

Real Estate & Land Use

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Court Rejects the Need for CEQA Analysis of Sea Level Rise and Invalidates CEQA Guideline

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CEQA Does Not Require Analysis of Significant Effects of the Environment on Projects

In an opinion ordered published last Friday, December 2, 2011 (originally filed November 9, 2011), the Second District Court of Appeal held that the City of Los Angeles was not required to discuss the impact of sea level rise as a result of global climate change on a proposed mixed-use development project.

(*Ballona Wetlands Land Trust, et al. v. City of Los Angeles* (2009) ___ Cal.App.4th ___ (Nov. 9, 2011, Case No. B231965).)

The court restated its prior conclusion that “the purpose of an EIR is to identify the significant effects of a project on the environment, not the significant effects of the environment on the project.” (See *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 905.)

The court also upheld the City’s determination that the project site would not be subject to inundation as a result of sea level rise, finding substantial evidence in the record to support the City’s determination. It should be noted that while not specifically addressed in *Ballona Wetlands*, projects located in floodplains or areas subject to inundation may remain subject to CEQA’s mandate that environmental impacts of projects be identified, analyzed, and mitigated if the project may have an impact on the physical environment, such as by causing a diversion of floodwaters due to new construction.

The court joined the Fourth District Court of Appeal in declaring Section 15126.2 and portions of the Appendix G checklist unauthorized and therefore invalid. On June 30, 2011, the Fourth District similarly rejected a challenge related to general plan and zoning amendments to allow more intensive residential development, holding that the impact of noxious odors on future residents of the development was not a potentially significant environmental impact of the development project. (*South Orange County Wastewater Authority v. City of Dana Point* (2011) 196 Cal.App.4th 1604, 1614-1618.) Both District Courts of Appeal affirmed agreement with the more than fifteen-year-old decision in *Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464.

It is anticipated that one or more of petitioners in the case will petition the California Supreme Court for review. As the scope of environmental review and analysis under the California Environmental Quality Act (“CEQA”; Pub. Resources Code, §§ 21000 et seq.) seems to be ever-expanding, CEQA practitioners across disciplines have long sought judicial clarification on the issue presented in *Ballona Wetlands* to inform their preparation of EIRs. While review by the Supreme Court is a matter of discretion and therefore not guaranteed, this case does

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present an opportunity for the Court to resolve an important question of law.

Case Summary

The Ballona Wetlands Land Trust, Anthony Morales, Surfrider Foundation, and Ballona Ecosystem Education Project (“BEEP”) challenged the City of Los Angeles’ certification of a revised EIR for the Playa Vista phase two project. The project, which is located south of Marina del Rey within the City of Los Angeles, is known as the Village. Phase one of the project is home to affordable and luxury housing, office and commercial space, and open space and recreational amenities.

The City first completed and certified a final EIR for the phase two project in April 2004. Various parties, including Ballona Wetlands, challenged the City’s certification of the original EIR and the project approvals. After several years of litigation, the City was ordered to vacate its certification of the EIR and project approvals, and to revise the EIR to remedy three identified deficiencies. The City complied with the order and revised and supplemented the EIR. The draft EIR circulated for public comment in January 2009 included a new section discussing the impacts of global climate change, and revised sections relating to land use, archaeological resources, and wastewater. The revised EIR was certified and the project approved in the spring of 2010, and the City filed a return to the writ of mandate stating that it had complied with the court’s 2008 order. Ballona Wetlands filed objections to the return, and BEEP filed a new petition for writ of mandate challenging the certification of the revised EIR and project approvals. The cases were consolidated at the trial court level.

Ballona Wetlands and BEEP specifically challenged the adequacy of the EIR’s project description, analysis of archaeological resources and sea level rise resulting from global climate change, and the finding of no significant impact on land use consistency. They also challenged an award of costs to the City and the real party in interest, Playa Capital Company, LLC.

The revised EIR included a new section on global climate change that addressed the project’s contribution to the cumulative impact of global climate change through its greenhouse gas emissions. The revised EIR also noted that global warming could result in a rise in sea level and the inundation of coastal areas. Ballona Wetlands argued, first in comment letters and then in litigation, that the EIR was inadequate because it failed to address the impacts of sea level rise resulting from global climate change.

The court addressed the proper scope of an EIR’s environmental impact analysis, finding that Section 15126.2(a) of the CEQA Guidelines mandates environmental review in a manner inconsistent with CEQA’s legislative purpose and not required by CEQA. Section 15126.2(a) provides, in pertinent part:

The EIR shall also analyze any significant environmental effects the project might cause by bringing development and people into the area affected. For example, an EIR on a subdivision astride an active fault line should identify as a

significant effect the seismic hazard to future occupants of the subdivision. The subdivision would have the effect of attracting people to the location and exposing them to hazards found there. Similarly, the EIR should evaluate any potentially significant impacts of locating development in other areas susceptible to hazardous conditions (e.g., floodplains, coastlines, wildfire risk areas) as identified in authoritative hazard maps, risk assessments or in land use plans addressing such hazards areas.

The court found Section 15126.2's requirement to identify the effects on the project and its users of locating the project in a particular environmental setting inconsistent with and unauthorized under CEQA. Guidelines provisions that are unauthorized by CEQA are invalid.

The court also rejected certain questions included in the CEQA Guidelines Appendix G checklist that concern the exposure of people or structures to environmental hazards because those questions could be construed to seek information about the effects on users of the project and structures in the project of preexisting environmental hazards.

On the substantive climate change issues that the court determined were properly within the scope of CEQA's mandated environmental review, the court concluded that the EIR's discussion of climate change impacts, including impacts of the project on the surrounding area, was adequate.

With respect to the EIR's analysis of archaeological resources, the court determined that the revised EIR adequately discussed preservation in place as the preferred manner to mitigate impacts on historic archaeological resources. (See CEQA Guidelines, § 15126.4(b)(3).) The court rejected petitioners' land use consistency arguments on the grounds that the claims were barred by res judicata because they could have been asserted before the entry of judgment in the prior proceeding and the material facts have not changed.

Lastly, the court confirmed that the City and real party in interest were prevailing parties in the 2010 proceedings and judgment, and were entitled to recover their costs. The court rejected Ballona Wetlands and BEEP's claims that they were prevailing parties because they successfully petitioned for a writ of mandate.

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