



“Deferral” Under CEQA: It’s Complicated!

By Arthur F. Coon on November 15th, 2011

CEQA calls for environmental review of discretionary projects at the earliest *meaningful* stage, to serve its purposes of public participation and informed decision-making. The basic idea is simple: analyze and shape the project to reduce or avoid environmental impacts *before* deciding to approve it. But there is a tension between CEQA’s mandate for *early* review and its requirement of *detailed* discussions of impacts and mitigation measures. Ever since the seminal case of *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, allegations of improper “deferral” – whether of analysis of potential impacts or feasible mitigation measures – have been a staple of CEQA litigation. Resolving the “deferral” dilemma calls for a careful, case-by-case balancing between CEQA’s mandate that significant environmental impacts and feasible mitigation measures be meaningfully analyzed prior to project approval, and the practical reality that the full extent of project impacts and precise details of needed mitigation frequently cannot be known until post-approval stages of project development.

In other words, it’s complicated. Two recent cases illustrate situations where EIRs have been upheld – and rejected – in the face of deferral challenges.

In *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, the Court of Appeal rejected plaintiff’s challenge to a Revised EIR for a 64-acre, mixed use, high rise development project located along the Oakland Estuary. The project was 3-1/2 miles from the active Hayward fault zone and 15-1/2 miles from the active San Andreas fault zone. To address potential seismic impacts, the EIR included mitigation measures that required further compliance with the Seismic Hazards Mapping Act and relevant provisions of the State and City’s Building Codes. This approach –reliance on compliance with the applicable regulatory framework – is common practice. However, plaintiff claimed (among other challenges) that the City improperly deferred mitigation of the project’s seismic effects.

In upholding the EIR’s deferred mitigation, the Court drew numerous relevant principles from the case law:

- Significant impact determinations and formulation of mitigation measures must occur *before* project approval.
- Where the agency has evaluated significant impacts and identified measures that will mitigate them, it doesn’t have to commit to any *particular* identified mitigation measure as long as it commits to mitigate the impacts.
- The details of *exactly* how mitigation will be achieved under the identified measures can properly be deferred pending completion of a *future study*.
- Where impacts are of a type for which mitigation is known to be feasible, but practical considerations prohibit devising such measures early in the planning process, the agency can permissibly articulate specific performance criteria and commit to ultimately devising mitigation measures that will satisfy the criteria.

(*Id.* at 906.)



Noting that “a condition requiring compliance with regulations is a common and reasonable mitigation measure” (see also, *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912), and relying on technical reports that had established the feasibility of mitigating the identified impacts, the Court concluded the City did not improperly defer seismic mitigation. The EIR’s extensive discussion and reliance on required future compliance with provisions and standards of the Seismic Hazards Mapping Act and State and City Building Codes designed to reduce risk of ground failure, prevent building collapse, and protect public safety were proper. The Revised EIR and accompanying Geotechnical Investigation (a preliminary study done to establish *feasibility* which had included numerous test borings and core penetrations to determine the site’s soil characteristics) adequately established the feasibility of future mitigation, and discussed a range of possible mitigation measures. Such measures included recommended deep foundation systems, requirements for piles, site grading requirements, and seismic structural design requirements, all of which were standard, accepted and proven engineering practices. (*Id.* at 906-910.) Commitment to such standards and general measures was adequate under CEQA, even though future site-specific investigations and future soils and other reports from registered civil engineers were contemplated and required to determine final project foundation and structure design, pile depths, remedial methods, type and sizing of structural building materials, grading plans, and so on.

A different result occurred in *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48. There the Court held (among other interesting things) that a “mitigation measure” proposed to *verify* that certain archaeological sites are historical resources for CEQA purposes was an unlawful deferral of environmental analysis. The EIR for a large, 1,579-acre mixed use project with residential, commercial, light industrial and other components, had identified 4 prehistoric and 3 historic-period Native American sites within the project site, and identified 5 of these as significant “historical resources” for CEQA purposes. The EIR’s mitigation measures included a “verification” measure providing for a *second* determination of whether each site qualified as a historical resource under CEQA, i.e., a “qualified archeologist” would analyze the previously-excavated artifacts from each and “[i]f it is verified that the site is a historical resource for purposes of CEQA the qualified archaeologist shall review all existing documentation and make recommendations as to the appropriate course of action ...” The Court held “the plain, unambiguous language” of the mitigation measure violated CEQA and that “neither CEQA nor the Guidelines authorize any mechanism or procedure for undoing an EIR’s conclusion that an archaeological site is an historical resource.” Rather, CEQA provides that determining whether an archaeological site impacted by a project is an historical resource is mandatory and must be made *before* the EIR is certified. (14 Cal. Code Regs. § 15064.5(c)(1).) The Court concluded: “The post certification verification procedure [is contrary to law and] allows for an environmental decision to be made outside an arena where public officials are accountable,”

The Court further construed the CEQA Guidelines’ reference to “preservation in place” as the “preferred manner” of mitigating impacts to historical archaeological resources to “mean that feasible preservation in place must be adopted to mitigate [such] impacts ... unless the lead agency determines that another form of mitigation is available and provides superior mitigation of the impacts.” If the preference for preservation in place is not followed, the Court stated, “the EIR shall state why another type of mitigation serves the interest protected by CEQA better than preservation in place.”

The Court also held the EIR’s discussion of mitigation measures was legally inadequate, and the measures “improperly defer the formulation of actual mitigation measures to the future.” According to



the Court: “Despite being labeled as mitigation measures in the EIR, these provisions simply are statements that the County will decide the mitigation to be adopted after it receives the recommendation of a professional archaeologist.”

Finally, the Court held the EIR’s discussion of impacts to non-historical, traditional cultural properties, while not subject to the special disclosure rules applicable to historical archaeological resources, also violated CEQA by recognizing the existence of potentially significant impacts to such properties while failing to discuss any mitigation.

In sum, while on relying compliance with the applicable laws and regulations may be sufficient, “figuring it out later” as to whether mitigation will be necessary – and if so, whether it will be feasible – is not likely going to be a defensible approach. These two recent cases underscore that determining what is proper (versus improper) “deferral” under CEQA requires a case-specific inquiry, involving careful consideration of:

- the type of development project and impacts involved to the extent they are presently knowable,
- what is realistically practical or feasible at the particular stage of project development at issue, and
- whether enough analysis and investigation has been done to establish with assurance that any “deferred” mitigation will be feasible and effective to meet identified performance standards.

The cases also illustrate the crucial role of a properly-drafted EIR, prepared by a consultant team familiar with the applicable legal rules, in resisting successfully a “deferral” challenge.