufficiently raised objections in its letter to the Board prior to its approval of the project and negative declaration. The court held that an objector need not have *personally* raised a specific ground in order to later contest it, so long as *someone* presented the relevant objection to the agency. Public Resource Code (PRC) Section 21177's purpose is to "ensure the agency has been given the opportunity to respond to objections before there is litigation." Thus, a party may litigate issues timely raised by others, so long as the objecting party properly objected to some aspect of the project during the public comment period.

Here, Petitioner's letter was a sufficient objection. While generalized environmental comments, such as "bland and general references to environmental matters" or "isolated and unelaborated comments" are insufficient, "a comment that raises questions about [the] proposed project is fairly understood as an expression of disapproval, and [a]s such, it constitutes an objection." Petitioner's letter raised "various concerns about potentially significant physical effects." Thus, Petitioner's letter, further reinforced by Petitioner's comments at the hearing before the Board, "sufficiently fulfilled its duty to object as required by PRC Section 21117, subdivision (b)."

The County was Obligated to Review the Entire Project

The court found the County erred in defining the Project as only encompassing the amendments to the general plan and zoning ordinance, but excluding what the negative declaration called the "underlying project"; this Project definition did not constitute the "whole of the action." The general plan amendment and zoning reclassification were not the entire project, but rather part of a project that also included development on the site of a gas station with a mini mart, fast-food restaurant, and full-service restaurant. These developments were known, and contemplated as part of the reason for the Project's general plan amendment and zoning reclassification. Neither the County's long-standing policy to cut up environmental review into phases, nor the possibility that the Project may not be approved — thus removing the requirement to analyze the underlying project — excused the County from its obligation to review the entire project, including the underlying project, at this initial step.

Further, the court found the County's omission of the underlying project from the initial study to be a presumptively prejudicial error. Since this information was not included in the initial study or otherwise presented to the Board, the Board was unable to make an informed decision — frustrating the purpose of CEQA's fundamental goal of fostering informed decision-making.



Disposition

Accordingly, the Court of Appeal reversed the trial court judgment, remanded the case to trial with directions to issue a writ of mandate, and awarded Petitioner costs on appeal.

- Opinion by Justice Butz, with Presiding Justice Raye and Justice Robie concurring.

- Trial Court: Superior Court of San Joaquin County, Case No. STK-CV-UWM-2016-0002787, Judge Barbara Kronlund.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
37 <i>AquAlliance v. US Bureau of Reclamation</i>		US District Court, Eastern District of California	

[*AquAlliance et al. v. US Bureau of Reclamation et al.*](#), United States District Court, Eastern District of California, Case No. 1:15–CV–754–LJO–BAM (February 15, 2018).

- The existence of significant impacts outside an agency’s boundaries does not necessarily render that entity an improper lead agency.
- A program EIR addressing a series of activities need not contain the detail and site-specific specifications of a project EIR.
- An analysis of cumulative impacts must consider existing degraded environmental conditions in determining the threshold of significance.

AquAlliance and other water-resource management and conservation organizations (Petitioners) challenged the US Bureau of Reclamation, the San Luis & Delta-Mendota Water Authority (Authority) and others (Respondents) over the Central Valley Project, a 10-year water-transfer program to move water from sellers located upstream of the Sacramento/San Joaquin Delta (Delta) to willing buyers south of the Delta (Project). Petitioners contended and Respondents disputed, inter alia, that the Final Long-Term Water Transfers Environmental Impact Statement/Environmental Impact Report (FEIS/R) violated CEQA.

Background for Appeal

The Project is among the largest and most important water projects in the country, serving primarily to transfer water from the Sacramento River in Northern California to water-deficient areas in the San Joaquin Valley and from the San Joaquin River to the southern regions of the Central Valley. The purpose of the Project is to facilitate water transfers from upstream sellers to downstream users to address severe reductions in water supply in dry years. Petitioners challenged the Project’s FEIS/R on the basis that it violated CEQA on several grounds.

The Authority Was an Appropriate Lead Agency

The Authority served as the lead agency for CEQA purposes. Petitioners argued that the Authority was not the proper CEQA lead agency and that, instead, the California Department of Water Resources (DWR) should have prepared and certified the FEIS/R. Petitioners argued that the Authority did not have “principle responsibility for implementing the project,” as required by CEQA. The court determined that, although some of the transfers at issue may originate and terminate in water districts outside the Authority’s boundaries, the Authority has a more significant role in the overall Project than DWR. The court also rejected arguments that the Authority was not an appropriate lead agency because it did not have sufficient authority over the transfers, and that the Authority had no legal mandate to mitigate groundwater or surface impacts in districts outside its jurisdiction. The court accepted the Authority’s argument that it had adopted legally feasible mitigation measures, and determined that the Authority’s level of control was sufficient.

Project Description Was Proper

Petitioners alleged that the Project description violated CEQA on two grounds. First, Petitioners argued that the description of the timing, amount, location, and frequency of transfers lacks sufficient specificity and certainty. While the FEIS/R listed each of the entities that are anticipated to buy and sell transfer water, and places an upper limit on the amount of water transferred, Petitioners argued that the FEIS/R omitted critical details about the timing, amount, location, and frequency of transfers, suggesting that the FEIS/R was unlawful because it “lack[ed] the necessary stable and discrete project description required for a project-level review.” However, the court agreed with the Authority that the FEIS/R used the CEQA process as it was intended to describe and analyze a series of individual activities having generally similar impacts that can be mitigated in similar ways. Accordingly, because impacts associated with a series of similar transfers could be analyzed generally, the lack of specific information regarding individual transfer details was not required.

Second, Petitioners argued that the FEIS/R’s “carriage water” component improperly conflated a mitigation measure with the Project itself and was undefined. Petitioners alleged that the FEIS/R indicated that the preferred alternative contained several “environmental commitments” that were designed to “avoid potential environmental impacts from water transfers.” One such environmental commitment was the use of carriage water, which, according to the FEIS/R, was a portion of the transfer that was not diverted in the Delta and would become Delta outflow, and would thereby be used to maintain water quality in the Delta. Carriage water was defined as the extra water needed to carry a unit of water across the Delta to export facilities while maintaining a constant salinity. The FEIS/R did not explain with any level of precision how carriage water is calculated, but instead explained that 10%-30% of transfers would be used as carriage water. The court held that while the explanation of carriage water use and calculation could have been more direct, the FEIS/R was not unlawful for failing to explain these elements in greater detail. Petitioners also argued that the way in which carriage water was described as an environmental commitment improperly compressed the analysis of impacts and mitigation measures into a single issue. The court likewise rejected this argument, citing precedent indicating that the distinction between elements of a project and measures designed to mitigate impacts of the project may not always be clear.

Description of Environmental Setting Was Proper

Petitioners asserted that the draft EIS/R (DEIS/R) omitted numerous “crucial existing environmental features.” First, Petitioners asserted that even after significant updates made in response to similar criticisms to the DEIS/R, the FEIS/R still failed to describe lawfully the Project’s environmental setting. Second, Petitioners argued that the Authority should have recirculated the FEIS/R for public comment. Petitioners made separate sets of arguments in connection with the FEIS/R’s description of existing groundwater levels and existing groundwater contamination.

Regarding groundwater levels, Petitioners alleged that use of outdated data paints an unfairly optimistic picture of the availability of groundwater. However, the court dismissed these arguments that generally focused on the DEIS/R, and which did not clearly extend to the FEIS/R. The court also found that, to the minimal extent these arguments could pertain to the FEIS/R, the arguments did not overcome the “presumption of correctness” that applies to the Authority’s decision not to recirculate.

Petitioners next argued that the FEIS/R failed to describe accurately existing groundwater contamination. For example, the DEIS/R concluded that any additional pumping of groundwater resulting from the Project “[was] not expected to be in locations or at rates that would cause substantial long-term changes in groundwater levels that would cause changes to groundwater quality.” Petitioners argued that the DEIS/R’s conclusion could not be supported without disclosing information about the location of contaminated groundwater and their proximity and interactivity with proposed groundwater pumping. But, again, Petitioners admitted that the FEIS/R added significant new information describing these contaminated sites to the FEIS/R. The court again found that these arguments focused on the DEIS/R and that they were unconvincing, and therefore held that recirculation was not required.

Assessment of Significant Environmental Impacts Was Partially Flawed

Groundwater Impact Modeling

Petitioners first argued that the model defined baseline conditions using an outdated baseline period from 1970 to 2003. Petitioners generally asserted that reliance on data from this period failed to accurately reflect existing and foreseeable growth in future water demand, failed to account for ongoing increases in global temperatures, and failed to account for the long-term trend of groundwater drawdown in the state. The FEIS/R explained that the model's reliance on this data period is nonetheless appropriate, despite the fact that the years since 2003 have been drier than average, because the model inputs included several 10-year periods that were even drier than the most recent period excluded from the model's data set. The court held that Petitioners failed to rebut this reasonable explanation that is supported by substantial evidence in the form of the cited historical runoff data.

Petitioners next argued that the FEIS/R was unlawful because it provided an internally inconsistent picture of the environmental baseline. As a specific example of internal inconsistency, Petitioners compared a portion of the FEIS/R that asserted "groundwater levels declin[e] moderately during extended droughts and recover[] to pre-drought levels after subsequent wet periods," to a section from the FEIS/R containing hydrographs of monitoring wells in the Sacramento Valley. The court found the graphs are more equivocal and therefore did not find the FEIS/R to be internally inconsistent on this issue.

Petitioners next argued that the FEIS/R ignored a consistent growth in water-supply demand. The computer models employed in the FEIS/R analysis were designed to approximate a fixed level of development, with one using a 2005 level of development and the other using a 2010 level of development. According to Petitioners, this meant that population, land use, and agricultural demands used in the models were representative of demands that existed in those years. However, the Authority explained in a supplemental briefing requested by the court that the 2010 land use data incorporated into the second model was the most recent land use data available in 2011, the time of initiation of this environmental review. Accordingly, the court found that the Authority did not act unlawfully by utilizing a 2010 level of demand.

Analysis of Climate Change Impacts

The Authority took the position that CEQA does not require an agency to analyze significant effects of climate change on a project. The FEIS/R does analyze the Project's anticipated contribution to global climate change in the form of, for example, increased emissions of greenhouse gasses caused by increased groundwater pumping for groundwater substitution transfers. Petitioners asserted, however, that climate change was an "existing condition" and a "hazard," the effects of which the Project could potentially exacerbate, and therefore additional analysis was required in the FEIS/R. The court determined that Petitioners failed to point to record evidence substantiating their position that the Project may exacerbate impacts to water supply caused by climate change, and therefore rejected this argument.

Assessment of Water Quality Impacts

Petitioners next argued that the FEIS/R was unlawful because it failed to evaluate water quality impacts in a manner that comports with the law, asserting that the Project would occasionally exceed existing water quality objectives or standards ostensibly in violation of CEQA. While acknowledging that "exceedances of water quality standards have occurred, especially during recent drought years," the FEIS/R concluded that "changes in operations associated with the range of potential water transfer activities ... [were] not expected to significantly affect water quality or exceedances." Among other things, the Authority pointed out that the carriage water was used to maintain compliance with whatever water quality standards were in force and effect. The court found the Authority's justifications sufficient and dismissed this argument.

Analysis of Biological Impacts to Reductions of Delta Outflows

Petitioners next argued that the FEIS/R failed to adequately analyze impacts resulting from acknowledged reductions to Delta outflows. Specifically, they argued that the FEIS/R's threshold of significance related to this particular impact was arbitrary and therefore violated CEQA, and that the cumulative impact analysis failed to take into consideration the already degraded condition of the Delta. In connection with the direct (as opposed to cumulative) impact analysis, the FEIS/R indicated that modeled changes in Delta outflow relative to existing conditions were considered substantial if they were greater than 10%. In selecting this threshold, the FEIS/R relied upon environmental studies evaluating impacts to fish habitats caused by decreased flows in freshwater streams and rivers. These studies revealed a consensus that differences in modeled flows of less than 10% would be within the noise of the model outputs. The court found this explanation to be well supported and rejected Petitioners' argument.

However, the court found Petitioners' arguments regarding the analysis of cumulative impacts to Delta outflow to be more compelling. Petitioners argued that the FEIS/R violated CEQA because it failed to consider the existing degraded environmental conditions in setting the threshold of significance. The court agreed that the record showed the Delta was already in a precarious state, due in part to reduced Delta outflows, and noted that the FEIS/R failed to account for such degradation in its cumulative impacts analysis. Accordingly, the court held that the analysis of cumulative impacts to Delta outflow did not pass muster under CEQA because it did not account for existing conditions in the Delta.

Mitigation Measures Were Partially Flawed

CEQA Challenges to Mitigation Measure GW-1

Mitigation Measure GW-1 is aimed at minimizing potential impacts to groundwater associated with groundwater transfers. Petitioners argued that the monitoring interval of one month was insufficient to properly capture readings. The court rejected this argument because, while the readings would occur once per month, monitoring would be continuous and data would be recorded and available. Petitioners also raised concerns with the open-ended exceptions to the monitoring requirements, which require monthly monitoring "where feasible" and "unless site-specific information indicates a different interval should be used." On this issue, the court sided with Petitioners.

Petitioners further argued that GW-1 failed to provide sufficiently specific significance criteria, a point with which the court also agreed, noting that while impact categories were identified, there was no indication as to when such impacts would be considered significant. Petitioners next asserted that monitoring requirements associated with land subsidence were insufficient. Under GW-1, if a seller is able to demonstrate compliance with "the local threshold for subsidence," such compliance will be considered sufficient. This approach does not account for scenarios in which such a finding would allow a seller to continue to pump despite non-infrastructure impacts, such as impacts to aquifer capacity. As such, the court agreed with Petitioners that this aspect of GW-1 creates an unlawful loophole. The court rejected Petitioners' argument that the changes to GW-1 between the draft and final EIR necessitated recirculation.

CEQA Challenges to Mitigation Measure WS-1

As explained by the Authority, Mitigation Measure WS-1 is intended to mitigate impacts to water supplies by imposing a streamflow factor to be incorporated into transfers. Petitioners argued that WS-1 unlawfully defers mitigation without creating a clear performance standard. The court rejected this argument, finding that the streamflow factor was a performance standard designed to avoid significant impacts and that the streamflow factor set a minimum value for streamflow depletion.

Assessment of Impacts to Giant Garter Snake Was Improper

Petitioners argued that the FEIS/R failed to satisfy CEQA's requirements with respect to the Project's impacts on giant garter snakes (GGS) because the Project could impact up to 10.5% of the rice acreage

(primary GGS habitat) within the Project area in any given year, and loss and fragmentation of habitat is the most serious threat facing the GGS. “The Authority respond[ed] by pointing out, correctly, that [Petitioners’] description of the factual picture is overly simplistic,” in part because loss of rice acreage would occur primarily in areas where the likelihood of GGS occurrence is low. However, the requirements intended to ensure that acreage loss is focused in areas where GGS occurrence probability is low were, according to the court, “fatally unclear.” Accordingly, Petitioners’ motion for summary judgment was granted as to this issue.



Petitioners further asserted that environmental commitments associated with controlling where acreage loss would occur were improperly incorporated into the Project description. Because, unlike the carriage water concept, the acreage loss control cannot properly be considered both a project and mitigation component, the court agreed with Petitioners that the FEIS/R violated CEQA for this reason as well.

Disposition

Accordingly, Petitioners’ motion for summary judgment was granted in part and denied in part, and the Authority’s motion for summary judgment was also granted in part and denied in part.

- Opinion by Judge Lawrence J. O’Neill.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
38 <i>City of Long Beach v. City of Los Angeles</i>		1 st	

[City of Long Beach v. City of Los Angeles](#), California Court of Appeal, First Appellate District, Division Three, Case No. A148993 (January 12, 2018).

- An EIR's analysis of air quality impacts is incomplete if it fails to provide information sufficient for the public and decision makers to understand how air quality will change with reference to time.
- The Attorney General is exempt from CEQA's issue exhaustion requirement.
- A project description does not need to analyze the project's environmental impacts.

The City of Long Beach (Petitioner) filed a petition for writ of mandate seeking to invalidate the City of Los Angeles's (Los Angeles's) environmental impact report (EIR) for a 153-acre near-dock railyard four miles from the Ports of Long Beach and Los Angeles (Project). On appeal, Los Angeles challenged the trial court's conclusions that:

- The EIR was deficient because its project description and analysis of indirect impacts failed to discuss reasonably foreseeable indirect impacts from freeing capacity at the existing railyard near the Project site, the Hobart railyard.
- The EIR's analysis of noise, traffic, air quality, and greenhouse gas emissions was inadequate.
- The Attorney General, who intervened in the petition, was not precluded from asserting objections to the EIR that were not raised in the administrative proceedings.

The court agreed with Los Angeles that the project description, analysis of indirect impacts, and analysis of noise, traffic, and greenhouse gas emissions were adequate, but affirmed the trial court's decision with respect to the inadequacy of the EIR's air quality analysis and the Attorney General's exemption from issue exhaustion rules.

Background for Appeal

On February 22, 2013, the Los Angeles Harbor Department issued a final EIR, which concluded that the Project would have significant unavoidable impacts on, among other things, air quality, noise, greenhouse gas emissions, and traffic. On March 7, 2013, the Los Angeles Board of Harbor Commissioners certified the EIR, adopted a statement of overriding considerations, and approved the Project. Following an appeal, the Los Angeles City Council affirmed the certification and approval on May 8, 2013. In June 2013, seven petitions were filed challenging the certification and approval. In May 2014, the Attorney General intervened in the action on behalf of Petitioner. The trial court ruled in favor of Petitioner, and Los Angeles appealed.

Attorney General Exempt From Exhaustion Requirement

As an initial matter, Los Angeles argued the trial court lacked jurisdiction to consider certain objections to the sufficiency of the EIR asserted by the Attorney General because his objections were not made by any party in the administrative proceedings. The Court of Appeal determined that Government Code Section 21177(d)'s plain language excused the Attorney General from the issue exhaustion requirement, concluding there was no ambiguity in the statutory language based on the legislative history.

Project Description Does Not Require Analysis of Impacts

Los Angeles argued that the trial court's holding that the project description was deficient — because it failed to include a discussion of the reasonably foreseeable indirect impacts at Hobart railyard — was based on a misunderstanding of what must be included in a project description. Los Angeles argued that a project description does not need to include an analysis of the project's impacts but merely describe the project. The Court of Appeal agreed with Los Angeles, and held that the project description accurately described the pertinent features of construction and operation of the proposed railyard. Additionally, the court found nothing misleading or inaccurate about the project description. Therefore, the Court of Appeal held that the EIR's project description was not deficient, because it accurately described the Project's pertinent features.

EIR Analysis of Indirect Impacts Adequate

The trial court concluded that the EIR's analysis of indirect impacts was deficient because it omitted any discussion of reasonably foreseeable impacts that will be caused by freeing capacity at Hobart railyard. The trial court stated that by constructing the Project, BNSF Railway Company (BNSF) will double the railyard's capacity, and the EIR failed to analyze how BNSF will utilize Hobart railyard once that capacity was created. However, the Court of Appeal disagreed, stating that the EIR's responses to comments addressed potential indirect impacts at Hobart railyard, and the record reflected that there was no unmet demand for rail service at Hobart railyard that would give rise to additional traffic when intermodal traffic is diverted to the new railyard. In addition, there were multiple analyses in the record showing that existing railyards were not operating at their maximum capacity, and any additional freed-up capacity would not give rise to indirect environmental impacts.

The Court of Appeal stated that this conclusion was supported by two reasons:

- The EIR stated that a facility's capacity does not create growth in demand.
- Substantial evidence supports the finding that BNSF has capacity at Hobart railyard to meet all projected growth until at least 2035.

Thus, there was a sufficient evidentiary basis for Los Angeles's conclusion that a predicted amount of economic growth will occur with or without the Project, and any such growth is not an indirect impact that the EIR was required to study. Therefore, the Court of Appeal concluded that there was substantial evidence in the record supporting Los Angeles's conclusion regarding the Project's potential indirect impacts, and the EIR was not required to study indirect impacts resulting from economic growth.

EIR Analysis of Noise, Traffic, and Greenhouse Gas Emissions Adequate

Regarding noise, the trial court concluded that the EIR failed to analyze under impact NOI-6 whether single-event noise would exceed maximum noise levels allowed under the City of Long Beach noise ordinance. However, the Court of Appeal agreed with Los Angeles that impact NOI-6 was intended to evaluate only increases in ambient noise levels, not single-event noise.

Regarding traffic, the trial court concluded that the EIR failed to analyze traffic on San Gabriel Avenue and consider how the influx of trucks would impact residents. The Court of Appeal held that the EIR reasonably concluded that trucks and residents would not often share the road because San Gabriel Avenue serves only a small residential area.

With respect to greenhouse gas emissions, the trial court concluded that the discussion of impacts was inadequate because it did not inform the public or decision makers of the reasons why the Project is consistent with state and local plans and policies. The Court of Appeal disagreed, finding that a comparison of the Project's expected emissions to a hypothetical business-as-usual scenario was an appropriate tool for evaluating efficiency and conservation efforts, and may be used to make the Project consistent with Assembly Bill 32's statewide goal of a 29% reduction from business as usual. The EIR properly used such a comparison tool and supported its conclusion with substantial evidence, sufficiently

separating its quantitative analysis from its qualitative analysis to inform the reader that the emissions will exceed baseline levels but the Project was nonetheless consistent with state and local plans.

Therefore, the Court of Appeal determined that there was no inadequacy in the EIR's analysis of noise, traffic, or greenhouse gas emissions.

EIR Analysis of Air Quality Analysis Inadequate

Los Angeles argued that the EIR's analysis of air quality was adequate because the composite emissions scenario methodology used was a "common industry-accepted protocol" that is supported by substantial evidence. Los Angeles argued it was not misleading and did not result in the omission of necessary information from the EIR. The Court of Appeal agreed that the methodology was not misleading but held, with the trial court, that the analysis of air pollution concentration impacts was incomplete.

The Court of Appeal concluded that the EIR failed to provide sufficient detail to enable participants to meaningfully understand and consider the issues raised by the Project. The Court of Appeal agreed with the trial court that crucial information was omitted from the EIR, because the EIR did not disclose or estimate how frequently and for what length of time the level of particulate air pollution in the area surrounding the Project will exceed the standard of significance. Los Angeles's reliance on cases approving "worst-case scenario" analyses was misplaced because a neighbor could not predict how bad air quality would be, if the railyard is constructed, at any point or for how long in the future. Thus, the EIR failed to set forth sufficient information to foster public participation and reasoned decision making.

With respect to the cumulative air quality impacts analysis, the trial court determined that the analysis relied on deficient screening methodology and failed to discuss how a potential cumulative expansion project would affect pollutant concentrations. Los Angeles argued that CEQA does not require the quantification of air quality impacts of the potential cumulative expansion project because quantification would be impractical and unreasonable. The Court of Appeal recognized that while quantification would be time consuming, the fact that CEQA does not require quantified analyses does not mean all meaningful information on a subject can be omitted from an EIR's cumulative impacts analysis. Thus, the EIR should have made a "good faith and reasonable disclosure" of the cumulative impacts prior to approval.



Therefore, the Court of Appeal determined that the EIR was inadequate for failure to include sufficient information to allow the public to adequately comment and analyze the Project's potential air impacts.

Disposition

Accordingly, the Court of Appeal affirmed in part and reversed in part the trial court's judgment and required Los Angeles to set aside certification of the EIR and approvals and to suspend Project activities until Los Angeles complies with CEQA.

- Opinion by Presiding Justice Stuart R. Pollak, with Justice Peter J. Siggins and Justice Martin J. Jenkins concurring.
- Trial Court: Contra Costa County Super. Ct., Case No. CIVMSN140300, Judge Barry Goode.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
39 <i>Georgetown Preservation Society v. County of El Dorado</i>		3 rd	

[*Georgetown Preservation Society v. County of El Dorado*](#), California Court of Appeal, Third Appellate District, Case No. C084872 (December 17, 2018).

- The application of design guidelines by a county review board do not insulate a project from the CEQA process at the initial study phase under the fair argument standard.
- Comments by members of the public regarding negative effects on aesthetics are sufficient to create a fair argument and necessitate an EIR.

Background for Appeal

Local residents acting through Georgetown Preservation Society (Petitioner) filed a petition challenging El Dorado County’s (County’s) adoption of a mitigated negative declaration (MND) for a proposed development of a Dollar General store in Georgetown’s historic center (Project). The County found that the Project met the aesthetic standards in the County’s Historic Design Guide and that Project impacts would be less than significant, eliminating the need for an environmental impact report (EIR). In response to Petitioner’s mandamus petition, the trial court found that there was substantial evidence to support a fair argument that the Project may have a significant aesthetic impact on the environment, but rejected Petitioner’s claims regarding traffic impacts and pedestrian safety, and declined to address Petitioner’s zoning claims. Accordingly, the trial court issued a writ of mandate requiring the County to prepare an EIR for the Project. The Project’s developers and the County (together, the Respondents) filed an appeal.

Effect of Historic Design Review

Respondents contended that because the County applied its Historic Design Guide principles and found that the Project met the aesthetic standards, a finding of compliance should be afforded the same level of deference as other interpretations and applications of the County General Plan or zoning rules and cannot be disputed by lay opinion evidence. Planning and zoning determinations are afforded greater deference because presumably the local entity can use its knowledge and experience to best interpret its own rules. However, a public agency’s own design review is not a substitute for CEQA, and conformity with a general plan does not insulate a project from CEQA review.

The fair argument standard purposely sets a low threshold for preparation of an EIR in order to maximize environmental protections. The Historic Design Guide analysis can serve as substantial evidence of a lack of environmental impacts, but it does not supersede CEQA review, and if contrary evidence also meets the fair argument standard, then an EIR is required.

Lay Opinions and the Fair Argument Standard

Despite Respondents’ characterization of public commentary regarding aesthetic concerns as “unsubstantiated lay opinions,” the court found that so many commenters objected to the size and overall appearance of the Project that it “cannot seriously be disputed that this body of opinion meets the low threshold for requiring an EIR.” Previously, courts have found lay opinion testimony on nontechnical matters to be admissible and probative, such that the testimony may satisfy the fair argument standard. Going beyond “a few stray comments,” a large number of interested people in this case commented that the Project would be too big and boxy, have a significant and negative effect on the current aesthetics,



and damage the look and feel of Georgetown's historic center. The court acknowledged that aesthetic concerns are subjective in nature, and that size and overall appearance are nontechnical matters that do not require special expertise. Respondents' argument that many of the commenters lacked the technical background to apply the County's design standards failed to address the fact that a rational layperson familiar with the area could conclude that the Project *may* negatively impact the historic center's aesthetics, presenting a fair argument under CEQA and triggering the requirement to address the potential impact in an EIR. Although Respondents contended that the County was not required to make explicit foundational or credibility findings to explain why it disregarded the public commentary, the court disagreed, and found that even if such findings had been made, they would have been an abuse of discretion by the County.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's writ of mandate and judgment.

- Opinion by Justice Duarte, with Acting Presiding Justice Butz and Justice Murray concurring.
- Trial Court: Superior Court of El Dorado County, Case No. PC20160205, Judge Warren C. Stracener.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
40 <i>Los Angeles Conservancy v. City of Los Angeles</i>		2 nd	

[L.A. Conservancy v. City of L.A.](#), California Court of Appeal, Second Appellate District, Division Four, Case Nos. B284089, B284093 (March 23, 2018).

- A finding of infeasibility under CEQA may be based on evidence that particular alternatives would not achieve project objectives.
- Under CEQA, approval occurs at an agency's earliest commitment to a project, not when the final approval in a series of approvals is issued; accordingly, an issue may be ripe for review despite the fact that no permit has been issued.

The Court of Appeal reversed in part and affirmed in part the trial court's judgment concerning a real estate development known generally as the 8150 Sunset Boulevard Mixed Use Project (Project) in the City of Los Angeles (City). In doing so, the court:

- Rescinded a writ of mandate preventing further approvals of the Project if it involved destruction of the historic Lytton Building on Sunset Boulevard
- Reinstated the City's finding of infeasibility regarding project alternatives that would have spared the Lytton Building, noting that alternatives that do not achieve project objectives may be considered infeasible under CEQA
- Issued a peremptory writ requiring the City to conduct a street vacation procedure for a right-turn lane that would be converted into a pedestrian plaza, finding the issue ripe for review under CEQA despite the fact that no permit had been issued for the street vacation

In all other respects, the court affirmed the trial court's judgment. Specifically, the court affirmed that substantial evidence supported the City's position that:

- The EIR did not omit relevant baseline information by failing to include commercial height restrictions that would not apply to the Project.
- The EIR complied with the General Plan, given certain ambiguities in height and density restrictions as they apply to commercial (as opposed to residential) developments.
- A seismic study sufficiently supported the proposed setback of 50 feet.
- The EIR did not violate the General Plan with respect to zoning, traffic, or emergency response times.
- Approval of a tentative tract map was consistent with the General Plan, given the broader finding of General Plan compliance.

Background for Appeal

In 2016, in order to prevent the destruction of the Lytton Building, a historically significant bank building, Petitioners Fix the City, Inc. (FTC) and the Los Angeles Conservancy (LAC) filed petitions for writ of

mandate challenging the City's approval of the Project. The Project's environmental impact report (EIR) found that destruction of the Lytton Building "would constitute a significant environmental impact under CEQA." The trial court granted the petition in part, allowing the Project to proceed but barring destruction of the Lytton Building.

In its appeal, the City sought to set aside the trial court's issuance of a writ of mandate precluding approvals resulting in the Lytton Building's destruction. The City contended on appeal that in issuing the writ, the trial court erred in finding that it failed to comply with CEQA by rejecting as infeasible three so-called "preservation alternatives" studied in the EIR that would have preserved the Lytton Building. In a cross-appeal, FTC and LAC challenged the trial court's denial of a broader writ of mandate to the extent that the Project was still permitted to proceed.

Substantial Evidence Supports Infeasibility Finding, Given Project Objectives

The Court of Appeal found that an agency may structure its EIR alternative analysis around a reasonable definition of project objectives, and need not study alternatives that cannot achieve the basic goals of the project. To reject a project alternative that would avoid significant impacts, the agency must first make a finding of infeasibility. If substantial evidence demonstrates that an alternative addressing significant impacts would not achieve primary project objectives, it may be deemed infeasible. If the agency makes a finding of infeasibility, the agency may, but is not required to, next make a finding that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment. The lead agency may then determine that an environmentally superior alternative is infeasible because it is inconsistent with a project's objectives and that approval of another alternative is appropriate under CEQA.

Applying this framework, the court held that substantial evidence supported the City's position that the preservation alternatives would not accomplish the objectives of the Project (such as developing vibrant buildings or creating new economic opportunities) and were therefore infeasible. The City's statement of overriding considerations also noted that the preservation alternatives were not consistent with the social considerations contained in the City's General Plan and supporting policies, several of which were reflected in the Project objectives outlined in the EIR. The court also noted that the City properly considered architecture and aesthetics in determining that the preservation alternatives fell short, and properly considered public comments, many of which were critical of the preservation alternatives.

Street Vacation Hearing Required for Turn Lane Conversion

The Project involves transforming a right-turn lane into a public plaza with no vehicular access. The Court of Appeal first noted that whether this change constituted a "vacation" was ripe for review, because under CEQA, approval takes place at the agency's "earliest commitment" to a project, not its final approval. Here, the EIR and Project approvals already included the creation of a corner plaza, which would require closing off the traffic lanes at issue. Even though the permit for the conversion of the turn lane had not yet been issued, the City had certified an EIR that analyzed the environmental impacts of the conversion. The City argued that because the area would still be open to the public, no vacation would occur. However, the court determined that because the lane would no longer be used as a street, a vacation procedure, including a public hearing, was required.

Relatedly, the court found that substantial evidence supported the City's finding that Project traffic impacts would be less than significant. The quantitative traffic analysis in the EIR showed that impacts to daily trips and average delay times would be less than significant after mitigation. Further, FTC and LAC failed to identify any City policy or regulation requiring the City to make an "adequacy" finding with respect to transportation infrastructure.



Disposition

Accordingly, the Court of Appeal affirmed in part and reversed in part the trial court's judgment, rescinding the writ that would prevent further approvals inasmuch as they threatened the Lytton Building, reinstating

the City's findings of infeasibility, and issuing a new writ requiring the City to conduct a public hearing for the street vacation.

- Opinion by Justice Mohr, with Presiding Justice Epstein and Justice Willhite concurring.
- Trial Court: Superior Court of Los Angeles County, Case Nos. BS166487, BS166484, Judge Amy D. Hogue.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
41 <i>Oakdale Groundwater Alliance v. Oakdale Irrigation District</i>		5 th	

[*Oakdale Groundwater Alliance v. Oakdale Irrigation District*](#), California Court of Appeal, Fifth Appellate District, Case No. F076288 (November 27, 2018).

- If substantial evidence establishes a reasonable possibility of significant environmental impacts, but the agency failed to prepare an EIR, the agency's action must be set aside.
- An agency's decision to adopt a negative declaration can be invalidated if the agency fails to provide an accurate project description or fails to adequately describe baseline conditions.

Oakdale Groundwater Alliance and two individuals (Petitioners) filed a petition challenging the Oakdale Irrigation District's (District's) approval of the "One-Year Pilot On-Farm Water Conservation Program and Transfer of Consumptive Use Water" (Project). Petitioners alleged that there was substantial evidence supporting an argument that the Project may have a significant effect on the environment, and that the Project's initial study/negative declaration inadequately described the Project and its baseline conditions. The trial court agreed and ordered that the District set aside its approval and prepare an environmental impact report (EIR). The trial court also denied the District's subsequent motion to vacate the judgment. The District appealed.

Background for Appeal

On March 15, 2016, the District approved the Project, under which participating landowners within the District's water service area would fallow up to 3,000 acres of farmland during the 2016 irrigation season. This fallowed land would potentially conserve up to 9,000 acre-feet of water during the irrigation season, which would be transferred to real parties in interest San Luis & Delta-Mendota Water Authority and State Water Contractors in exchange for funds to finance water conservation measures on the fallowed land.

Before the approval, the District prepared an initial study/negative declaration for the Project to examine the Project's potential direct, indirect, and cumulative impacts, and submitted a notice of intent to adopt a negative declaration and copy of the initial study to various public agencies for review and comment. The District received extensive comments from the California Department of Fish and Wildlife (CDFW) and Petitioners during the public comment period, yet the District approved the Project without an EIR on the grounds that the Project would not have a significant effect on the environment. The District also made no changes to the Project as a result of the public comments that it received.

Substantial Evidence Required an EIR

The Court of Appeal held that substantial evidence supported a fair argument that the Project may have a significant effect on biological resources and air quality. In doing so, the court found that the District failed to properly investigate the presence of threatened, endangered, or special status species in the Project area, despite CDFW's warning that the District's service area was known to contain a variety of protected species. The Court of Appeal also found that the District's initial study/negative declaration did not adequately discuss whether water conservation measures or fallowing operations would involve significant emissions of criteria pollutants. Thus, given the substantial evidence supporting an argument that the Project may have environmental impacts, and the District's corresponding failure to properly analyze that evidence, the court held that the District must prepare an EIR.

The District's Initial Study/Negative Declaration Was Defective

The Court of Appeal further held that the District's negative declaration was defective. First, the court found that the District did not provide an accurate and complete project description. Although the District noted that the Project included on-farm water conservation measures, it did not actually describe, or fully analyze the effects of, those measures in its initial study. Additionally, the District failed to sufficiently describe the baseline physical conditions of the Project area, thereby failing to provide decision-makers and the public with adequate information to assess anticipated environmental impacts. As a result, the District's initial study/negative declaration led to an insufficient evaluation of the Project's impacts.

The Trial Court Properly Denied the District's Motion to Vacate



Finally, the Court of Appeal held that the trial court properly denied the District's motion to vacate the judgment and peremptory writ of mandamus. Contrary to the District's argument, the writ and judgment were not mooted by the fact that the District's approval of the Project expired on its own terms after the trial court took the matter under submission. Not only did the case concern an issue of broad public interest, *i.e.*, the applicability of CEQA's EIR requirement, but the same controversy was likely to recur between the same parties. Thus, the case was not moot.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's peremptory writ of mandamus and judgment.

- Opinion by Justice Detjen, with Presiding Justice Hill and Justice Franson concurring.
- Trial Court: Superior Court of Stanislaus County, Case No. 2019380, Judge Roger M. Beauchesne.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
42 <i>Rodeo Citizens Association v. County of Contra Costa</i>		1 st	

[*Rodeo Citizens Association v. County of Contra Costa*](#), California Court of Appeal, First Appellate District, Division Three, Case No. A151184 (March 20, 2018).

- A project description need not address potential changes in the use of a facility that are unrelated to the project under consideration.
- CEQA does not require speculation regarding downstream GHG emissions that cannot be reasonably feasibly quantified.

Rodeo Citizens Association (Petitioner) had filed a petition for writ of mandate seeking to invalidate the County of Contra Costa's (County's) certification of the final environmental impact report (EIR) and approval of the Propane Recovery Project's (Project's) land use permit. The trial court found certain deficiencies in the air quality section of the recirculated final EIR (RFEIR) and issued a writ of mandate requiring reconsideration of that section, but rejected Petitioner's remaining arguments. Despite the trial court's issuance of the writ, Petitioner appealed the trial court's decision rejecting Petitioner's additional arguments that the Project description and the analysis of greenhouse gas (GHG) emissions and environmental hazards fail to comply with CEQA. The court found no error in the trial court's conclusions and affirmed the peremptory writ as issued.

Background for Appeal

In January 2015, the County published the RFEIR for the Project to address air and health issues raised by the Bay Area Air Quality Management District prior to the board's appeal hearing on the final EIR. On February 3, 2015, the County certified the RFEIR and approved a land use permit and a mitigation monitoring reporting program for the Project. On March 5, 2015, Petitioner filed a petition for writ of mandate challenging the County's approval of the Project and certification of the RFEIR. The trial court issued a writ of mandate requiring reconsideration of the air quality section of the RFEIR but rejected Petitioner's remaining arguments.

Accurate and Adequate Project Description

Petitioner argued the RFEIR Project description was defective because it failed to disclose that the Project would involve more frequent processing of nontraditional crudes containing higher levels of propane, butane, and contaminants that will result in higher emissions of air pollution during the refining processes. CEQA requires an accurate, stable, and finite project description. The court found that substantial evidence supported the County's conclusion that the Project was unrelated to a potential change in crude oil feedstocks used at the refinery and would not increase its present capacity to refine heavier crude oils. The record showed that the proposed Project would not affect the types and/or quantities of crude oil feedstocks that can be processed at the refinery, which is currently able to process a wide variety of crude oil feedstocks. Therefore, the County did not expressly or implicitly approve a change in crude oil feedstocks by approving the Project. Thus, the court upheld the trial court's conclusion that the Project description in the RFEIR was accurate and adequate.

Speculative GHG Emissions

Petitioner next argued that the RFEIR was inadequate because it failed to consider GHG emissions resulting from the combustion of the propane and butane that the Project would capture and sell to downstream users. The RFEIR stated that substantial speculation would be required to estimate the emissions consequences of the use of propane and butane because of potential post-sale applications. These applications include non-fuel uses and the replacement of other fuels that generate higher GHG emissions when combusted.

An EIR is required to evaluate a particular environmental impact only to the extent that doing so is “reasonably feasible.” According to the court, due to the uncertainty regarding the end uses and the volatile nature of the propane and butane market, the County reasonably concluded that quantification of downstream emissions would be speculative and thus no further analysis was required. The court also found support for the County’s conclusion in the Bay Area Air Quality Management District’s expressed satisfaction with how the recirculated draft EIR (RDEIR) addressed the issue, because the District had substantial expertise in air emissions and because the District raised the concern in its comment on the final EIR. Thus, the court held that the County’s failure to quantify the GHG emissions from the downstream uses of the recovered propane and butane did not violate CEQA.

Sufficient Analysis of Public and Environmental Hazard Impacts

Finally, Petitioner challenged the RFEIR’s findings that the Project would result in less-than-significant impacts on the public and the environment from the handling and transportation of hazardous materials. To analyze these potential impacts, the RFEIR evaluated whether the Project would create a significant hazard to the public or environment through the routine transport of hazardous materials or through the reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment. Further, the RFEIR evaluated whether the Project would emit hazardous emissions or handle hazardous or acutely hazardous materials within one-quarter mile of an existing or proposed school.

Petitioner argued that the RFEIR omitted the fact that a child care center is located less than 500 feet from the rail lines on which the propane and butane would be transported from the refinery. The court noted the County’s contention that Petitioner’s argument was arguably barred because it was not raised in the administrative proceedings. However, the court found the fact that the potential hazards posed by the rail transportation of the propane and butane were analyzed separately to be more important. While the RFEIR did not specifically address how the Project’s transport of hazardous materials might impact the child care center, the court noted that the RFEIR’s analysis of the risk zone for rail transport under the proposed Project extended only approximately 262 feet from the railroad tracks — after the risk of a highly improbable boiling liquid expanding vapor explosion was excluded.

Petitioner also argued that the RFEIR failed to analyze the Project’s contribution to the cumulative risk of rail-related accidents. Agencies’ decisions regarding the inclusion of information in the cumulative impacts analysis are reviewed under an abuse of discretion standard. The primary determination is whether including the projects was reasonable and practical and whether, without their inclusion, the cumulative impacts’ severity and significance were reflected adequately.

Petitioner had submitted a comment to the RDEIR questioning the omission of any cumulative impacts analysis relating to transportation risks. In its response to comments, the County explained that most of the related projects cited by Petitioner were located some distance from the Project and involved transport or refining crude to some degree, rather than rail transport of propane. County argued that comparing hazards of transporting propane and other types of hazardous substances cannot be meaningfully done. On appeal, Petitioner argued that CEQA does not require a nexus between projects or that they be of a similar type to be included in cumulative impact analyses. Rather, Petitioner argued, CEQA only asks whether projects will cause similar effects — such as the risk of train derailment — that might be individually insignificant but cumulatively considerable. However, the court found the County’s

explanation of why a cumulative analysis for transportation hazards was not included to be not unreasonable.



Finally, Petitioner argued that the RFEIR improperly determined the Project's hazard impacts would not be significant by comparing them to existing hazards rather than the existing physical environment and failed to disclose that the Project would increase hazards within existing hazard zones, and therefore did not include any mitigation to reduce the impact. However, the court found that the draft EIR evaluated the significance of the Project's impacts without reference to existing risks posed by operation of the refinery and determined that the potential impacts were less than significant. Thus, the court found no error in the analysis of hazard impacts in the RFEIR.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's judgment.

- Opinion by Justice Stuart R. Pollak, with Presiding Justice William R. McGuinness and Justice Martin J. Jenkins concurring.
- Trial Court: Superior Court of Contra Costa County, Case Nos. MSN15-0301, MSN15-0345, MSN15-0381, Judge Barry P. Goode.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
43 <i>Sierra Club v. County of Fresno</i>		Supreme Court of California	

[Sierra Club v. County of Fresno](#), California Supreme Court, Case No. S219783 (December 24, 2018).

- A discussion of potential environmental impacts in an EIR must include sufficient detail to enable those who did not participate in its preparation to understand and to meaningfully consider the issues raised by the proposed project.
- The issue of whether a discussion in an EIR is sufficient is a mixed question of law and fact subject to de novo review, though underlying factual determinations in an EIR are subject to a more deferential standard.
- An EIR must either make a reasonable effort to correlate a project's significant air quality impacts to potential health consequences, or explain why providing such an analysis is not feasible.
- A lead agency does not impermissibly defer mitigation if it leaves open the possibility of employing better mitigation efforts consistent with improvements in technology.
- A lead agency may adopt mitigation measures that do not reduce a project's significant and unavoidable impacts to a less-than-significant level, so long as the agency can demonstrate in good faith that the mitigation measures will be at least partially effective in mitigating impacts.

Background for Appeal

In 2011, Fresno County (County) approved a proposed master-planned community project consisting of residential, commercial, and open space, as well as a specific plan and community plan update (collectively, the Project). Specifically, the Project contemplates the construction of more than 2,500 residential units, 250,000 square feet of commercial space on 482 acres, and 460 acres of open space. Construction would occur in five phases over 10 years. As part of the Project approval, the County certified the environmental impact report (EIR) and adopted a mitigation monitoring program, which noted that the County would enforce compliance with mitigation measures through subsequent conditions of approval for future discretionary actions.

Several organizations (collectively, Petitioners) challenged the County's approval of the Project and certification of the EIR, alleging that the EIR was deficient because: the EIR failed to include an analysis connecting the Project's emission of air pollutants to the Project's potential impact on human health; the mitigation measures for the Project's long-term air quality impacts were vague, unenforceable, and lacked specific performance criteria; and the EIR failed to support its statement that the air quality mitigation measures would substantially reduce air quality impacts. The trial court denied the petition for writ of mandamus, and Petitioners appealed. The Court of Appeal reversed the trial court's denial of the petition, agreeing with Petitioners' contentions.

In Reviewing the Sufficiency of an EIR's Discussion of Potential Impacts, Courts Must Be Satisfied That the EIR Provides Sufficient Detail to Allow for Meaningful Public Participation

The California Supreme Court first analyzed the proper standard of review that courts must apply when adjudicating a challenge to the adequacy of an EIR's discussion of adverse environmental impacts and mitigation measures. The Court determined that an EIR must include sufficient detail "to enable those

who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.”

To reach its decision, the Court began with the general standard of review in a CEQA case: abuse of discretion. A lead agency may abuse its discretion by failing to follow the procedures required by CEQA or by reaching factual conclusions unsupported by substantial evidence. The Court recognized that judicial review of these types of errors differs; the question of whether an agency followed proper CEQA procedures is subject to de novo review, while courts give great deference to an agency’s factual determinations under the substantial evidence standard.

The Court clarified, however, that judicial review of claims concerning the adequacy of an EIR’s discussion of environmental impacts does not neatly fit within the “procedural/factual paradigm.” Put differently, the question of whether an EIR sufficiently describes an environmental impact is distinct from the question of whether the agency’s significance determinations are supported by substantial evidence. The Court explicitly provided that the issue of whether a description of an environmental impact is insufficient because it lacks analysis is not a substantial evidence question.

As such, the Court reasoned that a reviewing court’s inquiry into the sufficiency of the EIR’s discussion should be whether the EIR includes sufficient detail to further CEQA’s goal of facilitating informed agency decision-making and public participation. The Court held as the sufficiency of a discussion in an EIR is a mixed question of law and fact, a reviewing court should generally complete such an inquiry applying de novo review, meaning the court would not give deference to the agency’s determination. However, the Court also provided that underlying factual determinations in an EIR, such as an agency’s decisions on which methodologies to use in analyzing an environmental effect, should be subject to a “more deferential standard.”

The EIR Failed to Connect Significant Project Emissions to Potential Human Health Impacts

After establishing the applicable standard of review, the Court then moved to the issue of whether the EIR properly analyzed the impact of the Project’s significant emissions of air pollutants on human health. The EIR analyzed the Project’s potential impact on air quality, which estimated the Project’s annual emissions of criteria air pollutants and described the generalized health effects from exposure to those pollutants. The EIR concluded that the Project would have a significant and unavoidable adverse effect on air quality. However, the Court held that the EIR did not adequately correlate the Project’s significant air quality emissions to potential public health consequences.

For instance, the Court stated that while the EIR included a general discussion of the health effects of the air pollutants emitted by the Project, the EIR did not indicate the concentrations at which the pollutants would trigger the symptoms discussed. The EIR also did not adequately translate the bare numbers of the estimated emissions into adverse health impacts that would be caused by the Project.

The Court discussed amici curiae briefs, including briefs from expert air quality agencies, the South Coast Air Quality Management District and San Joaquin Valley Air Pollution Control District, that argued the current science does not allow a close correlation between criteria pollutant emissions from a single development project and health impacts given the state of environmental modeling. The Court acknowledged “[t]he parties may be correct” but expressed no view on the subject except to note that scientific certainty is not the standard. The Court concluded, however, that information in amici curiae briefs could not cure the lack of data or analysis in the administrative record. The Court explained that if it is infeasible to connect a project’s significant air quality emissions with potential human health impacts, the EIR “must adequately explain what the agency does know and why, given existing scientific constraints, it cannot translate potential health impacts further.”

The EIR’s Statement That Mitigation Would Substantially Reduce Air Effects Was Unsupported

Next, the Court reviewed whether the EIR’s discussion of the proposed mitigation measures accurately reflected the measures’ impact on reducing the identified adverse effects of the Project. The EIR stated summarily that “[i]mplementation of the following mitigation measures will substantially reduce air quality

impacts related to human activity within the entire Project area but not to a level that is less than significant.” The Court concluded that this statement was unsupported because the EIR provided no further explanation or factual support for that proposition. The EIR’s conclusion that the mitigation measures would have a “substantial” impact on the Project’s air quality effects must be supported by sufficient facts and analysis.

The County Did Not Improperly Defer Mitigation

The Court then addressed whether the EIR had impermissibly deferred selection of mitigation measures by including a clause that allowed the County to substitute different mitigation measures in the future. Generally, an EIR cannot defer the formulation of mitigation measures until after project approval. However, here, the Court held that the EIR’s substitution clause did not impermissibly defer selection of mitigation measures. The Court reasoned that the substitution clause should be encouraged because it allows for additional and better mitigation measures when they become available, thereby furthering CEQA’s goal of environmental protection. Thus, the County may retain the discretion to modify or substitute the adopted mitigation with equally or more effective measures in the future, so long as the changes do not increase the Project’s significant impacts. As such, the substitution clause was not an impermissible deferral of mitigation.

It should be noted that on January 3, 2019, the California Natural Resources Agency carried out a number of changes to the state guidelines for implementing CEQA, including changes related to deferred mitigation. The changes to the guidelines on deferred mitigation clarify that identification of mitigation measures may never be deferred, except under certain circumstances. Deferral may be appropriate as part of a future regulatory process if compliance is mandatory and substantial evidence confirms that the regulatory process would achieve the requisite performance standards. The new guidelines further provide that specific details of a mitigation plan may be deferred if fully formulating the mitigation plan at the time of project approval is impractical or infeasible, subject to certain conditions. Finally, the guidelines provide that deferral may also be appropriate if another regulatory agency is required to issue a permit for the project and that agency is expected to impose mitigation requirements independent of the CEQA process.

The EIR Properly Included Mitigation Measures to Reduce Significant Environmental Impacts, Even if the Measures Will Not Render the Impacts Insignificant

The Court next analyzed whether the County had violated CEQA by including mitigation measures in the EIR that would reduce the impacts of the Project, but would not reduce those impacts below the level of significance. A lead agency must adopt all feasible mitigation measures to reduce potential impacts to a level below the threshold of significance. However, the Court explained that an EIR can also include mitigation measures that only partially reduce significant impacts without violating CEQA. The Court recognized that, in enacting CEQA, the California legislature did not seek to prevent all development. Instead, CEQA allows a project to proceed even if there are significant environmental effects that cannot be fully mitigated. If, as in this case, a project still has significant environmental effects after all feasible mitigation measures have been implemented, the project may nonetheless be approved if the agency finds that the unmitigated effects are outweighed by the project’s benefits. As such, the Court ruled that the EIR properly included mitigation measures that partially reduce potential environmental impacts, even if the measures will not reduce the impacts to below the level of significance.

The Mitigation Measures Were Enforceable

Finally, the Court addressed Petitioners’ argument that certain mitigation measures in the EIR were unenforceable. The mitigation measures included equipping HVAC units at individual projects with catalyst systems and planting shade trees. Petitioners argued that these measures were unenforceable because the selection methodology for the catalyst systems was vague and because the measures did not specify the persons responsible for selecting which trees to plant. The Court disagreed, holding that the mitigation measures were sufficiently enforceable. The EIR’s methodology for determining whether an HVAC catalyst system was economically feasible was not vague because the mitigation measure



specified the cost at which a catalyst system was feasible and identified the brand of catalyst system to be used. Further, the measure for selecting shade trees was not vague because it made clear that the individuals or entities submitting plans to the County would select the trees. In addition, the Court stated that it was clear that the County would be enforcing the mitigation measures during the approval process for future development within the Project's planned community.

Disposition

Accordingly, the Supreme Court affirmed in part and reversed in part the Court of Appeal's judgment. The Court determined that the EIR's analysis of air quality impacts from the Project violated CEQA by failing to adequately connect the Project's anticipated emissions of air pollutants to their likely effects on human health. However, the Court found that the remainder of the EIR's discussion of air quality impacts and mitigation measures satisfied CEQA's requirements.

- Opinion by Justice Chin, with Chief Justice Cantil-Sakauye, Justice Corrigan, Justice Liu, Justice Cuéllar, Justice Kruger, and Justice Robie concurring.
- Court of Appeal: Fifth Appellate District, Case No. F066798, Justice Franson, with Acting Presiding Justice Cornell and Justice Kane concurring.
- Trial Court: Superior Court of Fresno County, Case Nos. 11CECG00726, 11CECG00706, 11CECG00709, Judge Rosendo Peña, Jr.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
44 <i>Sierra Club v. County of Kern</i>		5 th	

[Sierra Club v. County of Kern](#), California Court of Appeal, Fifth Appellate District, Case No. F071133 (July 10, 2018).

- The EIR's analysis of the long-term significance of the Specific Plan's GHG emissions was adequate at its time of release in 2011.
- The EIR's approach to mitigating GHG emissions was not a prejudicial abuse of discretion.
- CEQA does not require greater than a 1:1 mitigation ratio for the amount of farmland to be placed under an agricultural conservation easement or similar program.
- The County violated CEQA by deferring the formulation of air quality mitigation measures without firmly committing to specific performance standards.

In response to the Kern River Valley Specific Plan (Specific Plan) and related environmental impact report (EIR), Sierra Club (Petitioner) filed a petition for peremptory writ of mandate and complaint for declaratory and injunctive relief. The trial court denied the petition. On appeal, Petitioner argued that the County of Kern (County) violated CEQA by:

- Inadequately analyzing the long-term significance of the project's GHG emissions
- Inadequately mitigating the project's climate change impacts
- Inadequately mitigating impacts to agricultural resources
- Deferring the formulation of mitigation measures for air quality impacts

Background for Appeal

The County drafted the Specific Plan to guide future development of 110,510 acres in northeastern Kern County. In 2011, after the County certified the final EIR, Petitioner filed suit, claiming:

- The EIR used an inappropriate threshold for assessing the significance of impacts on climate change.
- The climate change mitigation scheme violated CEQA.
- The 1:1 mitigation for conversion of farmland was legally inadequate.
- The County failed to adequately respond to comments.
- The EIR failed to identify mitigation measures for impacts on air quality.

The trial court denied Petitioner's writ of mandate, and Petitioner appealed. The appellate court stayed the proceeding pending the California Supreme Court decision in a CEQA case on greenhouse gas (GHG) emissions: *Cleveland National Forest Foundation v. San Diego Association of Governments*, 3 Cal. 5th 497 (2017) (*CNFF*). The appellate court lifted the stay after *CNFF* became final.

EIR Need Only Consider and Discuss State GHG Emission Reduction Targets

Petitioner argued that the EIR failed to comply with CEQA because it did not correctly set the Specific Plan's thresholds of significance for GHG emissions, and failed to provide a legally adequate analysis and discussion of the significance of Specific Plan's impact on climate change in light of the state's 2050 reduction targets. The court disagreed, finding that substantial evidence supported the County's decision because the County considered how the California Air Resources Board (CARB) and regional air pollution control districts set their thresholds of significance for GHG emissions. Therefore, the County did not abuse its discretion in setting a threshold of 29% reduction from business as usual.

The appellate court also held that the County adequately analyzed and discussed its threshold. The court cited *CNFF* for the proposition that a lead agency does not abuse its discretion if it "sufficiently inform[s] the public, based on information available at the time, about the regional plan's greenhouse gas impacts and its potential inconsistency with state climate change goals." Because the County's EIR relied on qualitative thresholds tailored to scientific knowledge and regulatory schemes, and because the EIR explained that it rejected the 2050 target based on the uncertainty of the legislature's future standards, the court rejected Petitioner's argument that the EIR's discussion and analysis were inadequate.

County Did Not Refuse to Consider GHG Emission Mitigation Measures

Petitioner contended that the EIR's mitigation scheme violated CEQA because the County arbitrarily decided to exempt an unknown number of "smaller" projects from implementing climate change mitigation measures. The court disagreed, finding that the Specific Plan included multiple implementation measures related to greenhouse gases, and mandated the planning and community departments to determine the necessity of an Air Quality Impact Analysis. Further, the EIR stated that smaller proposed developments were subject to case-by-case review of mitigation measures to address GHG emissions.

The appellate court also rejected Petitioner's argument that the County failed to analyze the Specific Plan's consistency with Assembly Bill 32's (AB 32's) reduction goals. Because Petitioner's reply brief did not directly address the County's claim of waiver based on failure to raise the AB 32 argument in trial proceedings, Petitioner waived the claim. Finally, the court disagreed with Petitioner's contention that the County refused to consider potentially feasible transportation mitigation measures, finding that the County considered land use goals, transit-oriented housing, and other strategies to reduce emissions.

CEQA Does Not Require a Mitigation Ratio Greater Than 1:1

Under the Specific Plan, land being converted from agricultural to other uses corresponded in a 1:1 ratio to the land subject to restrictions under the agricultural conservation easement. Petitioner claimed that this ratio violated CEQA because it was insufficient to address a significant indirect/growth-inducing impact. The court, however, held that "agricultural conservation easements are not a mitigation measure ... required as a matter of law," and, "if a ratio of 0:1 passes muster, then a ratio of 1:1 is not deficient." Moreover, the Specific Plan, as a "program EIR," was subject to less stringent requirements of particularity than specific construction projects. Therefore, CEQA did not compel the adoption of a higher mitigation ratio.

Deferred Formulation of Air Quality Mitigation Measures Violated CEQA

Petitioner argued that the EIR's air quality mitigation scheme was inadequate because the County impermissibly deferred the formulation of air quality mitigation measures without adopting appropriate performance standards. The court agreed, holding that CEQA allows a lead agency to defer specifically articulating mitigation measures "as long as the lead agency commits itself to mitigation and to specific performance standards [emphasis in original]." The County did not satisfy this requirement, as the EIR did not recommend the adoption of any specific mitigation measures or performance standards to address significant operational emissions affecting air quality. Rather, the County only stated its commitment to devising mitigation measures for future development. The appellate court found this statement insufficient to satisfy CEQA, reasoning that requiring air quality impact mitigation to a "feasible" extent, and



compliance with “air quality standards” were not commitments to specific performance standards. Therefore, the EIR improperly deferred the formulation of mitigation measures.

Disposition

Accordingly, the Court of Appeal reversed and remanded the trial court’s denial of Petitioner’s petition for writ of mandate, directing the trial court to enter a new order granting a writ of mandate addressing the improper deferral of air quality impact mitigation measures. Furthermore, the court held that Petitioner was entitled to recover 25% of its costs on appeal.

- Opinion by Justice Franson, with Justice Peña and Justice Smith concurring.
- Trial Court: Superior Court of Kern County, Case No. CV-274340, Judge Kenneth Twisselman II.

Exemptions and Exceptions

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
45 <i>Aptos Residents Association v. County of Santa Cruz</i>		6 th	

[*Aptos Residents Association v. County of Santa Cruz*](#), California Court of Appeal, Sixth Appellate District, Case No. H042854 (February 5, 2018).

- The Class 3 CEQA exemption for small structures is not limited to a single small structure, but applies equally to multiple small structures considered together as a group.
- The standard of judicial review applicable to the cumulative impact and location exceptions turns on the nature of the underlying finding. If an exception is predicated on a factual issue, courts apply the substantial evidence test; other issues are reviewed under the fair argument test.

Petitioner alleged that the County of Santa Cruz (County) had violated CEQA on the grounds that the County had abused its discretion in failing to undertake an environmental impact analysis of a microcell transmitter project (Project). The County asserted that the Project was categorically exempt from CEQA, but Petitioner argued that the Project was improperly segmented and was not categorically exempt from CEQA because three exceptions to the exemption applied: cumulative impact, location, and unusual circumstances. The trial court found no abuse of discretion and denied the petition. The Court of Appeal affirmed, concluding that the County did not abuse its discretion in finding the Project exempt from CEQA review.

Background for Appeal

A developer proposed to install 13 microcells as part of a Distributed Antenna System in the Day Valley area of Aptos and submitted applications for 11 permits. The Project was intended to provide wireless cell coverage. Each microcell included a two-foot by one-foot antenna mounted on an extender pole, which would be attached to an existing utility pole in the County’s right-of-way or on private property, along with related pole-mounted equipment.

A County Planner concluded the microcells were “relatively visually inconspicuous,” and therefore fell within CEQA’s Class 3 categorical exemption for small structures. The Zoning Administrator agreed and approved the Project. Petitioner then appealed the approval to the County’s Planning Commission, asserting the County needed to consider the Project in conjunction with the impact of a planned public utility project. The County Planner prepared a second report, affirming that the Project had no visual impact, and that even when taking these two projects together, no cumulative impacts would occur. The County Planner added the Project was the least visually intrusive means of providing cell service to the area. Thereafter, the Planning Commission considered the permit applications and found the microcells qualified for a categorical exemption, both individually and as a group, because the visual impact was negligible. Petitioner appealed this decision to the County’s Board of Supervisors, citing new information regarding a possible project by a separate wireless service provider that required additional cumulative impact analysis. The Board declined to take jurisdiction.

Petitioner then sought a writ of mandate from the trial court, contending the County abused its discretion in failing to undertake an environmental impact analysis. The trial court found no abuse of discretion and denied the petition. Petitioner appealed.

The County Did Not Improperly Segment the Project

First, Petitioner argued the Project was improperly segmented because the County treated each microcell as a separate project. Petitioner pointed to the fact that each microcell unit had a separate permit application, and was issued a separate permit and exemption from the County. Petitioner argued that, had the County viewed the microcells as a single large Project, the Project would not be exempt under the Class 3 exemption for small structures. The Class 3 exemption applies to limited numbers of new small facilities or structures, including utility extensions. The exemption expressly uses the plural and refers to “small structures,” and thus is not limited to a single small structure. Here, the Project proposed to install small microcell units on existing utility poles in scattered locations, falling within the Class 3 exemption. The Court of Appeal found that the County properly considered the microcell units as a group. The nature of the paperwork required for Project approval is immaterial.

No Exception to the Exemption Applied

Standard of Review

Petitioner also challenged the County’s use of the Class 3 exemption by arguing various exceptions applied. Before deciding the merits of Petitioner’s exception arguments, the court determined that similar standards of judicial review apply to all three exceptions Petitioner asserted. If an exception is predicated on a factual issue, courts apply the substantial evidence standard; other issues are reviewed under the fair argument standard.

Cumulative Impact Exception

As to Petitioner’s cumulative impact exception claim, the court concluded Petitioner failed to produce evidence supporting a fair argument that the exception applied. Petitioner argued that a competing wireless service provider intended to install transmitter units in the same area, but the evidence Petitioner presented — an attorney’s declaration that he spoke with that wireless service provider regarding a desire to install transmitters in the area — was double hearsay and too vague to support a factual finding that the provider unambiguously intended to install a project of “the same type and in the same place.” In addition, Petitioner’s claim that the County failed to consider the cumulative impact of all microcell units included in the project lacked merit for the same reasons the court rejected Petitioner’s improper segmentation contention.

Location Exception

Similarly, the court found the location exception did not apply. This exception applies to projects that would be built at a location that may impact an “environmental resource of hazardous or critical concern [that is] designated [and] precisely mapped.” Petitioner had argued that the Project area is a rural area that is zoned “Residential Agricultural,” and thus, it is a location “designated” as an environmental resource of hazardous or critical concern. Although the court accepted that the Project area is a rural area zoned Residential Agricultural, the court determined that Petitioner failed to present evidence that the area in general or any of the specific utility poles where the microcell units would be installed satisfied the requirements of the location exception. Furthermore, the court rejected Petitioner’s argument that the County abused its discretion by failing to consider whether the microcell units would be placed in the least visually obtrusive location. The County Planner’s staff report explicitly considered visual impact, and determined that any visual impact would be necessarily insignificant and does not require further environmental review.

Unusual Circumstances Exception

Finally, the court rejected Petitioner’s unusual circumstances argument because Petitioner failed to produce evidence that it was unusual for small structures to be used to provide utility extensions in a rural area, or for these structures to be used for this same purpose in an area zoned Residential Agricultural. Because Petitioner failed to show unusual circumstances existed, the court did not engage in the next



inquiry — whether there is a reasonable possibility of an environmental impact. The court also did not analyze the second avenue through which a petitioner can assert the unusual circumstances exception (*i.e.*, the project will have a significant environmental impact).

Disposition

Therefore, the Court of Appeal affirmed the trial court's denial of Petitioner's petition for writ of mandate, finding that the County did not abuse its discretion in finding the Project exempt from CEQA review.

- Opinion by Justice Mihara, with Acting Presiding Justice Elia, and Justice Bamattre-Manoukian.
- Trial Court: Santa Cruz County Superior Court, Case No. CV179176, Judge Paul Marigonda.

Exemptions and Exceptions

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
46 <i>California Water Impact Network v. County of San Luis Obispo</i>		2 nd	

[*California Water Impact Network v. County of San Luis Obispo*](#), California Court of Appeal, Second Appellate District, Division Six, Case No. B283846 (June 28, 2018).

- A law requiring technical standards and objective measurements to be met in order for a permit to be issued does not transform issuing a permit into a discretionary act requiring CEQA review.
- CEQA is not triggered whenever an agency has some discretion, but only when a certain type of discretion is involved — specifically the authority to mitigate environmental damage.

California Water Impact Network (Petitioner) petitioned for a writ of mandate challenging the County of San Luis Obispo's (County's) approval of well construction permits without conducting a CEQA review. The trial court dismissed the petition on demurrer, agreeing with the County that issuance of a well drilling permit is a ministerial act such that CEQA does not apply. Petitioner timely appealed.

Background for Appeal

In 2016, the County issued permits (Permits) to construct wells on land belonging to the real parties in interest (Real Parties), four agricultural enterprises, without conducting a CEQA review. Real Parties' operations are predominantly vineyards, ranging from 160 to 400 acres, and the well depths authorized ranged from 500 to 1,000 feet. Chapter 8.40 of the County Code governs well construction and permitting and provides that well permits shall be issued if they comply with County and state standards, including well seal depths, extraction limits in coastal zones, and other building criteria incorporated into the code from two State Department of Water Resources (DWR) Bulletins (Bulletins).

Petitioner argued before the trial court that the County made a discretionary decision to issue well permits because determining compliance with certain County and state standards required the County to make a discretionary judgment concerning groundwater depletion, which required environmental review under CEQA. The County argued that CEQA did not apply because the issuance of the Permits was a purely ministerial function. The trial court agreed with the County and dismissed Petitioner's action. Petitioner appealed.

Issuing Well Permits Not a Discretionary Act

On appeal, Petitioner conceded that both the specification of well seal depths in Chapter 8.40 and the determination that Real Parties' wells were not within the coastal zone for purposes of the California Coastal Act were ministerial acts, but argued that the standards established in the DWR Bulletins, which had been incorporated into Chapter 8.40, required the County to exercise discretion to consider and deny permits based on cumulative depreciation and overuse. The court rejected this argument on two grounds. First, the court emphasized that the standards related only to ground water *quality*, which was not at issue. Second, the court determined that the standards set forth in the Bulletins are technical requirements that do not call for the exercise of subjective judgment, and it would be an impermissible reading to construe either the Bulletins or the remainder of Chapter 8.40 to imply discretion. Accordingly, the court found the issuance of well permits to be a ministerial act.

Discretion Exercised Was Not Type to Trigger CEQA Review



Petitioner next argued that the County exercised at least some discretion in issuing well permits, because the language in Chapter 8.40 requires an applicant to include any information necessary to determine if underground waters will be protected. The court rejected this argument as well, reasoning that the instruction to applicants to include all necessary information does not transform the inquiry into a discretionary review because the well permitting ordinance does not give the County discretion to shape a well permit to mitigate potential environmental damage arising from groundwater overuse. The court further noted that a new state law, the Sustainable Groundwater Management Act (SGMA), addresses groundwater depletion, but the SGMA is not addressed in Chapter 8.40. The court thus found that the limited discretion given to the County in determining whether adequate information was submitted to determine that groundwater would be protected from contamination was not the discretion to mitigate environmental damage to some degree, as required to trigger CEQA compliance.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's determination that the County's issuance of well permits was a ministerial act that did not require CEQA review.

- Opinion by Justice Perren, with Presiding Justice Gilbert and Justice Tangeman concurring.
- Trial Court: Superior Court of San Luis Obispo County, Case No. 16CVP-0195, Judge Barry LaBarbera.

Exemptions and Exceptions

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
47 <i>Don't Cell Our Parks v. City of San Diego</i>		4 th	

[*Don't Cell Our Parks v. City of San Diego*](#), California Court of Appeal, Fourth Appellate District, Division One, Case No. D071863 (March 15, 2018).

- Exhaustion of administrative remedies is not required if the agency did not hold a public hearing or otherwise provide an opportunity for members of the public to raise objections.
- A stand-alone utility can qualify under the Class 3 exemption.
- For the location exception to CEQA exemptions to apply, a location impacted by a project must be designated as an environmental resource of hazardous or critical concern by an agency.

The petitioner, a nonprofit entity (Petitioner), had filed an unsuccessful petition for writ of mandate seeking to overturn the approval of development and use permits for a wireless communications facility (Project). Petitioner argued that the City of San Diego's (City's) determination that the Project was exempt from environmental review under the Class 3 exemption was erroneous because, as a stand-alone utility, the Project would not qualify for a Class 3 exemption. Petitioner also argued that, even if the Project fell within the Class 3 exemption, an environmental impact report (EIR) would be required because the unusual circumstances exception and location exception applied. The court rejected each of these arguments.

Background for Appeal

In June 2014, Verizon filed an application to build the Project, a wireless communications facility consisting of a 35-foot high faux tree and a 220-square-foot equipment enclosure in a dedicated park. In April 2015, the City determined that the Project was exempt from CEQA because the Project qualified for a Class 3 categorical exemption. Petitioner appealed the City's exemption determination, but the City Council denied this appeal, determining that the Project was exempt from environmental review. The City subsequently approved development and use permits for the Project. Petitioner filed a petition for writ of mandate seeking to overturn the City's approval of these permits and exemption determination. The trial court ruled in favor of the City, and Petitioner appealed.

Exception to Exhaustion of Administrative Remedies Applies

The City argued that Petitioner's CEQA claims were barred because Petitioner had failed to exhaust its administrative remedies; Petitioner had not raised its arguments in the administrative appeal or in materials submitted to the City. The court noted that CEQA's exhaustion requirement provides an exception in cases in which there was no public hearing or other opportunity for members of the public to raise those objections before the approval of the project. The court determined that nothing in the record indicated that the City had held a hearing or provided an opportunity for the public to raise objections before the City filed a notice of CEQA exemption. Therefore, the court held that the exception to the exhaustion requirement applied to Petitioner's CEQA arguments.

Project Is Within Class 3 Categorical Exemption

Petitioner argued that the Project did not fit within the meaning or use of the Class 3 exemption — which applies to new, small facilities — because the Project was a new stand-alone utility rather than the type of

urban infill development the Class 3 exemption was intended to exempt from CEQA review. The court held that the Project did qualify for a Class 3 exemption based on the plain language of CEQA Guidelines Section 15303. The court reasoned that although none of the qualifying examples of projects listed in Section 15303 directly applied, the Project was “much smaller” than some of the examples provided in Section 15303. In support of the City’s determination that the Class 3 exemption applied, the court also cited case law applying the Class 3 exemptions to hundreds of telecommunications equipment boxes on city property.

Unusual Circumstances Exception Does Not Apply

Next, Petitioner argued that, even if the Project fell within the Class 3 exemption, the unusual circumstances exception applied because there was evidence the Project would have significant environmental impacts. Under the two methods of establishing that the unusual circumstances exception applies, the party invoking the exception must either: (1) prove both unusual circumstances and a significant environmental effect due to those circumstances, or (2) provide evidence that the project will have a significant environmental impact.

Petitioner argued that the Project’s location within a dedicated park is an unusual circumstance, and that the Project would have an adverse environmental impact on aesthetics and the uses of the park. Applying the first method, the court determined that, even if the Project was an unusual circumstance, Petitioner failed to prove a significant environmental effect. The court discussed evidence in the record showing that the Project would not have a significant adverse impact on the environment, noting that Petitioner did not challenge this evidence. The court then determined that the record did not support a conclusion that the Project would cause a “significant” adverse impact to aesthetics or uses of the park. Specifically, the court found that before-and-after photographs demonstrated that the Project would not significantly impede views from the park, and that Petitioner presented no evidence showing how the Project would impact aesthetics or uses of the park. Based on these same findings and reasons, the court determined that Petitioner also failed to satisfy the second method. Thus, the court concluded that Petitioner failed to establish that the unusual circumstances exception applied to the Project.

Location Exception Does Not Apply



Finally, Petitioner argued that the location exception — which applies to projects that may impact an environmental resource of hazardous or critical concern where designated, precisely mapped, and officially adopted pursuant to law by federal, state, or local agencies — applied to the Project, contending that the Project’s location in a dedicated park was a sensitive and protected resource area. The court determined that Petitioner provided no evidence that the park had been designated an “environmental resource of hazardous or critical concern” by any agency. The court concluded that the lack of such a designation defeated Petitioner’s argument that the location exception applied.

Disposition

Accordingly, the Court of Appeal affirmed the trial court’s judgment. The City’s determination that the Project is categorically exempt from CEQA review under a Class 3 exemption and subsequent approval of the Project will stand.

- Opinion by Justice Gilbert Nares, with Acting Presiding Justice Richard D. Huffman and Justice Judith L. Haller concurring.
- Trial Court: Superior Court of San Diego County, Case No. 37-2015-00026359-CU-TT-CTL, Judge Judith F. Hayes.

Exemptions and Exceptions

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
48 <i>McCorkle Eastside Neighborhood Group v. City of St. Helena</i>		1 st	

[McCorkle Eastside Neighborhood Group v. City of St. Helena](#), California Court of Appeal, First Appellate District, Division Five, Case No. A153238 (December 18, 2018).

- Where an agency's discretion to deny or consider a particular activity is limited, its approval is considered ministerial and CEQA does not apply, or CEQA review is limited to the extent of that discretion.

Background for Appeal

In December 2016, the City of St. Helena's (City's) Planning Commission (Commission) approved an application for a demolition permit and design review plan for a proposed eight-unit multi-family dwelling (Project). The St. Helena Municipal Code requires design review for multi-family units in the district of the Project site, but does not require a conditional use permit. After the Commission found that the Project was exempt from CEQA under the Class 32 categorical exemption (CEQA Guidelines Section 15332), McCorkle Eastside Neighborhood Group (Petitioner) appealed to the City Council. The City Council denied the appeal, reasoning that the Project was exempt from CEQA under the Class 32 categorical exemption. Further, the City Council found that even if the Project were not exempt, the City would be allowed to undertake only a limited review of design-related environmental issues. Petitioner filed a petition for writ of mandate seeking to invalidate the City Council's action, alleging violations of CEQA and local zoning laws. The trial court denied the petition, and Petitioner appealed, contending that the City violated CEQA because the City Council:

- Abused its discretion by approving a resolution granting demolition and design review permits without an EIR, based on an improper determination that the Class 32 categorical exemption applied
- Improperly limited the scope of its review to design review, delegating its duty to the Commission

Applicability of Class 32 Categorical Exemption

On appeal, Petitioner argued that the City Council did not properly adopt a Class 32 categorical exemption because the City Council did not:

- Determine whether the project would "result in any significant effects relating to traffic, noise, air quality or water quality" under CEQA Guidelines Section 15332(d)
- Consider whether the project fell under the unusual circumstances exception to the Class 32 categorical exemption under CEQA Guidelines Section 15300.2, or whether there was a reasonable possibility the Project would have a significant effect on the environment due to unusual circumstances

The court held that even if the City Council did not consider traffic, noise, or air and water quality, its discretion was properly limited to design review, since no conditional use permit was required for multi-family housing in the district. The court reasoned that the City's design ordinances prevented the City Council from denying the Project for non-design-related matters. Further, the City Council's extensive findings that CEQA review was limited to design-related issues and that the Project would not result in

design-related CEQA impacts were supported by substantial evidence. The court concluded that because CEQA was limited in scope to design review, it was unnecessary to question whether the Class 32 categorical exemption applied or whether any exception to the exemption applied.

Non-Delegation



Petitioner also argued that the City Council did not consider issues unrelated to aesthetics when determining that CEQA did not apply, and thus improperly delegated the City Council's authority under CEQA. Petitioner relied on *Vedanta Society of Southern California v. California Quartet, Ltd.* (2000) 84 Cal.App.4th 517, which stands for the proposition that elected decision-makers of a local body have ultimate responsibility for making a decision under CEQA, which is inconsistent with delegation. Petitioner reasoned that because the City Council limited its review of environmental issues, it did not fulfill its responsibility. The court rejected this reasoning, holding that there was no improper delegation of the City's authority under CEQA. The court reasoned that the City Council held a full hearing and, under de novo review, issued findings on Petitioner's appeal of the Commission's decision consistent with the St. Helena Municipal Code, and thus did not abdicate its duty.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's judgment upholding the City's approval of the Project.

- Opinion by Justice Needham, with Acting Presiding Justice Simons and Justice Bruiniers concurring.
- Trial Court: Napa County Superior Court, Case No. 17CV000205, Judge Michael L. Byrne and Judge Mark S. Boessenecker.

Exemptions and Exceptions

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
49 <i>San Diegans for Open Government v. City of San Diego</i>		1 st	

[*San Diegans for Open Government v. City of San Diego*](#), California Court of Appeal, Fourth Appellate District, Division One, Case No. D073284 (December 27, 2018).

- The existing facilities exemption is assessed as of the time the lead agency makes its CEQA determination.
- The unusual circumstances exception requires a showing that the prospective environmental impacts are causally linked to the unusual circumstances cited.

Background for Appeal

In 1925, John D. Spreckels developed an oceanfront amusement park in the Mission Beach neighborhood — now referred to as Belmont Park — that was later granted to the City of San Diego (City) upon his death. In 1987, the City entered into a 50-year lease agreement with Belmont Park Associates to revitalize and maintain the property. Over the years, the lease was assigned several times, and in November 2012 Symphony Asset Pool XVI, LLC (Symphony) became the lessee.

In April 2015, the San Diego City Council (City Council) approved an amended and restated lease with Symphony that contemplated finished and pending capital improvements to the premises totaling US\$25 million (Project). That same month, the City Council adopted a resolution determining that approval of the Project was exempt from environmental review under CEQA pursuant to the existing facilities exemption.

On May 11, 2015, San Diegans for Open Government (Petitioner) filed a petition for writ of mandate and complaint for declaratory and injunctive relief against the City, alleging that the existing facilities exemption did not apply to the Project and that, even if it did, environmental review was nonetheless required pursuant to CEQA's unusual circumstances exception. The trial court denied the petition, and Petitioner appealed.

Existing Facilities Exemption Applies

On appeal, Petitioner argued that the Project did not qualify for the existing facilities exemption because it contemplated substantial capital improvements to Belmont Park, including the construction of a new restaurant and bar, new food venues, and a new arcade. Petitioner contended that Symphony's expenditures in excess of \$25 million were evidence enough that the scope of the Project exceeded negligible improvements. The trial court rejected this argument and explained that application of the existing facilities exemption turns on whether the Project involves expansion of use beyond that *existing at the time of the lead agency's determination*. Because the construction Petitioner challenged had been completed before the City Council issued the CEQA exemption, those improvements constituted existing facilities as of the date the Project was approved and fit squarely within the exemption.

Unusual Circumstances Exception Does Not Apply

Petitioner also argued that, even if the exemption did apply, environmental review was still required due to CEQA's unusual circumstances exception. Petitioner reasoned that unusual circumstances existed because the City passed Proposition G, a 1987 ballot initiative aimed at curbing development in the

Mission Beach community, as well as the Mission Beach Precise Plan, with shared goals of ensuring that future projects would “not have a negative impact on Mission Beach in terms of noise, traffic, parking or intensity of development and use.” Petitioner argued that the Project was therefore unusual because it featured improvements the local electorate had sought precisely to prohibit, and that the Project’s anticipated revenues of more than \$100 million would certainly result from a substantial influx of visitors that, in turn, would have a significant effect on the environment in the form of increased traffic and noise.



The trial court rejected Petitioner’s argument on two grounds. First, Petitioner’s environmental impact claims were “entirely speculative” because anticipated revenue growth alone could not establish that increased noise and traffic impacts would follow. Second, the Project’s impacts had no connection to Proposition G. The court made it clear that the unusual circumstances exception requires a showing that the prospective environmental impacts are causally linked to the unusual circumstances cited, which Petitioner could not show.

Disposition

Accordingly, the Court of Appeal affirmed the trial court’s judgment.

- Opinion by Justice Irion, with Presiding Justice Nares and Justice Guerrero concurring.
- Trial Court: Superior Court of San Diego County, Case No. 37-2015-00015780-CU-TT-CTL, Judge Judith Hayes.

Exemptions and Exceptions

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
50 <i>Stewards of Public Land v. City of Pasadena</i>		2 nd	

[*Stewards of Public Land v. City of Pasadena*](#), California Court of Appeal, Second Appellate District, Division Two, Case No. B277996 (August 30, 2018).

- The general effects of the long-standing operation of an archery range on subsequently developed residences did not constitute unusual circumstances, and no exception to a CEQA exemption applied.

Background for Appeal

In February 2015, the City of Pasadena (City) City Council considered a proposal for minor physical and programmatic changes to the operation of Lower Arroyo Archery Range (Project), including:

- Removing an unapproved path in front of the targets at the southern range
- Relocating 150 linear feet of a main trail to increase the distance from the trail to the shooting area
- Reorganizing shooting lines
- Relocating two targets from private property to public property
- Limiting times of use of the southern range
- Establishing a mandatory safety training program for range users
- Establishing and posting rules for use of the range
- Placing native stones, plants, boulders, and wooden fencing as a natural barrier between walking paths and the archery ranges

The Project also amended the City's municipal code to allow the City Manager to promulgate rules for archery on City-owned lands.

As to CEQA, the City found that the Project was categorically exempt from CEQA and that no exceptions to the categorical exemptions applied to the Project. A Notice of Exemption (NOE) was timely filed shortly thereafter.

Following the February 2015 meeting, the City drafted an ordinance that would allow the City Manager to promulgate rules for archery on City-owned lands and require a mandatory safety program for range users. In September 2015, the City Council adopted the ordinance and, shortly thereafter, issued a second NOE. The second NOE explained that these actions were also within the scope of the previously approved action and exempt from CEQA under Category 1 Exemption. *Stewards of Public Land* (Petitioner) filed suit, and the trial court rejected all of its claims. Petitioner then filed a timely appeal.

The City Properly Relied on the Class 1 Categorical Exemption

A Class 1 Categorical Exemption exempts a project from CEQA review if the project involves repair, maintenance, and minor alteration of existing public topographical features involving negligible or no expansion of existing uses. Petitioner argued that the following required a further review through an environmental impact report (EIR):

- Removing the 14-target limit allowed under the Lower Arroyo Master Plan
- Removing an unauthorized path
- Relocating 150 feet of walking trail
- Changing the range area of the Lower Arroyo from a mixed-use area to a single-use area dedicated exclusively to archery

Here, the court found that substantial evidence supported the City's conclusion that the exemption applied. The court then turned to Petitioner's more relevant claim that the historical and unusual circumstances exceptions applied.

The Historical Resources Exception Does Not Apply

The CEQA Guidelines provide an exception from CEQA's categorical exemptions for projects that may cause substantial adverse change in the significance of a historical resource. Petitioner argued that this exception applies to the Project, thereby requiring additional CEQA review.

Petitioner averred that because the State Historical Resources Commission lists the Lower Arroyo — the park in which the archery range sits — in the National Register of Historical Places and the California Register of Historical Resources, any change to the archery range was a significant impact on the historic resource.

The court rejected this argument. Here, the record showed that the archery range was not a historical resource. The archery range was expressly omitted as a factor of any significance in the City's landmark designation and in the City's National Register of Historical Places application. Further, law enforcement identified the trail running along the face of the archery targets as a safety hazard, and the trail was omitted from maps depicting authorized trails at the time the Lower Arroyo Master Plan (LAMP) was prepared. The trail was also designated for removal under the LAMP. The court found that the portion of the path that passes along the face of the archery targets was of no historic significance.

The court also assessed whether the relocation of 150 feet of the trail could result in changes to a historically designated trail. Here, the court found no merit in the argument that relocating a 150-foot segment of the trail — which extends more than 8,000 feet through the entire Arroyo Seco — or placing natural materials along the trail to deter persons from straying into a dangerous archery field would materially alter significant features of a historical resource. Thus, the court found that Petitioner failed to satisfy the burden of establishing that the Project would significantly impact a historical resource.

The Unusual Circumstances Exception Does Not Apply

A two-part test is used to determine whether the "unusual circumstances" exception to the exemption applies:

- First, Petitioner is required to establish a reasonable possibility that the Project contains unusual circumstances — some feature that distinguishes the Project from other projects within the same exempt class.
- Second, if unusual circumstances are present, Stewards must establish the reasonable possibility of a significant effect on the environment due to the unusual circumstances.



The court found that no unusual circumstances were present. The location of the archery range next to private residences was not an unusual circumstance. The court noted that the archery range predated the construction of many of the private residences, and Petitioner offered no evidence that the proximity was unusual. Similarly, arrows potentially ending up on the property of residences — a safety concern — was not an unusual circumstance. The court found that the City addressed this issue in the new ordinance, which required a safety course from range users, and that such a solution was within the City Council's power and discretion. Because the court found no unusual circumstances in the Project, evaluating the second prong of the unusual circumstances test was unnecessary.

Disposition

The Court of Appeal held that the City's determination that the Class 1 Categorical Exemption applied was supported by substantial evidence and that neither of the claimed exceptions applied. The trial court judgment was affirmed in full.

- Opinion by Justice Pro-Tem Goodman; with Acting Presiding Justice Ashmann-Gerst and Associate Justice Chavez concurring.
- Trial Court: Los Angeles County Superior Court, Case No. BS154299, Judge James C. Chalfant.

Exemptions and Exceptions

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
51 <i>World Business Academy v. California State Lands Commission</i>		2 nd	

[World Business Academy v. California State Lands Commission](#), California Court of Appeal, Second Appellate District, Division Four, Case No. B284300 (June 13, 2018).

- The “existing facilities” categorical exemption may apply to nuclear power plants.
- The “unusual circumstances” exception is generally inapplicable to a proposal to continue existing operations without change, such as a lease renewal to maintain the status quo.

Background for Appeal

Pacific Gas & Electric (PG&E) owns and operates the Diablo Canyon two-unit nuclear power plant in San Luis Obispo County. The nuclear units are licensed by the federal Nuclear Regulatory Commission to operate until November 2, 2024, and August 26, 2025. The Diablo plant’s cooling system uses water-intake and discharge structures located on state-owned tidal and submerged lands overseen by the California State Lands Commission (Commission). The Commission had previously authorized leases for these lands, with expiration dates of August 27, 2018, and May 31, 2019.

In January 2015, PG&E submitted an application to the Commission to replace the expiring leases with a single lease that would terminate on the same date as its federal licenses. Commission staff prepared a report that concluded the proposed lease fell within CEQA’s categorical exemption for existing facilities because the infrastructure related to the lease had existed for over 40 years, and there were no operational or physical changes to the Diablo plant. Although the report discussed the applicability of the exception for unusual circumstances, it recommended that the Commission apply the “existing facilities” exemption. The Commission adopted the report’s recommendations. Thus, the Commission authorized the lease replacement, finding that the lease replacement fell under the existing-facilities exemption.

On August 2, 2016, World Business Academy (Petitioner) filed a verified petition for a writ of administrative mandate. Petitioner argued that the existing-facilities exemption did not apply to the lease replacement, and that even if it did, the “unusual circumstances” exception should apply. The trial court rejected Petitioner’s arguments and agreed with the Commission that the lease replacement was within the existing-facilities exemption to CEQA and that the unusual-circumstances exception did not apply. Petitioner appealed.

Existing-Facilities Exemption Applies

On appeal, Petitioner argued that the existing-facilities exemption applies only to utility structures that convey and distribute power (such as wires and telephone poles), and not those that generate it (such as power plants). The CEQA Guidelines (Guidelines) provide a non-exclusive list of projects that may fall within the existing-facilities exemption. This list includes “utilities used to provide electric power.” The Guidelines state that the “key consideration is whether the project involves negligible or no expansion of an existing use.” Here, the Court of Appeal rejected Petitioner’s argument, noting that “provide electric power” encompasses the generation of power, and that the lease replacement did not expand the existing use and satisfied the Guidelines’ key consideration.

Next, Petitioner argued that the Secretary of the California Natural Resources Agency (Secretary) did not have the authority or intention to include nuclear power plants within the existing-facilities exemption

because nuclear power plants significantly impact the environment. The court rejected this argument, reasoning that the class of projects at issue in the existing-facilities exemption was not power plants, but rather existing facilities of all types. Therefore, the court concluded that it was reasonable and within the Secretary's authority to find that the existing facilities, as a class, do not significantly impact the environment.

In addition, Petitioner argued that the Commission failed to undertake legal analysis and make factual findings to support the application of the existing-facilities exemption. The court rejected this argument, reasoning that the Commission was not obligated to make an explicit finding that there were no unusual circumstances. The court determined that the record supported the Commission's finding that the lease replacement would not expand the existing use of the Diablo plant, and that therefore the existing-facilities exemption applied.

Unusual-Circumstances Exception Does Not Apply

Petitioner also argued that the Commission should have applied the unusual-circumstances exception. The unusual-circumstances exception provides that a categorical exemption may not be applied when:

- The project has some feature that distinguishes it from others in the exempt class
- There is a reasonable possibility of a significant effect on the environment due to the unusual circumstance

With respect to the first prong, Petitioner argued that the Commission failed to make findings as to whether the lease replacement presented some characteristic that distinguished it from other projects in the exempt class. The Court of Appeal agreed with Petitioner, but found it unnecessary to address the Commission's consideration of unusual circumstances because the second prong of the exception was not satisfied.

Under the second prong of the unusual-circumstances exception, an agency must apply the "fair argument" standard. Under this standard, an agency must find that there is a "fair argument" of a significant effect if there is substantial evidence to support that conclusion, even if there is competing substantial evidence to the contrary. The existence and significance of an environmental effect must be measured against a baseline, which is the state of the environment without the project. Here, Petitioner argued that the Commission applied a flawed baseline because it focused on whether PG&E was making changes in the way it operated the Diablo plant, rather than on the impacts that could arise from an additional seven years of plant operations should the lease be granted. The court rejected this argument, reasoning that with respect to an ongoing project — such as renewal of a lease — the established levels of a particular use and its physical impacts are considered to be part of the existing environmental baseline. Thus, the court found that all of the purported environmental effects were part of the Diablo plant's current baseline operations and the second prong was not satisfied.

Finally, Petitioner argued that the Commission failed to apply the "fair argument" standard and ignored evidence of several unusual circumstances that may have a significant environmental effect. These circumstances included the plant's large size and location on the coast, discharge of heated seawater, fuel rod storage, risks of seismic events and terrorist attacks, and PG&E's past criminal conviction related to its natural gas business. The court rejected Petitioner's argument, finding that, for each of these circumstances, the Commission did not ignore substantial evidence that these circumstances would have a significant environmental effect, and therefore did not err in concluding that the unusual-circumstances exception did not apply.



Disposition

Accordingly, the Court of Appeal affirmed the trial court's decision to deny Petitioner relief.

- Opinion by Justice Audrey Collins, with Presiding Justice Norman Epstein and Justice Thomas Willhite concurring.

- Trial Court: Superior Court of Los Angeles County, Case No. BS163811, Judge Mary H. Strobel.

Exemptions and Exceptions

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
52 <i>Bottini v. City of San Diego</i>		4 th	

[*Bottini v. City of San Diego*](#), California Court of Appeal, Fourth Appellate District, Division One, Case No. D071670 (September 18, 2018).

- Under CEQA, the appropriate baseline for review must reflect the environmental conditions that exist at the time environmental analysis is commenced; CEQA does not apply retrospectively to work that is already completed.

The Bottinis (Petitioners) filed a petition for a writ of administrative mandamus challenging the determination by the City Council of the City of San Diego (City) that a residential construction project (Project) required full environmental review under CEQA. Petitioners also sought damages against the City, alleging violations of the takings, due process, and equal protection clauses of the California Constitution. The trial court granted the petition for writ of administrative mandamus on the CEQA issues, which the City appealed.

Background for Appeal

This appeal centers on the demolition of the Windemere Cottage (Windemere), a late-Victorian-era beach bungalow that was previously located on Petitioners' property. In 2010, the prior owners of the property nominated the Windemere as a historical resource with the Historical Resources Board (Board). However, before the Board's ruling, the prior owners sold the property to the Bottinis for \$1.22 million. The Bottinis withdrew the pending historical nomination and filed a "single discipline preliminary review" application with the Board to determine any constraints on future development of the property. In September 2011, the Board declined to grant historical status to the Windemere.

Shortly thereafter, in November 2011, Petitioners requested that the City's Neighborhood Code Compliance Division (Division) determine whether the cottage constituted a public nuisance based on an engineering report that found it lacked structural integrity and was susceptible to collapse. The Division declared the cottage a public nuisance and required Petitioners to obtain a demolition permit to remove the cottage from the property. Petitioners immediately obtained the permit and bulldozed the Windemere.

In August 2012, Petitioners applied to the City's Development Services Department (Department) for a coastal development permit (CDP) to construct a single-family home on their now vacant lot. Following a number of public meetings, the Department determined that the Project was categorically exempt from CEQA review as new residential construction on a vacant lot. Subsequently, however, the City Council granted a CEQA appeal and remanded the Project to the Department to reevaluate its exemption determination. The City Council also concluded that the environmental baseline for the review process should be January 2010, and that the Department's environmental determination should include the demolition of the Windemere. Petitioners then filed their petition for a writ of administrative mandamus, which the trial court granted after finding that the demolition of the Windemere and the construction of the single-family home were separate projects.

Baseline Appropriately Reflected Current Conditions

The Court of Appeal affirmed the trial court's determination that the Project's baseline appropriately did not include the earlier demolition of the Windemere. Because the City authorized the demolition of the Windemere as being in the interest of public safety, the demolition was not connected to the construction

of a new single-family home. Rather, the demolition permit served a purpose distinct from, and not a part of, the Project under review. Thus, the appropriate environmental baseline for review was the vacant lot that existed at the time Petitioners submitted their request for a CDP.

Project Categorically Exempt From CEQA Review

Further, the Court of Appeal held that the Project was a class 3 categorical exemption, which includes single-family residences. Because the City improperly defined the Project and baseline, it also erred in concluding that the Project was not exempt. The court determined that no exceptions to the exemption applied. The historical resource exception did not apply, because — even assuming the Windemere did in fact constitute a historic resource under CEQA — the Project would not cause a substantial adverse change in the Windemere’s significance. Likewise, the demolition of the Windemere did not cause the unusual circumstances exception to apply, because the demolition was not part of the Project at issue.



Finally, the court held that there was no violation of the rule against segmentation of projects. The demolition permit was itself subject to a CEQA exemption as a ministerial project. It was therefore not subject to environmental review at the time it was issued or prior to Petitioners’ construction of a new home. Rather, the demolition was an intervening event that took place outside of CEQA’s requirements, and no environmental review of that completed work was required. Accordingly, CEQA’s categorical exemption for the construction of a single-family home squarely applied to Petitioners’ Project.

Disposition

Accordingly, the Court of Appeal affirmed the trial court’s judgment on CEQA and upheld Petitioners’ writ of mandamus. Separately, the Court of Appeal affirmed the trial court’s decision to grant summary judgment in favor of the City on Petitioners’ constitutional claims.

- Opinion by Justice Aaron, with Acting Presiding Justice Haller and Justice Guerrero concurring.
- Trial Court: Superior Court of San Diego County, Case No. 37-2013-00075491-CU-WM-CTL, Judge Katherine A. Bacal.

Exemptions and Exceptions

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
53 <i>County of Ventura v. City of Moorpark</i>		2 nd	

[*County of Ventura v. City of Moorpark*](#), California Court of Appeal, Second Appellate District, Division Six, Case No. B282466 (June 12, 2018).

- Two separate activities can constitute one “project” under CEQA so long as those activities serve a single purpose, have the same proponents, and are inextricably linked.
- Courts do not balance the policies served by statutory exemptions against the goal of environmental protection because the legislature has already determined that the policy benefits of the exemption outweigh the benefits of environmental review.

The trial court determined that a beach restoration project undertaken by Broad Beach Geologic Hazard Abatement District (BBGHAD) and the related settlement agreement with the City of Moorpark (City) were a single statutorily exempt project. The County of Ventura and the City of Fillmore (Petitioners) appealed on the grounds that even if the beach restoration were exempt, the settlement represented a separate, non-exempt project that was not properly reviewed under CEQA.

Background for Appeal

The state formed BBGHAD to restore Broad Beach in Malibu. The restoration required 1.5 million cubic yards of sand to be dumped onto the beach over a 20-year period. Most of the dumping would occur via major deposits of 300,000 cubic yards of sand every five years. During the periods of major deposits, 44,000 one-way truck trips would pass through the City, which lies between the sand quarries and the beach. The City expressed concerns to BBGHAD about potential impacts on residents from sand hauling while the restoration project was being approved. The City’s complaints led to negotiations, which culminated in a settlement agreement between BBGHAD and the City.

Petitioners challenged the project in a petition for a writ of mandate and a request for injunctive and declaratory relief. The trial court found that the project, including the settlement agreement, was statutorily exempt from CEQA as an emergency action. Petitioners appealed.

Settlement and Beach Restoration Comprise One Project

Petitioners argued that while the restoration project might have been statutorily exempt as an emergency action under California Public Resources Code Section 21080(b)(4), the settlement between BBGHAD and the City was a separate non-exempt project that was not properly reviewed and approved under CEQA.

The Court of Appeal found that under two separate tests, the restoration project and the settlement constituted one project:

- First, the court analyzed the question under *Plan for Arcadia, Inc. v. City Council of Arcadia* (1974)³, which held that two separate actions can constitute a single project so long as they are among various steps that taken together obtain an objective, and are otherwise related to each

³ 42 Cal.App.3d 712.

other. In *County of Ventura*, the court found that the beach restoration and the settlement agreement were each pieces of a single, coordinated endeavor.

- Second, the court looked at the three-factor test laid out in *Banning Ranch Conservancy v. City of Newport Beach* (2012)⁴ for determining separate projects. The court in *Banning Ranch* found that two activities could constitute a single project under CEQA so long as the two activities had the same proponents, served the same purpose, and could not be implemented independently. In *County of Ventura*, the court found that because the settlement and the beach restoration had the same proponents (*i.e.*, BBGHAD and the City), served a single purpose, and were inextricably linked, they constituted a single project.

No Balancing Test for Statutory Exemptions

Petitioners also argued that, regardless of whether the restoration project and settlement agreement were a single project, these activities should not be exempt from CEQA. Petitioners argued that the trial court was required to balance the policies served by the exemption against the goal of environmental protection. Petitioners contended that without a balancing test, the court would not fulfill the legislature's intention to afford the fullest possible protection to the environment.

However, the court held that statutory exemptions promote an interest important enough that the legislature decided to forgo the benefits of environmental review. Thus, because the trial court found that the restoration project qualified as an exempt emergency action under California Public Resources Code Section 21080(b)(4), the trial court could not use a balancing test to overrule the exemption.



Disposition

Accordingly, the Court of Appeal affirmed the portion of the trial court's judgment that the beach restoration and settlement agreement constituted a single project that was exempt from CEQA review.

- Opinion by Justice Tangeman, with Presiding Justice Gilbert and Justice Yegan concurring.
- Trial Court: Superior Court of Santa Barbara County, Case No. VENCI00479937, Judge Thomas Pearce Anderle.

⁴ 211 Cal.App.4th 1209.

Mitigated Negative Declarations

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
54 <i>Tennis Club Preservation Society v. City of Palm Springs</i>		4 th	

[*Tennis Club Preservation Society v. City of Palm Springs*](#), California Court of Appeal, Fourth Appellate District, Division Two, Case No. E068896 (October 22, 2018).

- The doctrine of laches prevents Petitioner’s claim that the Phase III plan violates the MND’s mitigation measures because the Phase III plan conforms to the plans approved 15 years prior.
- The Project is not a phased development for the purposes of a local ordinance such that a Planning Commission review and approval would be required prior to further development.

Background for Appeal

On September 25, 2003, real parties in interest John Wessman and Baristo Group, LLC (collectively, Developer) submitted an initial application for a planned development district (PDD), consisting of 12 two-story dwellings. Following community meetings, the application was revised such that “a two-story unit located in the northern section of the [P]roject and adjacent to existing single-story residential has been replaced with a single-story unit.”

On October 21, 2003, the City Planning Commission recommended adopting the initial study (IS) and a mitigated negative declaration (MND). On October 24, 2003, the IS and MND were made available to the public. The Project was described as consisting of 13 buildings: “twelve (12) two-story triplex buildings and one (1) duplex building for a total of 38 condominium buildings.” Following a noticed public hearing on November 26, 2003, the Planning Commission voted to recommend the Project and approval of the IS/MND. On December 17, 2003, the City approved the Project and ordered the MND filed. As approved, the Project included two entitlements: the PDD and the tentative tract map (TTM).

By 2005, construction on Phases I and II had been completed (for 27 of 38 units), while construction on Phase III had not yet begun. In July 2016, the Developer submitted plans to the City for construction of Phase III. City staff reviewed the plans, found them to conform to those previously approved by the City in 2003, and approved them. Tennis Club Preservation Society (Petitioner) filed the instant action alleging violations of the MND and certain applicable Palm Springs Municipal Code (PSMC) sections and sought to enjoin the City’s issuance of required building permits for Phase III. The trial court denied the petition, and Petitioner made a timely appeal.

Compliance With Mandatory Mitigation Measures

Petitioner argued that Phase III of the Project failed to comply with a mandatory mitigation measure in the MND that required reducing the height of a building on the northern edge of the project area to a single story. Specifically, Petitioner argued that the Developer did not reduce the height of the building on the northern border, but rather added a second single-story building. The court acknowledged that an additional building had been added, but found that this addition was approved in December 2003 with the IS/MND and that Petitioner’s challenge was time-barred.

When the Developer submitted the final plans for Phase III in 2016, the City’s planning staff concluded that all of the buildings were substantially in the same shape, form, height, and location as in the previously approved 2003 plans.

The court found that the Phase III plans complied with the IS/MND because the final plans conformed to the previously approved 2003 plans and that Petitioner's challenge to the addition of the single-story building on the northern border was time-barred. According to the court, "the time to challenge [the addition] was in 2003."

Re-Review and Re-Approval by the Planning Commission

Petitioner argued that the City could not issue construction permits for Phase III without review and approval by the planning commission, because PSMC Section 94.03.00(I)(2) provides that phased planned developments that cease construction for a period of two years or more require planning commission review and approval prior to further development.



The City argued that the PSMC section did not apply to the Project, because the Project was not a phased planned development despite repeated references in the record by the Developer describing the Project as "phased" and seeking the City's approval of a "phased project." The Developer contended, and the court agreed, that the references to "phases" referred to the phasing of the TTM and not the PDD. As the Developer argued, the purpose of the PDD is to define the specific development standards for the Project's buildings, while the purpose of the TTM is to define the Project's division of land and improvements. Based on the record, the court found that the PDD was neither approved nor required to be built in phases, and thus PSMC Section 94.03.00(I)(2) did not apply to the Project.

Disposition

The Court of Appeal affirmed the trial court's judgment and awarded the City its costs on appeal.

- Opinion by Presiding Justice Ramirez, with Justice McKinster and Justice Miller concurring.
- Trial Court: Superior Court of Riverside County, Case No. RIC1607283, Judge Gloria Trask.

Mitigated Negative Declarations

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
55 <i>Protect Niles v. City of Fremont</i>		1 st	

[Protect Niles v. City of Fremont](#), California Court of Appeal, First Appellate District, Division Five, Case No. A151645 (July 16, 2018).

- A project’s visual impact on an officially designated historical district is appropriate to review as a potential aesthetic impact under CEQA.
- Residents’ personal observations of traffic conditions where they live and commute may constitute substantial evidence, even if residents’ accounts contradict the conclusions of a professional traffic study.

Protect Niles (Petitioner), an unincorporated community organization, filed a petition for writ of mandate seeking to invalidate the City of Fremont’s (City’s) adoption of a mitigated negative declaration (MND) and to order the City to prepare an environmental impact report (EIR) for an 85-unit residential and retail development in a historical district (Project). The trial court found substantial evidence supporting a fair argument of significant adverse aesthetic and traffic impacts.

Background for Appeal

In June 2014, the project developer, Valley Oak Partners (Valley Oak) submitted a planning application to the City for the Project. Following an initial study, City planning staff prepared a draft MND in lieu of an EIR. The draft MND was referred to the Niles Historical Architectural Advisory Board (HARB) for advisory review. After a January 2015 hearing, HARB voted to recommend denial of the Project as incompatible with the existing Niles Historical Overlay District (Niles HOD). The Project and draft MND were then referred to the City Planning Commission for approval. The Planning Commission recommended approval of the Project and adoption of the MND, subject to certain conditions. On March 3, 2015, the City Council voted to approve the Project and adopt the MND.

On April 3, 2015, Protect Niles filed a petition for writ of mandate in Alameda County Superior Court ordering the City to set aside the Project approvals and prepare an EIR. The petition argued that substantial evidence supported a fair argument of significant aesthetic / land use impacts, traffic impacts, hazardous materials impacts, and impacts on the nearby Alameda Creek Regional Trail. The trial court found that substantial evidence supported a fair argument of significant impacts on aesthetics and traffic only, and ordered the City to vacate its Project approvals and refrain from approving the Project absent compliance with CEQA in the preparation of an EIR. Valley Oak filed a timely appeal.

Substantial Evidence Supports a Fair Argument for Adverse Aesthetic Impact

Several courts have recognized that a project’s impact on the aesthetic character of a surrounding community is a proper subject of CEQA review. However, the context is crucial in determining the appropriateness of such review. Aesthetic issues are ordinarily the province of local design review boards and not CEQA, but aesthetic impacts may arise in a particularly sensitive context. Here, the Court of Appeal found that the designated Niles HOD was an area the City itself has recognized as a particularly sensitive context. Furthermore, a project’s visual impact on a surrounding officially designated historical district is appropriate for aesthetic impact review under CEQA.

The Court of Appeal also found that substantial evidence in the record supported a fair argument that the Project could result in significant aesthetic impacts to the Niles HOD. The City's initial study found the Project to be compatible with the Niles HOD because its design reflects the architectural style of the industrial buildings that previously occupied the site, and the HOD Guidelines recognize eclectic architecture. However, HARB opined that the Project was inconsistent with the Niles HOD because of its height, density, and massing, as well as architectural style. Several HARB members and Niles residents echoed similar sentiments about the Project's incompatibility with the character of the surrounding community. The Court of Appeal noted that the comments about incompatibility were not solely based on vague notions of beauty, but were grounded in inconsistencies with the prevailing building heights and architectural styles in the Niles HOD. Further, HARB — the board specifically charged with assessing compatibility with the Niles HOD — overwhelmingly voted to deem the design incompatible based on the Project's massing, scale, and size.

Valley Oak argued that the conclusion of an advisory body like HARB should not by itself constitute substantial evidence in support of a fair argument of a significant environmental impact. The court rejected this argument because Petitioner did not rely solely on HARB's vote, but also the board members' underlying aesthetic judgments. The court found that, collectively, the HARB members' opinions about the compatibility of the Project with the Niles HOD constituted substantial evidence of the Project's potentially significant aesthetic impacts.

Substantial Evidence Supports a Fair Argument for Adverse Traffic Impact

Valley Oak also argued that the trial court erred in finding that substantial evidence supported a fair argument that the Project could result in significant traffic impacts. This is because, at trial, Petitioner's argument on the traffic issue consisted almost entirely of oral statements made during the administrative proceedings by residents, City officials and staff, and professional consultants expressing concern about the traffic impacts. The Court of Appeal agreed with the trial court's finding that these fact-based comments constituted substantial evidence supporting a fair argument that the Project will have significant adverse traffic effects.

The initial study for the Project incorporated a traffic study analysis, and concluded that the Project would cause the level of service at the nearby intersection to deteriorate from an already "unacceptable" E level of service to a lower F level of service. However, the amount of deterioration would be less than the City's threshold of significance for signalized intersections. The traffic study also indicated that a left-hand turn pocket lane would be warranted at the intersection under national guidelines, but the City staff ultimately decided not to require such a pocket lane. The traffic study also assessed visibility at the intersection based on the posted speed limits for Niles Boulevard. Residents' and City officials' oral statements contend that the posted speed limit is frequently exceeded on Niles Boulevard, and as a result, there was limited visibility for specific approaches to the intersection and an increased potential for accidents.



In addition, residents and City officials stated that the Project's proposed parking would require some cars to back into westbound traffic to exit the parking spaces and return to the flow of traffic. The court found that the fact-based comments by residents based on the residents' personal observations of traffic conditions where they live and commute may constitute substantial evidence supporting a fair argument of significant adverse impacts, even if they contradict the conclusions of a professional traffic study.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's judgment granting a writ of mandate ordering the City to overturn the Project's approvals, and to require the preparation of an EIR for the Project.

- Opinion by Justice Bruiniers, with Acting Presiding Justice Simons and Justice Needham concurring.
- Trial Court: Alameda County Superior Court, Case No. RG15765052, Judge Frank Roesch.

Supplemental Review

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
56 <i>Center for Biological Diversity v. County of Los Angeles</i>		2 nd	

[*Center for Biological Diversity v. County of Los Angeles*](#), California Court of Appeal, Second Appellate District, Division Five, Case No. B284427 (June 19, 2018).

- When modifications to an area plan do not constitute “significant new information” or “substantial changes” as compared to the original area plan, an agency need not revise the EIR before certification, recirculate the EIR, prepare a subsequent or supplemental EIR, or prepare an addendum to the EIR.
- When modifications to a plan do not require an agency to recirculate an EIR, or prepare a supplemental EIR or addendum, the agency is not required to make further CEQA findings or provide an updated statement of overriding considerations.

The Center for Biological Diversity (Petitioner) sought a writ of mandate to compel the County of Los Angeles (County) to set aside its approval of the modified Antelope Valley Area Plan (Plan) and certification of the environmental impact report (EIR). The trial court denied the petition, finding that the modifications at issue were not significant and that the EIR’s findings related to project impacts remained valid. The Court of Appeal affirmed the trial court’s denial of the petition.

Background for Appeal

The County updated the Plan, a Land Use Policy Map (LUPM), and a Zoning Map and published a draft EIR — which was finalized after public comment. The Plan defined several area types, including Economic Opportunity Areas (EOAs), where major infrastructure development is underway, and Rural Preserve Areas, where residential development is limited to preserve natural resources and minimize development. The Plan also includes special management areas, such as Significant Ecological Areas (SEAs), which are intended to protect the biodiversity of the County. After a public hearing, the County’s Board of Supervisors (Board) certified the EIR and adopted CEQA Findings of Fact and a Statement of Overriding Considerations. The Board also stated it would approve the Plan and maps subject to certain modifications, which exempted EOAs from certain policies in the Plan, limited expansion of SEAs into certain EOAs, and reduced the footprint of Rural Preserve Areas in EOAs. Following Plan modification, the Board approved a resolution that recertified the EIR without changes, incorporated the earlier CEQA Findings of Fact and Statement of Overriding Considerations, and approved the modified Plan. The Board found that, because the modifications to the Plan did not change the conclusions in the EIR, revision and recirculation of the EIR were not required.

Petitioner then petitioned for a writ of mandate to set aside the Board’s adoption of the modified Plan and recertification of the EIR. The trial court found that the Board’s determinations that the changes to the Plan did not constitute significant new information were supported by substantial evidence and denied the petition, and Petitioner appealed.

Substantial Evidence Supported the Board's Conclusion That Plan Modifications Did Not Require a Revised EIR

Petitioner argued that certain modifications to the Plan would result in greater significant environmental effects than were captured in the EIR and, thus, required revision of the EIR. These modifications included:

- Exempting EOAs from compliance with certain policies in the Plan
- Reducing SEA coverage in EOAs
- Reducing the footprint of Rural Preserve Areas in EOAs

The agency's determination of whether modifications constitute significant new information requiring additional CEQA review is a factual issue, subject to review under the substantial evidence standard, rather than a procedural issue subject to de novo review. Applying this standard of review, the court rejected each of Petitioner's arguments.

First, as to exempting EOAs from compliance with certain policies in the Plan, the court held that Petitioner did not meet its burden of showing there was no substantial evidence in the record to support the Board's conclusion that the modifications did not present any new significant information. The policies that no longer applied to EOAs under the Plan were designed to require low-density development, ensure adequate buffers between development and sensitive areas, and provide for open space preservation. Petitioner argued that exempting EOAs from compliance with these policies would negatively affect certain resource areas, and the court rejected Petitioner's arguments for the following reasons:

- *Scenic vistas.* Certain policies that no longer applied in EOAs were listed in the EIR as mitigating potential impacts to scenic vistas by requiring low-density development. The court noted that even without those policies, the LUPM required very low-density development in most of the EOAs. The court rejected Petitioner's argument that because those policies are "relevant" to the analysis of scenic vistas they were also essential to the analysis.
- *Sensitive plant communities.* Petitioner failed to identify for the court which sensitive plant communities were present in the EOAs, and the court determined that the EOAs did not contain significant areas of sensitive plant communities. Additionally, the court noted that there are alternative protections for sensitive plant communities by several existing agencies.
- *Wetlands.* The court found that the LUPM limits development in EOAs, other agencies regulate wetlands, and other policies specific to wetlands remain applicable to EOAs.
- *Wildlife movement.* The court cited the reliance on existing regulations applicable to these areas and the fact that a policy that remains in place specifically addresses wildlife movement.
- *Seismic hazards.* The court noted that this analysis may not have been required at all, since an EIR need not address the environment's effects on a project. Assuming the analysis was required, the court still found the LUPM limits the density of development in EOAs to address any concerns about seismic hazards in these growth areas.
- *Development on unstable soils.* The modifications did not result in any changes to the LUPM in areas of steep slopes, and an existing ordinance addresses development in Hillside Management Areas.
- *Airport safety hazards.* The court found that Petitioner failed to meet its burden because the originally proposed and adopted LUPMs were identical for areas that might be impacted by current or future airport-related uses.

Second, the court found that the reduction in SEA coverage in the EOAs — a decrease of only 6% from the previous version of the Plan — was not significant new information. Petitioner failed to show that the review required by mitigation measures applicable to SEAs would have been significantly greater than project-level CEQA review — which would apply to any development in an EOA. Additionally, a number of other programs and policies continue to provide protection for sensitive areas and wildlife.

Third, as to the reduced footprint of Rural Preserve Areas in EOAs, the court explained that the Rural Preserve Area designation does not dictate land use in a given area, but is reflective of more detailed land use restrictions in the LUPM. The County argued that removing the Rural Preserve Area designations did not affect the allowable development density in EOAs because density is still restricted by the underlying LUPM. Petitioner did not dispute this claim, and the court found that because Petitioner had not shown that land use designations changed significantly, it did not meet its burden of showing the Board's decision was not based on substantial evidence.

The Board Was Not Required to Recirculate the EIR or Conduct Additional Environmental Review

Next, Petitioner contended that the County should have either recirculated the EIR prior to approving the Plan, or prepared a subsequent EIR, supplemental EIR, or an addendum to the EIR, to reflect changes in the Plan. An EIR must be recirculated when significant new information is added after notice has been given and before it has been certified. New information is “significant” only if the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect or a feasible way to mitigate or avoid such an effect. A subsequent or supplemental EIR is only required when there are substantial changes to the proposed project or the project circumstances, or new information that was not known at the time of the EIR becomes available. Here, the court determined that the modifications to the Plan did not amount to significant new information that would require recertification and recirculation, nor did they amount to substantial changes that would require a subsequent or supplemental EIR. The court also dismissed Petitioner's argument that the County should have prepared an addendum to the EIR, finding that the Board's resolution detailing the required modifications served the same purpose as an addendum and allowed for informed decision-making.

The Board Was Not Required to Update the CEQA Findings or Statement of Overriding Considerations



Finally, Petitioner claimed that the CEQA Findings of Fact and Statement of Overriding Considerations failed to consider the previous version of the Plan as an alternative to the adopted Plan. Just as an agency is not required to recirculate an EIR or prepare a subsequent or supplemental EIR every time new information is identified, changes to a plan do not necessarily require changes to the findings and statement of overriding considerations. Thus, the court held that the County was not required to issue new CEQA Findings of Fact or an updated Statement of Overriding Considerations, as the modifications did not require the County to recirculate the EIR or to prepare a supplemental EIR or addendum.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's judgment denying the petition for writ of mandate and upholding the County's approval of the Plan and certification of a program EIR.

- Opinion by Justice Baker, with Acting Presiding Justice Kriegler and Justice Kim concurring.
- Trial Court: Superior Court of Los Angeles County, Case No. BS156932, Judge James C. Chalfant.

Supplemental Review

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
57 <i>Advocates for Better Community Development v. City of Palm Springs</i>		4 th	

[*Advocates for Better Community Development v. City of Palm Springs*](#), California Court of Appeal, Fourth Appellate District, Division Two, Case No. E066193 (February 20, 2018).

- On appeal, a CEQA challenge is moot where, due to events that occur while the appeal is pending, the court is no longer able to grant effective relief.

Advocates for Better Community Development (Petitioner) had filed an unsuccessful petition for writ of mandate seeking to invalidate the City of Palm Springs' (City's) addendum to an environmental impact report (EIR) for changes to a planned development. Petitioner argued that the City's approval was inconsistent with the Museum Market Plaza Specific Plan (Specific Plan) and that the approval violated CEQA because the changes were substantial and required additional environmental review. The court held that these issues were moot due to an ordinance that the City passed modifying the Specific Plan before Petitioner filed its notice of appeal.

Background for Appeal

On October 17, 2012, the City Council adopted Resolution No. 23238, approving the City's addendum to the EIR for a planned mixed-use development (Project). Petitioner filed an initial petition for a writ of mandate challenging this approval, but the trial court sustained a demurrer on Petitioner's CEQA claim as time-barred. On September 17, 2014, the City approved a revised Project from the developer, and on October 22, 2014, Petitioner challenged the City's approval of changes to the development plan that would allow developers to swap uses between two parcels — one originally designated as open space, and the other as commercial development. The trial court entered judgment denying Petitioner's writ of mandate on April 13, 2016. On April 20, 2016, before Petitioner filed a notice of appeal, the City adopted Ordinance No. 1889, which amended the Specific Plan to allow the changes the developer had proposed and that the City had previously adopted. The City Council approved a second addendum to the EIR and, at the same time, adopted the new Specific Plan. Petitioner challenged this City Council action, but ultimately sought voluntary dismissal. On June 9, 2016, Petitioner appealed the April 13, 2016 judgment.

City Council's Amendments to Specific Plan Mooted Petitioner's Challenges

First, Petitioner argued that the City Council's approvals of the revised Project were improper, because allowing commercial development was inconsistent with the Specific Plan. However, the Court held that this issue was moot, because the Specific Plan had been amended to allow the changes that Petitioner now challenged in its appeal.

Second, Petitioner argued that its challenge to the revised Project allowed it to reopen a challenge under CEQA to the City Council's 2012 adoption of Resolution No. 23238. Specifically, Petitioner argued that the changes to the distribution of open space outlined in the original Specific Plan were so substantial as to require a subsequent EIR. However, the court held that this issue was also moot. Even assuming Petitioner could challenge the 2012 decision, the court was unable to enjoin development due to the new ordinance, which allowed the development.

Petitioner argued that the appeal was not moot because the City's decision to adopt the new Specific Plan was based entirely on actions that Petitioner was challenging in its lawsuit. Therefore, a court order invalidating the approval of the revised Project would also invalidate the amendments to the Specific

Plan. The court disagreed, noting that City Council ordered a second addendum to the EIR to evaluate whether further environmental analysis was required. Moreover, the court concluded that the new Specific Plan reduced densities and use intensities, reducing the environmental impacts.

Petitioner also argued that the appeal was not moot because the case presented a matter of continuing public interest. The court summarily dismissed this argument. Lastly, Petitioner argued that ruling that the appeal was moot was against public policy, because the ruling would reward the City's efforts to "evade judicial review of its unlawful approvals." Again, the court rejected this argument, because the City did not evade unfavorable judgment; the City prevailed on all previous petitions seeking to stop the development.

Disposition

Accordingly, the Court of Appeal dismissed the appeal as moot and ordered the parties to bear their own costs on appeal.

- Opinion by Justice Slough, with Acting Presiding Justice McKinster and Justice Miller concurring.
- Trial Court: Riverside County Superior Court, Case No. PSC1405677, Judge Craig Riemer.



- i 62 Cal.4th 204.
- ii April 21, 2015, B256125.
- iii Nov. 3, 2016, B256125.
- iv 17 Cal.App.5th 1245.

LW.com

Beijing
Boston
Brussels
Century City
Chicago
Dubai
Düsseldorf
Frankfurt
Hamburg
Hong Kong
Houston
London
Los Angeles
Madrid
Milan
Moscow
Munich
New York
Orange County
Paris
Riyadh*
San Diego
San Francisco
Seoul
Shanghai
Silicon Valley
Singapore
Tokyo
Washington, D.C.

* In cooperation with the Law Office of Salman M. Al-Sudairi