CEQA Year In Review 2013

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A Summary of Published Appellate Opinions Under CEQA

By Steve Kostka, Barbara Schussman, Julie Jones, Marc Bruner & Christopher Tom

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INTRODUCTION AND OVERVIEW

The published court decisions in 2012 reflected a heightened recognition that CEQA does not require perfection, but rather a reasonable effort to provide environmental information that actually will be useful to agency decision-makers. This trend continued for the most part in 2013, with a number of cases emphasizing the discretion afforded to lead agencies when conducting CEQA reviews.

The Supreme Court ruled that a lead agency may, in appropriate circumstances, use a future environmental baseline to evaluate a project's impacts. This ruling rejects the notion that the environmental baseline must be defined in all cases by existing conditions—a notion spawned by two recent appellate decisions that had caused considerable confusion in recent years over how to make an accurate and meaningful assessment of a project's long-term traffic and air quality effects.

Another case ruled that a lead agency has the discretion to formulate its own project-specific significance thresholds. This ruling emphasized that the thresholds in Appendix G to the CEQA Guidelines are only suggestions rather than rigid requirements.

A number of other cases refused to second guess the analysis in an environmental impact report, including the methodology the agency uses and the judgments it makes in assessing impacts, as well as the conclusions it reaches based on the data in the administrative record. Several decisions made it clear that an agency does not impermissibly defer mitigation merely because it leaves to future resolution the precise details over how the mitigation measures will be implemented.

The decisions also illustrate the heavy burden project opponents must meet to demonstrate there is significant new information requiring recirculation or supplementation of an EIR. The cases on supplemental review reinforce the significant streamlining benefits of relying on previously completed program EIRs in issuing new project-specific approvals.

Several cases emphasized the principle that there is no project "approval" triggering CEQA review until the agency makes a definite commitment regarding the project, even if agency officials have expressed support for the project or the details of the proposed development are well defined. Even where courts found that an agency approved a project without conducting an adequate CEQA review, in two instances courts allowed the challenged agency action to stand pending compliance with CEQA's requirements. The courts also are showing an increasing willingness to rely on the "harmless error" doctrine to uphold project approvals in the face of minor CEQA defects. These cases illustrate the discretion and flexibility that courts have in shaping CEQA remedies when violations are found.

The cases also continue to adhere to a strict interpretation of the statutes of limitations for bringing CEQA challenges, although one case adopted a more lenient reading of CEQA's requirement to request a hearing date after a case is brought.

On the other side of the ledger, one case held that offsite agricultural easements constitute feasible mitigation for projects that convert farmland to development, creating a conflict with a 2012 decision that reached the opposite conclusion. Another case held that impacts on parking qualify as an effect on the environment, disagreeing with a prior court's conclusion that such impacts are merely social rather than environmental. Another case faulted an EIR for a climate change analysis that failed to measure the increase in greenhouse gas emissions that the project would cause as compared to preexisting conditions.

The cases also highlight the strict procedural and administrative rules that agencies must follow when conducting their CEQA reviews. For example, agency decision-makers may not delegate to a lower body the authority to certify an EIR where that body lacks the authority to approve or disapprove the project. Agencies must also provide public notice of a proposed decision to adopt or certify a CEQA document for a project, in addition to the notice required for the agency's proposed decision on whether to approve the project. In another important technical ruling, a court held that the "common interest" doctrine does not protect from public disclosure communications between the agency and the project proponent before the project is approved.

CEQA has long been a focal point of judicial attention and this trend seems to be intensifying, with five CEQA cases now pending before the California Supreme Court. The issues range from the applicability of CEQA to a city's adoption of an ordinance enacting a voter-sponsored initiative; to the proper interpretation of the "unusual circumstances" exception to CEQA's categorical exemptions; to the scope, feasibility, and adequacy of mitigation; to whether CEQA is limited to an evaluation of the impacts caused by the project or instead also includes impacts ***on*** the project from existing environmental conditions.

CONTENTS

San Diego Citizenry Group v. County of San Diego, 219 Cal. App 4th 1 (2013)

Save Panoche Valley v. San Benito County, 217 Cal. App. 4th 503 (2013)

Masonite Corporation v. County of Mendocino, 218 Cal. App. 4th 230 (2013)

Neighbors for Smart Rail v. Exposition Metro Line Construction Authority, 57 Cal. 4th 439 (2013)

Friends of Oroville v. City of Oroville, 218 Cal. App. 4th 1352 (2013)

California Clean Energy Committee v. City of San Jose, 220 Cal. App. 4th 1325 (2013)

Recirculation

South County Citizens for Smart Growth v. County of Nevada, 221 Cal. App. 4th 316 (2013)

Supplemental CEQA Review

Concerned Dublin Citizens v. City of Dublin, 214 Cal. App. 4th 1301 (2013)

Latinos Unidos de Napa v. City of Napa, 221 Cal. App. 4th 192 (2013)

CEQA Litigation

Citizens for Ceres v. Superior Court, 217 Cal. App. 4th 889 (2013)

Alliance for the Protection of the Auburn Community Environment v. County of Placer, 215 Cal. App. 4th 25 (2013)

May v. City of Milpitas, 217 Cal. App. 4th 1307 (2013)

San Joaquin Raptor Rescue Center v. County of Merced, 216 Cal. App. 4th 1167 (2013)

Save the Plastic Bag Coalition v. County of Marin, 218 Cal. App. 4th 209 (2013*)*

POET LLC v. California Air Resources Board, 218 Cal. App. 4th 681 (2013)

Golden Gate Land Holdings LLC v. East Bay Regional Park District, 215 Cal. App. 4th 353 (2013)

San Diego Citizenry Group v. County of San Diego, 219 Cal. App. 4th 1 (2013)

Comunidad en Accion v. Los Angeles City Council, 219 Cal. App. 4th 1116 (2013)

Cases Pending Before the Supreme Court

Tuolumne Jobs & Small Business Alliance v. Superior Court
Supreme Court No. S207173 (Review granted December 7, 2012)

Berkeley Hillside Preservation v. City of Berkeley
Supreme Court No. S201116 (Review granted May 23, 2012)

City of San Diego v. Board of Trustees of California State University
Supreme Court No. S199557 (Review granted Apr. 18, 2012)

City of Hayward v. Board of Trustees of California State University
Supreme Court No. S203939 (Review granted Oct. 17, 2012)

California Building Industry Ass'n v. Bay Area Air Quality Management District
Supreme Court No. S213478 (Review granted Nov. 26, 2013)

A. WHEN DOES CEQA APPLY?

1. EXECUTION OF A PRE-DEVELOPMENT LOAN, INITIATION OF ZONING, AND COMMUNICATIONS SUPPORTING A PROJECT DID NOT CONSTITUTE PROJECT APPROVAL

***Neighbors for Fair Planning v. City and County of San Francisco,* 217 Cal. App. 4th 540 (2013)**

When does agency support for a project rise to the level of a project approval triggering CEQA review? Courts have continued to grapple with this question since the California Supreme Court's decision in *Save Tara v. City of West Hollywood,* 45 Cal. 4th 116 (2008), a case in which the Court declined to articulate a bright line rule, instead announcing a case-by-case test that balances competing factors.

In *Neighbors for Fair Planning v. City and County of San Francisco*, the court of appeal applied the *Save Tara* balancing test to a series of actions the San Francisco Board of Supervisors and Mayor's Office of Housing took before final approval of an affordable housing and community center project. Those actions included the execution of a loan agreement for predevelopment activities; the initiation of a zoning ordinance to increase height and density limits; statements by a supervisor supporting the project; and staff efforts to assist with the project design.

The court explained that the key question under *Save Tara* is whether the agency's actions further the project "in a manner that forecloses alternatives or mitigation measures" that would ordinarily be part of CEQA review for the project. Here, they did not.

Prior to CEQA review and project approval, the Mayor's Office of Housing executed a loan agreement with the project proponent that was limited to predevelopment studies—design work, surveys, appraisals, environmental review, and associated legal expenses. The predevelopment studies did not commit the city to approve the project, and the agreement said as much. Unlike the loan at issue in *Save Tara*, the agreement required the developer to repay the loan regardless of whether the city ultimately approved the project. More importantly, the loan authorized no physical changes to the environment, in sharp contrast to the agreement in *Save Tara*, which had contemplated relocating existing residents before the CEQA review.

Nor did introducing an ordinance constitute a decision to approve a zoning change for the project. Approval means the decision by a public agency that "commits the agency to a definite course of action" with regard to the project. The exact date of approval is a matter determined by a public agency according to its rules and regulations. In this case, the city charter specified that the board of supervisors could act only by written ordinance or resolution, which requires the vote of a majority of its members. Approval occurred once the vote was taken – two months after the city certified an environmental impact report – not at the initial introduction of the ordinance.

Finally, the project opponents pointed to a handful of notes, email messages and communications indicating city support for the project. The court had no trouble rejecting all of them as insufficient to trigger CEQA, including the strongest of the bunch – an email from an individual supervisor indicating she supported the project and would initiate the zoning change. In the court's words, "one supervisor's advocacy for the Center's expansion is not equivalent to action, let alone approval." Similarly, the court considered involvement by city staff in the project's design "neither unusual, suspicious, nor demonstrative of preapproval."

The case demonstrates that agency support for a project will not violate CEQA as long as the agency retains full discretion to consider mitigation measures and alternatives, including the alternative of rejecting the project, during the CEQA process.

2. COUNTY MAY SUBMIT APPLICATION FOR STATE FUNDING PRIOR TO CEQA REVIEW

***City of Irvine v. County of Orange*, 221 Cal. App. 4th 846 (2013)**

In December 2011, the Orange County Board of Supervisors passed a resolution authorizing the county to submit an application for $100 million in state funding to expand the James A. Musick Jail Facility to add over 500 beds. The City of Irvine, which sits adjacent to the jail, filed a lawsuit alleging that the county failed to comply with CEQA before submitting the application. The court of appeal rejected the city's challenge, ruling that the county's application did not constitute an "approval" of a project under CEQA.

Based on the balancing test established by the Supreme Court in *Save Tara*, the court of appeal concluded that the state funding application did not effectively commit the county to proceed with the expansion. Emphasizing the distinction between "advocating or proposing a project" and "committing to it," the court explained that a commitment that triggers CEQA must preclude or foreclose alternatives or mitigation measures that CEQA otherwise would require the agency to consider.

The court found the county retained all of its discretion under CEQA to consider alternatives and mitigation measures. Based on a review of the legal provisions governing the state prison funding program, the court determined that the submission of an application "was merely a preliminary step" in the process. In particular, the court explained that the state's initial approval of an application was only a "conditional award," which did not guarantee any funding and only meant the applicant was qualified to move forward to the next phase of the process. The state program expressly required a number of additional steps following issuance of a conditional award to secure the funding, including CEQA review. The court therefore concluded that the application "committed the County to nothing."

In reaching this conclusion, the court rejected the city's claim that the county's application triggered CEQA due to its high level of detail. The court stated:

> The amount of detail or the advanced stage of the project's design, however, covers only part of the analysis for determining whether an agency's action constitutes an approval under CEQA. An approval under CEQA requires both a definite course of action and a commitment to that definite course of action.

Because the county's application involved no commitment, there was no approval and thus no requirement yet for CEQA review.

B. EXEMPTIONS

1. PLASTIC BAG BAN FOUND EXEMPT FROM CEQA REVIEW AS AN ACTION TO PROTECT THE ENVIRONMENT

***Save the Plastic Bag Coalition v. County of Marin*, 218 Cal. App. 4th 209 (2013)**

A county's plastic bag ban has been held exempt from CEQA review. As in *Save the Plastic Bag Coalition v. City of Manhattan Beach,* 52 Cal. 4th 155 (2011) – a negative declaration case decided by the Supreme Court – the plastic bag industry was unable to persuade decision-makers that plastic bag bans actually harm rather than help the environment and, therefore, that such a ban necessitated an EIR.

Marin County's ordinance prohibits certain retailers in unincorporated areas of the county from dispensing single-use plastic bags, and requires a charge of at least five cents for dispensing a single-use paper bag. The county found the ordinance exempt from CEQA, citing categorical exemptions for actions taken by regulatory agencies to assure the maintenance, restoration, or enhancement of "a natural resource" (Class 7) or "the environment" (Class 8).

While disavowing any blanket exemption from CEQA for plastic bag bans, the court readily dismissed the challenge in this case. In the *Manhattan Beach* case, the Supreme Court emphasized that "common sense" supported the city's conclusion that a plastic bag ban affecting more than 200 retailers was simply too small to cause significant environmental impacts, even if the ban caused consumers to turn to single-use paper bags. Because Marin County's ban would affect only 40 retailers, the court of appeal had no difficulty upholding the county's use of an exemption here.

The petitioner attempted a novel argument that "regulatory" actions and "legislative" actions are mutually exclusive categories, CEQA's Class 7 and 8 exemptions apply only to "regulatory" actions, and therefore the exemptions did not apply to the plastic bag ordinance, which was "legislative." The court rejected this argument, noting that neither CEQA nor the California Constitution supported it.

This case, along with the California Supreme Court's decision in *Manhattan Beach,* indicates an increased willingness by the courts to reject CEQA attacks on measures designed to provide environmental benefits.

C. NEGATIVE DECLARATIONS

1. POSSIBILITY OF INCREASED TRAFFIC AND PARKING IMPACTS FROM NIGHTTIME FOOTBALL GAMES NECESSITATED EIR FOR STADIUM PROJECT

***Taxpayers for Accountable School Bond Spending v. San Diego Unified School District,* 215 Cal. App. 4th 1013 (2013)**

A school district approved a mitigated negative declaration for a project involving improvements to a school stadium, including bleacher replacement and field lighting. The petitioners claimed an EIR was required based on potentially significant traffic, parking and lighting impacts. The court of appeal agreed in part, finding an EIR was required as substantial evidence showed the possibility of significant traffic and parking impacts resulting from the stadium project.

The court found installation of field lighting for evening games would not have a significant environmental effect. Although acknowledging that some residents would be affected by light and glare exceeding the established threshold of significance – resulting in potential sleep disruption – the court upheld the finding that this impact was less than significant because of the limited hours of evening lighting, the limited number of evening events, and the limited number (approximately seven) of affected residences.

As to the traffic analysis, however, the court found that the MND should have calculated a "baseline" attendance record for afternoon games and then compared that baseline to expected attendance at evening games. The court also faulted the MND's calculation of anticipated attendance because it was based on average evening attendance at five schools without explaining why three other schools with stadium lighting were excluded from the analysis. The court, emphasizing the "general consensus" that evening football games will increase traffic, concluded that "any traffic problems experienced in the past logically will only be exacerbated if the Project is completed." As a result, substantial evidence supported a fair argument that the project could have a significant impact on traffic, necessitating an EIR.

As to parking impacts, the court disagreed with the statement in *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco,* 102 Cal. App. 4th 656 (2002), that a parking shortage amounted to a social inconvenience rather than an environmental impact. The court next found that the MND's failure to establish a baseline attendance number precluded an informed assessment of the project's adverse impact on parking in the area. The court observed that personal observations by local residents about parking impacts were sufficient to support a fair argument that the project could have a significant impact on traffic.

The court of appeal accordingly directed the superior court to issue a writ of mandate ordering the school district to vacate its project approval and prepare an EIR.

2. PRIOR ONSITE SOIL CONTAMINATION DOES NOT AUTOMATICALLY NECESSITATE PREPARATION OF AN EIR

Parker Shattuck Neighbors v. Berkeley City Council,
1st Dist. No. A136873 (Nov. 7, 2013; Ordered published Dec. 4, 2013)

Proposals to redevelop infill sites often present difficult issues regarding how the potential effects of preexisting contamination should be evaluated under CEQA. In *Parker Shattuck*, the court made it clear that – without evidence showing a significant environmental impact might occur – the fact that a development site might contain contaminated soil is not, standing alone, enough to necessitate an EIR.

The project opponents challenged a mitigated negative declaration the city adopted for a mixed-use development comprising 155 residential units and 20,000 square feet of commercial space. Soils on the site had been contaminated by petroleum leaking from underground storage tanks. But after removal of 75 tons of contaminated soil, the Regional Water Quality Control Board issued a closure letter stating that no further corrective action was needed. The opponents nevertheless contended an EIR was required, claiming that excavating and disturbing contaminated soil on the site might have a significant adverse effect on construction workers and future project residents. The court of appeal disagreed, and upheld the city's determinations.

The court first rejected the argument that an EIR was automatically required simply because the site remained on the state's "Cortese list" of potentially contaminated sites. The court reasoned that since a site may stay on the Cortese list even after a determination that no further remediation is required, developing a site on the list does not invariably involve a significant environmental effect.

The court also rejected the opponents' claim that an EIR was required because of their expert's suggestions that a vapor-intrusion study was needed. The expert had asserted that project residents might be at risk because vapors from hydrocarbons remaining in the soil could travel through the soil into the buildings, exposing them to polluted air. The court found the expert's opinion insufficient "because a suggestion to investigate further is not evidence, much less substantial evidence, of an adverse impact." The court also was not persuaded by the expert's contention that soil contamination might put construction workers at risk, as the expert did not explain why this was so, but instead simply claimed the past contamination "should lead to further investigation."

D. ENVIRONMENTAL IMPACT REPORTS

1. USE OF PROJECT-SPECIFIC SIGNIFICANCE THRESHOLDS DOES NOT VIOLATE CEQA

***Save Cuyama Valley v. County of Santa Barbara,* 213 Cal. App. 4th 1059 (2013)**

In *Save Cuyama Valley v. County of Santa Barbara*, the court of appeal strongly endorsed a lead agency's authority to use its own, project-specific significance thresholds in an EIR. In addition, the court upheld the county's project approval despite finding that one of the EIR's impact findings was erroneous.

The county prepared the EIR for a proposal to mine sand and gravel in the bed of the Cuyama River. The EIR used a significance threshold for river bed and bank impacts that the county had crafted specifically for the project. In upholding this project-specific significance standard, the court emphasized that:

- CEQA gives lead agencies discretion to develop their own significance thresholds.
- Agencies may devise significance thresholds on a project-by-project basis.
- CEQA requires that a lead agency formally adopt a threshold of significance only if it is for "general use" in evaluating future projects.
- The significance thresholds listed in Appendix G to the CEQA Guidelines are only "suggested" and an EIR need not explain why different thresholds are used.

In another important ruling, the court rejected a claim that the county's project approval was fatally flawed, even though the court agreed with the project opponent that the EIR wrongly concluded that the project's impact on groundwater quality would be less than significant. The court found that the premise for the EIR's conclusion—that groundwater would rarely be exposed by mining operations—was not adequately supported by the data. But the court also found no showing that the error hampered informed decision-making about the project. One of the county's conditions of project approval required the mine operator to avoid excavating near the groundwater level and to backfill any pit in which groundwater was exposed. Because the EIR set forth the relevant data, and the condition of approval would negate any adverse impact on groundwater quality from the project, the court concluded that the EIR's unsupported conclusion about the impact's significance was "of no moment."

At a time when the proper role of the environmental impact checklist in Appendix G to the CEQA Guidelines is facing heightened scrutiny, the decision in *Save Cuyama Valley* is an important reminder that the significance thresholds in Appendix G are only "suggestions" —and that lead agencies have the ultimate responsibility for determining what thresholds to use in the environmental documents they prepare.

The court's ruling also is notable for upholding the project approval despite the error in the analysis of groundwater impacts, as it reflects the courts' increasing willingness to consider whether flaws in an EIR should be treated under CEQA as harmless error.

2. PROJECT OBJECTIVES ARE UPHELD UNDER CEQA, BUT ALTERNATIVES ANALYSIS IS INVALID

***Habitat & Watershed Caretakers v. City of Santa Cruz,* 213 Cal. App. 4th 1277 (2013)**

In 2008, the City of Santa Cruz and the University of California settled litigation challenging the University's long-term development plan for expanding the UC Santa Cruz campus. A key provision of the settlement agreement required the city to seek approval from the Local Agency Formation Commission for providing water and sewer service to the part of the planned campus expansion outside the city's boundaries. The city then prepared an EIR for the LAFCO to use in issuing its approval.

Project opponents sued, raising a host of claims under CEQA. In an opinion published in November 2012, the court of appeal ruled that the project objectives were invalid because they failed to provide an accurate description of the project's underlying purpose. According to the court, the project objectives presented in the EIR—which stated that the project was designed merely to implement the settlement agreement and obtain the necessary LAFCO approvals—did not reveal the real purpose of the project, which was to provide water and sewer service to parts of the expanded campus.

But the court then withdrew its opinion and filed a new decision after rehearing. The court changed its ruling on the project objectives, emphasizing that the Final EIR corrected the problem caused by the Draft EIR by revising the objectives to disclose the project's true purpose.

Although the court upheld the project objectives, it adhered to its prior ruling that struck down the EIR's analysis of project alternatives. The court faulted the EIR for failing to evaluate an alternative that would use less water than the proposed project.

The city and UC unsuccessfully argued that an evaluation of this alternative was not required under CEQA. They claimed that the alternative would not avoid significant impacts on water supplies resulting from the campus expansion, since UC could simply expand other areas of the campus already within the city's water service area, thereby resulting in the same amount of water use without the need for any LAFCO approvals. In rejecting this claim, the court emphasized that these issues should have been discussed and analyzed ***in the EIR***. The court concluded:

> CEQA does not permit a lead agency to omit any discussion, analysis, or even mention of any alternatives that feasibly might reduce the environmental impact of a project on the unanalyzed theory that such an alternative might not prove to be environmentally superior to the project.

3. JUDICIAL REVIEW OF ENVIRONMENTAL IMPACT REPORTS: APPLYING THE DEFERENTIAL SUBSTANTIAL EVIDENCE TEST

North Coast Rivers Alliance v. Marin Municipal Water District, 216 Cal. App. 4th 614 (2013)

The trial court in *North Coast Rivers* put the EIR a water district had prepared for a desalination project under a microscope, finding its treatment of eleven separate issues "inadequate." In reversing the trial court's decision, the court of appeal upheld the EIR based on a straightforward application of CEQA's "substantial evidence" standard of review, which requires judicial deference to the agency's factual findings and policy determinations.

An agency may use AB 32 greenhouse gas reduction targets as a significance threshold. The trial court found invalid the EIR's conclusion that the project's greenhouse gas emissions would not be cumulatively considerable. In reversing, the court of appeal upheld the adequacy of the significance threshold the water district used, which was based on AB 32 standards. The EIR analyzed whether the project's power use would interfere with the county's goal of reducing countywide GHG emissions by 15 percent, in comparison with 1990 levels, by the year 2020. The EIR concluded the project would not interfere with achieving that goal. This analysis, the appellate court found, "more than satisfied the requirements of CEQA."

An EIR's description of the environmental setting is sufficient if it provides the overall context for the impact analysis. The trial court found the EIR's description of the environmental setting deficient, criticizing its description of the age, types and population of the aquatic species in the area likely to be affected by the project. The court of appeal disagreed. First, the court of appeal noted that the EIR's description of the environmental setting was based on water sampling during the most critical periods of the year, a year-long study in the planned intake and discharge zones, and decades of data. Second, the court summarized the information the EIR provided on the life stages of relevant species, spawning and migration patterns, types of

aquatic habitats in the area, and the organisms found in those habitats. Looking at this information as a whole, the court of appeal concluded the EIR's description of the environmental setting was "more than adequate."

The significance of aesthetic impacts is a judgment call for the agency. The EIR found that one of the project's ridge-top water storage tanks would not significantly degrade the visual character of the area. Reversing the trial court's ruling that this finding was not adequately supported, the court of appeal determined that the EIR's detailed discussion and analysis provided sufficient evidence that the tank would not be visible from most vantage points, and would not be visually imposing from others. The appellate court further explained that it was up to the water district to decide, as a matter of policy, whether to classify the visual impact as significant or not in light of the setting.

A pilot study by a qualified expert may be used to support an EIR's impact findings. The EIR found that wastewater discharges would not adversely affect water quality, as the wastewater would be treated to comply with discharge limitations on toxic contaminants and other pollutants. Despite the EIR's detailed analysis and responses to comments, the trial court found inadequate the EIR's discussion of the impacts from periodic use of chlorine to clean bio-fouling organisms (primarily barnacles and mussels) from the seawater intake system. Once again, the court of appeal found the trial court got it wrong. The EIR's conclusions were fully supported by an expert report, based upon a year-long pilot study, which found that the cleaning process could be operated safely and would not cause toxicity in receiving waters.

An EIR need not follow standard protocols recommended by regulators in studying an impact. The trial court concluded that the methodology used to study entrainment of aquatic organisms in the plant's water intake was deficient because the water district did not follow the recommendations of the California Department of Fish and Wildlife and National Marine Fisheries Service regarding the amount of water sampling that should be conducted. Reviewing the extensive evidence in the record, the court of appeal concluded that the trial court's ruling failed to afford the proper deference to the water district under the substantial evidence standard of review, which applies to disagreements over the methodology for studying an impact. The trial court thus erred by substituting its judgment for that of the agency in determining the appropriate methodology.

An EIR need not discuss consistency with the applicable general plan, only any inconsistency with the plan. The trial court found the EIR did not contain an adequate discussion of general plan policies that might be "affected" by one of the project's storage tanks. Again, the court of appeal disagreed. The CEQA Guidelines require only that an EIR identify and discuss any ***inconsistencies*** between the project and the governing general plan. The trial court's ruling conflicted with the Guidelines by requiring the EIR to undertake a full-blown analysis of the project's ***consistency*** with the plan.

The EIR adequately addressed comments on geological impacts. According to the trial court, the EIR failed to provide sufficient information to address concerns about liquefaction and health and safety impacts related to earthquakes, particularly effects on water supply. The court of appeal, however, found no violation of CEQA. The EIR contained detailed information on geologic conditions and the potential for seismic hazards and determined that compliance with seismic design requirements would reduce seismic risks to the project's facilities to an insignificant level. According to the court, this determination was amply supported by the evidence and "nothing more was required."

An EIR need not analyze alternative ways to mitigate impacts that will be less than significant. The court of appeal also reversed the trial court's ruling that the EIR did not adequately discuss the option of using green energy credits to mitigate the project's energy consumption effects. The EIR had discussed a range of scenarios for powering the project, including purchasing green energy credits. But the EIR explained that the project would incorporate reconductoring of existing power transmission lines and that because energy would be used efficiently, energy consumption impacts would be less than significant. In light of this conclusion, the court of appeal found there was no need for further discussion of green energy credits as a mitigation measure.

Precise performance standards for mitigation are not required. The EIR identified landscaping to mitigate the visual impacts of two of the project's storage tanks. The mitigation called for the water district to work with a landscape architect to develop a landscaping plan "that will soften the visual intrusion of the tanks and identify success metrics such as survival and growth rates for the plantings." The trial court disapproved the mitigation, finding (among other things) it did not contain criteria for evaluating the plan's adequacy and the objective to "soften" the tanks' "visual intrusion" was too vague and indefinite. In upholding the mitigation, the court of appeal reasoned that the stated performance standard, coupled with the commitment to implement the landscaping plan and to monitor and maintain the landscaping, provided sufficient assurance that the mitigation would occur.

Leaving the specifics of mitigation to be developed in consultation with a regulatory agency is not an improper deferral. To mitigate the noise impacts on sensitive aquatic species from pile driving in San Rafael Bay, the water district adopted a measure calling for consultation with the National Marine Fisheries Service regarding steps to protect fish, which "normally include specifying allowable seasonal work windows" and "use of physical attenuators such as air bubble curtains." The trial court ruled this measure "impermissibly defers" identification of the specifics. In reversing this ruling, the appellate court found the required consultation under the Endangered Species Act about ways to avoid a "take" of protected fish species sufficed to ensure effective mitigation. The court noted that no impermissible deferral occurs where a regulatory agency is expected to impose mitigation requirements independent of CEQA and the EIR includes both performance standards and a commitment to mitigate.

A Final EIR's consideration of a new alternative that is rejected as infeasible does not trigger a duty to recirculate the EIR. In response to comments, the Final EIR added an alternative involving construction of a pipeline to deliver water from the Russian River along with additional conservation measures. The trial court ruled recirculation of the EIR was required, finding that this alternative represented a "significant new feasible solution to the project objectives." The court of appeal yet again faulted the lower court for ignoring the applicable standard of review, and for "conducting its own water supply and calculation and analysis." In upholding the water district's decision not to recirculate the EIR, the court of appeal found substantial evidence in the record supported the district's conclusions that the availability of additional water from the river was highly uncertain, that the district did not have enough carry-over storage capacity, and that increased reliance on water from the river would not achieve the district's objective of diversifying its water portfolio.

***San Diego Citizenry Group v. County of San Diego*, 219 Cal. App 4th 1 (2013)**

San Diego County's decision to permit visitor-serving wineries by right survived a CEQA challenge. Deferring to the county's decision to encourage such wineries – despite their unavoidable environmental impacts – the court upheld the county's EIR evaluating zoning changes to eliminate the requirement to obtain a use permit.

As of 2006, all visitor-serving wineries in two county agricultural zones required discretionary conditional use permits. The county's board of supervisors decided to encourage winery development. After a four-year process, the county adopted zoning and general plan amendments allowing boutique wineries by right, without a discretionary zoning permit, and thus without further environmental review unless the winery activity necessitated some other type of discretionary approval. The ordinance imposed many restrictions on the wineries, including minimum local grape requirements, parking requirements, and prohibitions on parties and amplified music. Despite these restrictions, the county's EIR identified 22 significant unavoidable environmental impacts to air quality, biological resources, cultural resources, hydrology and water quality, noise, transportation and water supply.

The petitioner first claimed the county board of supervisors had not made a "preliminary policy determination" regarding the project objectives at the beginning of the CEQA process, and therefore the drafters of the EIR could not rely on the EIR's stated project objectives. The court rejected this argument, noting that the board of

supervisors had in fact specifically directed staff to develop an ordinance that would include, among other uses, "By-Right Boutique Wineries."

Focusing on this project objective, the court dismissed the petitioner's challenges to the EIR's discussion of mitigation measures and alternatives, holding that the EIR was not required to examine any mitigation or alternative that would defeat the objective of encouraging the wine industry by streamlining the approval process and permitting boutique wineries by right.

The court also upheld the adequacy of the EIR's analysis of traffic and water supply impacts. Ruling that an EIR for a large scale zoning amendment need not be as specific as an EIR for a particular development project, the court found that the EIR's effort to predict future winery growth based on survey data was adequate, as was the EIR's projection of traffic generation from wineries, which was based on data from three existing wineries in the region.

As for water supply, the court rejected the argument that the EIR's analysis did not meet the standard set by the California Supreme Court in *Vineyard Area Citizens for Reasonable Growth v. City of Rancho Cordova*, 40 Cal. 4th 412 (2007). According to the court, a "conceptual" EIR—such as for a general plan amendment or a county-wide zoning amendment—"meets *Vineyard's* requirements by identifying the likely source of water for new development, noting the uncertainties involved, and discussing measures being taken to address the situation in the foreseeable future." The court found that the EIR satisfied this standard by describing the use of water by existing grape growers and winery operators and extrapolating from this information, by discussing projected declines in agricultural use in the area, by discussing how grapes use less water than other crops, and by considering relevant information from other counties. The court thus upheld the EIR's water supply analysis, even though the county could not predict precisely how many by-right wineries might develop and even though unmitigated significant impacts to water supplies might occur.

***Save Panoche Valley v. San Benito County*, 217 Cal. App. 4th 503 (2013)**

This case gives a boost to utility-scale solar projects by rejecting the types of Williamson Act and CEQA challenges that often are brought against those projects.

The case concerns the Panoche Valley Solar Farm, a solar photovoltaic facility in San Benito County. The project site had been used primarily for cattle grazing, and most of it was under Williamson Act contracts. The county approved a reduced-scale 399-MW alternative designed to mitigate the environmental impacts of the project as proposed. Not satisfied, three local environmental groups sued to challenge the approval. The court of appeal rejected each of their claims.

The need for renewable energy supported cancellation of the Williamson Act contract on public interest grounds. The Williamson Act is designed to protect farmers from the economic pressures of encroaching development. In exchange for entering into a contract with the city or county restricting the property to agricultural uses, the landowner is taxed on the agricultural value of the land rather than its fair market value (which often accounts for development potential). Here, the county cancelled the Panoche Valley contracts on public interest grounds. A public interest cancellation requires two separate findings: (1) other public concerns substantially outweigh the objectives of the Williamson Act and (2) no proximate land unprotected by a Williamson Act contract is available and suitable for the proposed use, or development of the land under a Williamson Act contract would provide a more contiguous pattern of urban development.

Citing AB 32 and the Renewables Portfolio Standard requirements enacted by the Legislature, the court had little trouble concluding that substantial evidence supported the county's finding that the public interest in renewable energy outweighed the purpose of the Williamson Act. The court stated: "Though completion of the solar project by itself will not fulfill the state's renewable energy goals, each additional renewable energy project helps the state advance toward meeting the requirements of the RPS."

The court next ruled that substantial evidence supported the county's finding that there was no proximate non-contracted land suitable for the proposed use. The court explained that "proximate" land under the Williamson Act means "property close enough to the restricted parcel to serve as a practical alternative for the proposed use." The court thus rejected the opponents' claim that another potential solar project site was a proximate alternative. The evidence showed the alternative site was located approximately 60 miles away, in two different counties, was itself encumbered by Williamson Act contracts, and did not appear to be available in any event.

The EIR's mitigation for biological impacts was legally adequate. The court ruled that the EIR did not improperly defer the analysis or mitigation of biological impacts. The EIR called for a protocol survey for the blunt-nosed leopard lizard before construction and a 22-acre buffer zone for each individual found, which represented an area determined by a biological study to be the largest home range of the lizard. Other mitigation measures required preconstruction surveys for birds, a survey if active nests were found, and a 300-foot buffer around the nests. Preconstruction surveys, and relocation of any individuals found, were required for the San Joaquin coachwhip and coast horned lizard. Similar measures were imposed for other species.

The court found the measures adequate. According to the court, the mitigation did not call for simply adopting the recommendations of a future survey, which would have been an improper deferral. Rather, the mitigation identified specific actions to be taken upon discovery of protected species.

The EIR's reliance on conservation easements was adequate. The court also weighed in on the debate over whether conservation easements, which some argue only preserve the status quo, can serve as effective mitigation. The court found sufficient evidence to support the county's determination that biological and agricultural impacts would be adequately mitigated by measures that included conservation easements.

In discussing biological impacts, the court acknowledged the petitioners' opinion that the measures would not decrease the project's impacts, but found substantial evidence supported the county's determination that the measures constituted adequate mitigation. Citing an earlier judicial decision, the court noted the "mitigation need not account for every square foot of impacted habitat to be adequate" and found sufficient evidence in the record "that conservation of habitat through easements and other methods would mitigate the impact on the biological resources to a less than significant level."

With respect to agricultural impacts, the court ruled that CEQA's definition of mitigation "does not necessarily mandate that the County is tasked with creating new habitats." It noted that the EIR called for creation of conservation easements, while also requiring the developer to restore the site and return the agricultural soils to their original condition at the end of the project's useful life. The court ruled these measures were sufficient, stating: "The goal of mitigation measures is not to net out the impact of a proposed project, but to reduce the impact to insignificant levels."

4. OFFSITE CONSERVATION EASEMENTS ARE FEASIBLE MITIGATION FOR LOSS OF AGRICULTURAL RESOURCES

***Masonite Corporation v. County of Mendocino,* 218 Cal. App. 4th 230 (2013)**

Mendocino County certified an EIR for a proposed sand and gravel quarry that would have converted prime farmland. The court of appeal struck down the county's determination that this significant impact could not feasibly be mitigated through the use of offsite conservation easements.

The EIR stated that a conservation easement on offsite lands would address only indirect and cumulative impacts resulting from the pressure created by a project to convert additional agricultural lands. But the EIR found the project was unlikely to exert such pressures for a variety of reasons, and concluded that feasible mitigation measures were not available for the direct loss of agricultural land. The EIR therefore concluded the impact from this direct loss "would be significant and unavoidable." At a public hearing on the project, county

staff added that an easement over agricultural land elsewhere was not feasible mitigation because it would not recreate the prime farmland acreage present on the project site.

The court of appeal treated the county's infeasibility finding as a determination that mitigation was *legally* infeasible, and accordingly reviewed the finding as a question of law with no deference to the county's decision. The court then ruled that an agricultural conservation easement "may appropriately mitigate for the direct loss of farmland," even though such an easement does not replace the onsite resources that will be lost to development.

The court agreed with the argument that if agricultural lands were preserved through conservation easements at a 1:1 ratio, then at least half of the agricultural land in a region would be preserved. The court also cited cases upholding the use of conservation easements as mitigation for impacts to biological resources and took note of evidence in the record, and statements in other cases, indicating that conservation easements are commonly used for mitigation purposes. It further emphasized the legislative policy in California to preserve agricultural land and quoted a legislative declaration that CEQA plays an important role in advancing this policy. It concluded that excluding conservation easements as a means to mitigate farmland conversion "would be contrary to one of CEQA's important purposes."

Remarkably, the *Masonite* court also relied upon *Citizens for Open Government v. City of Lodi*, 205 Cal.App.4th 296 (2012), a decision ***upholding*** a city's conclusion that "there were no feasible mitigation measures to avoid the loss of prime agricultural farmland because it was not possible to recreate prime farmland on other lands." In contrast with the *Masonite* decision, the *Lodi* court reviewed the city's infeasibility finding as a question of fact, not law, which required the court to uphold the finding as long as it was supported by substantial evidence. The *Masonite* court did not address these rulings and instead focused on language in other parts of the *Lodi* opinion.

The conflict between *Masonite* and *Lodi,* and the fact that disputes regarding the viability of agricultural conservation easements as mitigation are coming before the courts with increasing frequency, may draw the attention of the California Supreme Court in the future.

5. USE OF FUTURE BASELINE IN CEQA ANALYSIS APPROVED BY CALIFORNIA SUPREME COURT

***Neighbors for Smart Rail v. Exposition Metro Line Construction Authority*, 57 Cal. 4th 439 (2013)**

The California Supreme Court both resolved a split in the appellate courts and forged new law on the baselines agencies may use to assess projects' environmental effects under CEQA.

In an unusual 3-3-1 decision, the Court upheld the approval of an extension of the Los Angeles Metro rail line. A majority of the justices held that a lead agency has discretion to measure a project's impacts against a baseline of environmental conditions that are anticipated to exist far in the future and after project operations have begun. But in order to do so, the agency must "justify its decision by showing an existing conditions analysis would be misleading or without informational value." No such showing need be made, however, if an EIR uses a baseline consisting of conditions that will exist when the project ***begins*** operations rather than a later date. The decision makes it clear there is no requirement that the baseline consist of conditions existing when the environmental review begins.

The EIR analyzed traffic and air quality impacts by comparing future project conditions to estimated baseline conditions in the year 2030. The Supreme Court thus confronted the familiar problem raised by section 15125(a) of the CEQA Guidelines, which states:

> An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or . . . at the time environmental review

> is commenced. . . . ***This environmental setting will normally constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant***. (Emphasis added.)

The latter sentence has caused significant confusion in the CEQA case law, including two recent appellate decisions holding that a lead agency must always use conditions prior to project approval as the baseline for its CEQA analysis.

Faced with the "counterfactual" prospect of requiring EIRs to use an early baseline for traffic and air quality—two types of conditions that are certain to change by the time a project is constructed and operating—three justices signed the lead opinion, which arrived at a compromise rule. A fourth justice agreed with the rule, thereby providing a majority on this point. The other three justices disagreed with the rule, but agreed with the lead opinion that the project approval should be upheld. The key elements of the decision are as follows:

- *"Existing conditions" for purposes of the baseline are not limited to conditions existing at the time the environmental analysis is commenced.* Fundamental to the majority decision is the redefinition of the term "existing conditions" to include conditions later than those existing as of the notice of preparation of the EIR or the beginning of CEQA review. In the majority's view, "existing conditions" can include "environmental conditions that will exist when the project begins operations." Most CEQA practitioners have long used this baseline, labeling it "Near Term No Project Conditions" (or something similar), rather than "Existing Conditions." In this respect, the Court's majority has simply changed the vocabulary for a commonly used traffic and air quality baseline, now labeling conditions projected to occur at commencement of project operations as the "adjusted existing conditions" baseline.

- *An agency may use both an existing conditions and a future conditions baseline*. Use of a distant future baseline need not be relegated solely to an EIR's analysis of cumulative impacts or its "no project" alternative. Instead, an agency may consider "both types of baseline—existing and future conditions—in its primary analysis of the project's significant adverse effects."

- *Exclusive reliance on a baseline that does not capture impacts at the beginning of project operations is suspect*. The majority concluded that agencies have discretion to use a future time, "well beyond the date the project is expected to begin operation," as the EIR's sole baseline for impacts analysis. But the use of such a baseline raises concerns that the initial impacts of project operations will be missed, and that long-term projections are less reliable than short-term projections. For these reasons, the majority concluded that a lead agency may rely exclusively on a "distant future" baseline only if the agency shows that use of an "existing conditions" baseline would be "misleading or without informational value."

- *Sunnyvale West and Madera Oversight Coalition are disapproved.* All seven justices disapproved these two recent appellate court decisions "insofar as they hold an agency may never employ predicted future conditions as the sole baseline for analysis of a project's environmental impacts." See *Sunnyvale West Neighborhood Ass'n v. City of Sunnyvale City Council*, 190 Cal. App. 4th 1351 (2010); & *Madera Oversight Coalition v. County of Madera*, 199 Cal. App. 4th 48 (2011).

- *The agency's reliance solely on a 2030 baseline was not prejudicial error.* Although a four-justice majority found the Authority had not adequately justified its decision to use only a 2030 baseline for its EIR, the three justices who signed the lead opinion—following an emerging judicial trend—found the error non-prejudicial. Concluding the error did not deprive the public and decision-makers of substantial relevant information about the project's likely adverse impacts, the lead opinion concluded that the project opponents' efforts to overturn the EIR certification and project approval should be rejected.

The fourth justice, while agreeing with the lead opinion's new rule, would have found the error prejudicial and would have granted the petition for writ of mandate. But the three remaining justices, in a concurring and dissenting opinion, agreed with the lead opinion's conclusion that the EIR and project approval should not be disturbed. These justices found no CEQA violation and would have established a more permissive rule, under which the agency retains discretion to use a distant future baseline if it "is supported by substantial evidence and results in a realistic impacts analysis that allows for informed decision-making and public participation."

The *Neighbors for Smart Rail* decision embraces use of an "adjusted existing conditions" baseline consisting of conditions at the time project operations are expected to begin. In so doing, the decision should restore some order following the period of confused and duplicative analyses ushered in by the *Sunnyvale West* and *Madera Oversight* cases.

6. FAULTY GREENHOUSE GAS ANALYSIS SINKS EIR

***Friends of Oroville v. City of Oroville*, 218 Cal. App. 4th 1352 (2013)**

An EIR must not only identify a proper significance threshold for a project's greenhouse gas emissions, it must also correctly apply that threshold.

The *Friends of Oroville* case involved a proposal to replace an existing Wal-Mart store with a "Supercenter." The EIR determined that the proper significance threshold for the project was whether the project would significantly hinder or delay California's attainment of the reduction targets contained in AB 32, the Global Warming Solutions Act of 2006. Applying this significance threshold, the EIR calculated that the project's GHG emissions would constitute only 0.0003 percent of California's 2004 GHG emissions, identified a list of mitigation measures, and concluded that the project's environmental impacts from GHG emissions would be less than significant.

The court found that while this threshold was appropriate, it was incorrectly applied. Citing as a model the GHG analysis approved in *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista*, 197 Cal. App. 4th 327 (2011), the court found the Wal-Mart EIR deficient for two reasons.

First, the EIR employed a "meaningless" comparison of the project's GHG emissions to those of the entire State of California. The relevant question, the court said, was whether the project's emissions were significant in light of the EIR's stated significance standard based on AB 32, which seeks to cut projected 2020 emissions levels by 20 percent.

Second, the EIR should have calculated the *net* increase in GHG emissions from the proposed Supercenter over those of the Wal-Mart store it would replace, and then "quantitatively or qualitatively" estimated the effect of the project's mitigation measures on GHG emissions. "These calculations were done in *Citizens,*" the court said, and "[s]uch calculations or estimates, or a reasonable equivalent, must be done here."

The court rejected Wal-Mart's argument that the project was consistent with AB 32 because the mitigation measures were drawn from the California Air Resources Board's AB 32 Scoping Plan. The court pointed out that 68 percent of the project's GHG emissions would come from motor vehicles and that the Scoping Plan provided no transportation-related measures applicable to the project. The court likewise rejected Wal-Mart's claim that the EIR's traffic analysis showed the Supercenter would reduce vehicle trips, finding the EIR's conclusions on this point to be "speculative and contradictory."

This case suggests that in areas of California where the regional air district has not adopted GHG thresholds of significance, courts will continue to look to the *Citizens* case as a model for analysis of GHG impacts. The case also highlights the importance of a logically reasoned and internally consistent EIR.

7. AN EIR MUST BE CERTIFIED BY THE BODY WITH APPROVAL AUTHORITY FOR THE PROJECT

***California Clean Energy Committee v. City of San Jose*, 220 Cal. App. 4th 1325 (2013)**

In *California Clean Energy Committee*, the court held that CEQA does not allow a city council to delegate certification of an EIR to a planning commission, where the council is the decision-maker on the project. The court further ruled that, where such a delegation occurs, the project opponent is not required to appeal the planning commission's certification to the city council or repeat its comments on the draft EIR when the council later considers certification anew.

The City of San Jose published a Draft EIR on a comprehensive update of its general plan. The petitioner submitted comments objecting to the environmental analysis. The planning commission certified the Final EIR and recommended that the city council approve the general plan update. The petitioner did not appeal the certification to the city council, though the matter was already slated to go to the council. The council then independently recertified the EIR and approved the general plan update. The petitioner filed a CEQA lawsuit challenging the EIR, raising the claims it had presented in its comments on the Draft EIR.

The court of appeal concluded that the petitioner adequately exhausted its administrative remedies.

The court first ruled that CEQA requires that decision-makers on a project independently consider and review the adequacy of the environmental analysis before deciding whether to approve the project. Based on this ruling, the court held that the decision-making body with project approval authority must certify the EIR and may not delegate the certification to a body that lacks this authority. Applying these principles, the court found that San Jose's city council could not delegate certification of the EIR to the planning commission, since the commission lacked the power to approve the general plan update.

Having found the delegation to the planning commission improper, the court then ruled that the project opponent was not required to follow the procedures in the city's code for appealing the commission's decision to the city council.

Finally, the court ruled that the petitioner had adequately exhausted its administrative remedies, even though it did not repeat the CEQA claims in its comment letter when the matter reached the city council. The court reasoned that the city council, as the ultimate decision-makers on the general plan update, had the petitioner's comment letter before it when it approved the project, and that the letter adequately apprised the council of the petitioner's environmental objections.

While the rulings in the case are procedural, the decision could have a substantial impact on how cities and counties make their decisions under CEQA and how those decisions may be challenged by project opponents.

E. RECIRCULATION

1. EIR RECIRCULATION CLAIMS MUST OVERCOME A HIGH HURDLE

***South County Citizens for Smart Growth v. County of Nevada*, 221 Cal. App. 4th 316 (2013)**

In *South County Citizens*, the court rejected the claim that an agency was required to recirculate its EIR when a new alternative was proposed after publication of the Draft EIR. The decision is important because it lays out the heavy burden facing a petitioner claiming that recirculation of an EIR is required.

The case involved a proposed shopping center in Nevada County. At a planning commission hearing on the Final EIR, county staff recommended a modified alternative to the project. The commission agreed with staff and recommended that the board of supervisors certify the Final EIR and approve the staff alternative. The project applicant, responding to the planning commission's concerns, then proposed a revised version of the project.

The commission met again and recommended the applicant's modified project to the board of supervisors, which then certified the Final EIR and approved the project.

A citizens group challenged the county's actions, claiming it had violated CEQA by failing to recirculate a revised Draft EIR. Applying the standards in the CEQA Guidelines, the court held that a new alternative constitutes "significant new information" requiring recirculation only if all three of the following tests are met: (1) the alternative is feasible; (2) the alternative is considerably different from alternatives already analyzed; and (3) the alternative would clearly lessen the project's significant environmental impacts.

The court next laid out the petitioner's burden of proof when challenging an agency's decision not to recirculate an EIR after a new alternative is introduced. The petitioner must show that:

- No substantial evidence supports the agency's express or implied finding that the new alternative is not feasible;
- No substantial evidence supports the agency's express or implied finding that the alternative is not considerably different from alternatives already analyzed; and
- No substantial evidence supports the agency's express or implied finding that the new alternative would not lessen the project's significant environmental impacts.

The court found the petitioner failed to meet this burden. Among other things, the petitioner failed to demonstrate the absence of substantial evidence that the new alternative was not considerably different from all of the others analyzed in the EIR. Moreover, the petitioner did not meet the burden of "setting forth all the evidence favorable to the county" and showing how this evidence was lacking.

The petitioner also asserted the county violated CEQA by failing to make findings on the feasibility of the staff alternative. The petitioner argued that because the board did not adopt the staff alternative, it had to make findings that the alternative was infeasible. The court disagreed, ruling that although a lead agency must give reasons for rejecting an alternative as infeasible during the ***scoping process***, the staff alternative was proposed well after publication of the EIR. At that stage, the county "was only required to find that the staff alternative was not significant new information, a finding that may be implied from its decision to certify the EIR without recirculating it."

This case provides clear guidance on when a new alternative, proposed after publication of the EIR, triggers recirculation. By requiring the petitioner to establish that no substantial evidence supports the agency's express or implied finding that the new alternative is not significant new information, *South County Citizens* sets a high bar for petitioners bringing a recirculation challenge.

F. SUPPLEMENTAL CEQA REVIEW

1. NEW SIGNIFICANCE STANDARD FOR GREENHOUSE GAS EMISSIONS IS NOT NEW INFORMATION TRIGGERING SUPPLEMENTAL CEQA REVIEW

***Concerned Dublin Citizens v. City of Dublin,* 214 Cal. App. 4th 1301 (2013)**

The court of appeal in *Concerned Dublin Citizens* resolved three CEQA issues that have not been directly addressed in other published opinions:

- The proper interpretation of the statutory exemption for housing projects that are consistent with a previously adopted specific plan.

- How the CEQA Guideline on further review following a program EIR should be applied.

- Whether new air district guidelines setting significance thresholds for greenhouse gas emissions amount to "significant new information" triggering supplemental review.

The court's unambiguous answers to these questions provide helpful guidance to public agencies and project sponsors on a handful of important recurring issues.

- *Residential projects consistent with a specific plan for which an EIR was certified are exempt from CEQA*. Government Code section 65457 provides a CEQA exemption for residential projects that are consistent with a specific plan, if an EIR was certified for the specific plan and none of the triggers in CEQA section 21166 requiring supplemental review have occurred. In the first published opinion to interpret section 65457, the court explained that a development comprising residences together with "the usual incidents of residential units, such as yards, parks, or other uses authorized as permitted uses within a residential zoning district" qualifies as a residential project under the statute. The opinion also makes clear that a residential development is not disqualified from the exemption simply because the applicable zoning designation might allow nonresidential uses, as long as the approved project is entirely residential.

- *A tiered EIR need not follow a program EIR*. As is often the case, the prior EIR for the specific plan was prepared as a program EIR under section 15168 of the CEQA Guidelines. The EIR indicated further CEQA review would occur as projects to carry out the plan are considered. The petitioners claimed that because the city was relying on a program EIR, a tiered EIR "must necessarily follow." In rejecting this claim, the court explained that "nothing in section 15168 or any other provision mandates a particular level of environmental review in evaluating later projects within the scope of a certified program EIR." The opinion thus confirms the basic principle that the level of environmental review required for a project within the scope of a program EIR will vary from case to case. Further review can include no new environmental document, a finding the project is exempt, adoption of a negative declaration, or preparation of an EIR, depending on the situation.

- *New significance thresholds are not new information*. When a project is considered for approval based on a previously certified EIR, project opponents invariably claim that "significant new information" has come to light since the EIR was certified and that a supplemental EIR is required by CEQA section 21166. Here, the petitioners pointed to the local air district's newly-adopted significance thresholds for GHG emissions in claiming that the project's GHG emissions constituted a new significant impact requiring a supplemental EIR. But the opinion makes clear that a change in significance thresholds does not qualify as "significant new information." The court reasoned that such a change does not show that the physical impact the project will have on the environment has changed. The court's ruling on this issue should provide helpful guidance in a variety of situations where it is claimed that supplemental CEQA review is required as a result of new information about how an impact is classified—rather than new information about the nature or extent of the impact.

2. COURT REJECTS CLAIM THAT NEW GENERAL PLAN HOUSING ELEMENT REQUIRES NEW EIR

***Latinos Unidos de Napa v. City of Napa*, 221 Cal. App. 4th 192 (2013)**

Affordable housing advocates lost a claim that the City of Napa's new General Plan Housing Element required an EIR. The court upheld the city's decision that its 2009 Housing Element was not a new project, but rather a modification of the General Plan the city already had studied in a 1998 EIR. Therefore, in examining the Housing Element under CEQA, the city needed to ask only whether the Housing Element would cause new or

substantially more severe environmental impacts than those found in the 1998 General Plan EIR. The petitioner failed to demonstrate that such impacts would occur.

The 2009 Housing Element increased minimum and maximum residential densities in certain areas of the city, permitted single-family detached homes at the same densities as single-family attached homes, and provided for co-housing, among other changes. The city prepared an initial study and determined, under CEQA section 21166, that implementation of the Housing Element would not cause impacts requiring a supplement to the city's 1998 General Plan EIR.

Citing *Save Our Neighborhood v. Lishman*, 140 Cal. App. 4th 1288 (2006), the challengers argued that whether the Housing Element was a new project or a modification of the 1998 General Plan project was a question of law for the court. The court declined to follow this precedent, agreeing instead with *Mani Brothers Real Estate Group v. City of Los Angeles*, 153 Cal. App. 4th 1385 (2007), that the "question-of-law" approach would inappropriately undermine the deference courts owe to a city's decision-making. Following *Mani,* the court ruled that the city's decision to treat the Housing Element as a modification of the General Plan, rather than as a new project, would be upheld if substantial evidence supported it.

The court then found such substantial evidence. First, the 1998 General Plan EIR addressed the city's then-existing Housing Element. Second, every 2009 Housing Element feature challenged in the case represented a change to the density standards that were included in the Land Use Element of the 1998 General Plan and that were analyzed in the General Plan EIR.

Finally, substantial evidence supported the city's conclusion that the 2009 Housing Element would not cause new or substantially more severe impacts than those shown in the 1998 General Plan EIR. The record showed the city had added housing at a substantially slower rate than the 1998 General Plan EIR anticipated. Thus, the challengers did not meet their burden of showing that the increased residential density allowed under the 2009 Housing Element would be inconsistent with the residential growth impacts anticipated in the 1998 EIR.

Latinos Unidos provides useful guidance in two important respects. First, the case follows the *Mani* rule affording deference to a lead agency's decision whether a project is new or instead represents a modification to a previously studied project. Second, in rejecting the claim that the city's 1998 General Plan EIR was too old to remain valid, the case supports the proposition that EIRs do not automatically go "stale" after some period of years.

G. CEQA LITIGATION

1. COMMUNICATIONS BETWEEN AGENCY AND APPLICANT PRIOR TO EIR CERTIFICATION ARE NOT PROTECTED FROM DISCLOSURE

Citizens for Ceres v. Superior Court, 217 Cal. App. 4th 889 (2013)

The Fifth Appellate District issued another in a series of decisions regarding administrative records in CEQA cases. In *Citizens for Ceres*, the court held that the "common interest doctrine" does not protect otherwise privileged communications shared by a developer and an agency prior to approval of a project. The court reasoned that the agency and project proponent do not share the same interests at the preapproval stage.

At issue in *Ceres* was a shopping center anchored by a Wal-Mart store. Opponents brought a CEQA lawsuit, and a dispute arose over the contents of the administrative record. The city and Wal-Mart contended that attorney-

client and work-product documents they had exchanged during preparation of the EIR advanced a shared interest in ensuring a legally adequate CEQA document and hence were protected from public disclosure under the common interest doctrine. They relied on *California Oak Foundation v. County of Tehama,* 174 Cal. App. 4th 1217 (2009), which held that the goal of preparing an EIR that will withstand legal challenge constitutes a sufficient common interest to protect from disclosure attorney-client and work-product information shared by an agency and a developer. The court in *California Oak* relied on the well-established common-interest doctrine reflected in Evidence Code section 952, under which a disclosure reasonably necessary to achieve the purposes for which the lawyer is consulted does not waive the privileged nature of the information that is disclosed.

The *Ceres* court drew a bright-line distinction between privileged information shared ***before*** and ***after*** project approval, ruling that the developer and the agency had no preapproval common interest:

> [T]he common-interest doctrine, which is designed to preserve privileges from waiver by disclosure under some circumstances, does not protect otherwise privileged communications disclosed by the developer to the city or by the city to the developer ***prior*** to approval of the project. This is because, when environmental review is in progress, the interests of the lead agency and a project applicant are fundamentally divergent. While the applicant seeks the agency's approval on the most favorable, least burdensome terms possible, the agency is duty bound to analyze the project's environmental impacts objectively. An agency must require feasible mitigation measures for all significant impacts and consider seriously and without bias whether the project should be rejected if mitigation is infeasible or approved in light of overriding considerations. (Court's emphasis.)

The court acknowledged the prior case law upholding the common interest doctrine as to parties with interests that were partly common and partly opposed. But the court concluded that "the relationship between a lead agency and project applicant is unique" in that before project approval, "the agency must ***objectively judge*** whether the project as proposed is environmentally acceptable and therefore must make a decision about ***whether*** it will align itself with the applicant in part, in whole, or not at all." (Court's emphasis.) Accordingly, "the agency does not have even partially common interests with the applicant. The nature of its interest is held in abeyance until it decides whether to approve the project."

After project approval, by contrast, there was "no longer any conflict between an agency's role as an ally of the project and its role as an objective evaluator of the project." The court disagreed with *California Oak Foundation* to the extent that case could be construed as holding that preapproval communications between an agency and an applicant qualified for the common interest exemption from disclosure.

2. CEQA'S STATUTE OF LIMITATIONS MEANS WHAT IT SAYS

Alliance for the Protection of the Auburn Community Environment v. County of Placer,
215 Cal. App. 4th 25 (2013)

When a public agency files a notice of determination (NOD) after approving a project, CEQA's statute of limitations (Public Resources Code section 21167) provides that any lawsuit challenging the environmental review for the project must be brought within 30 days after the NOD is filed. In *Alliance for the Protection of the Auburn Community Environment*, the petitioner filed a CEQA lawsuit three days after the 30-day deadline. The trial court dismissed the case as untimely, and the court of appeal affirmed the dismissal.

The petitioner's attorney unsuccessfully argued that the lawsuit should be allowed to proceed based on section 473(b) of the Code of Civil Procedure, which provides that a court may grant relief from a judgment of dismissal against a party where the dismissal is attributable to the mistake or "excusable neglect" of the party or its attorney. The attorney had apparently provided a completed petition for a writ of mandate to a filing service on the 30th day after the NOD, but the service arrived at the court too late in the day and therefore filed the petition on the next business day, after a weekend.

In rejecting the petitioner's plea for relief, the court of appeal cited a line of prior cases holding that section 473(b) does not apply where a party fails to meet a statute of limitations for bringing a lawsuit. The court reasoned that statutes of limitations are mandatory "rather than flexible in nature." It further reasoned that CEQA's short statute of limitations "aims to ensure extremely prompt resolution of lawsuits" and "makes no provision for extending the limitations period on a showing of good cause." The court thus concluded that relief under section 473(b) was not available.

3. CEQA LIMITATIONS PERIOD IS NOT EXTENDED BY FILING NOTICE OF EXEMPTION THAT CITES ALTERNATIVE GROUNDS FOR EXEMPTION

***May v. City of Milpitas*, 217 Cal. App. 4th 1307 (2013)**

The Government Code contains a 30-day limitations period for challenging the approval of a project falling within the CEQA exemption for residential projects consistent with a specific plan. The court ruled this 30-day period is not extended when the public agency files of a notice of exemption (NOE) citing different grounds for an exemption.

Most limitations periods for challenges under CEQA are found in the CEQA statute itself. The limitations periods found in CEQA are triggered by the agency's filing of either a notice of determination regarding the environmental impacts of the project or an NOE declaring that the project is exempt from CEQA.

The project in *May* was subject to a CEQA exemption found in a different statute—Government Code section 65457—which is part of the Planning and Zoning Law. This provision exempts from CEQA residential projects consistent with a specific plan for which a previous EIR has been certified. Section 65457 provides that an action challenging a project subject to its provisions must be filed within 30 days "after the lead agency's decision to carry out or approve the project in accordance with the specific plan."

The project in question, a condominium development, was within a specific plan for which a program EIR had been certified. The developer subsequently sought amendments to its tentative map and development permits. The city council approved the requested amendments, finding that the project was consistent with the previously adopted specific plan.

The city then filed an NOE stating that the approval was exempt from CEQA under Guidelines section 15168(c)(2), which provides that no new environmental review is required if a project is covered by a program EIR and none of the triggers requiring a supplemental review have occurred. The NOE also stated that the project was exempt under CEQA's "common-sense exemption," which states that an activity is not subject to CEQA "[w]here it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment. . . ." (CEQA Guidelines § 15061(b)(3).)

The petitioners filed their CEQA action 34 days after the filing of the NOE. The city and real parties in interest contended the action was time-barred under Government Code section 65457 because it was filed more than 30 days after the city council's decision approving the project. Petitioners responded that the filing of the NOE had rendered the action subject to the 35-day limitations period found in CEQA, which runs from the NOE filing date.

The appellate court disagreed with the petitioners. It concluded that the city council effectively triggered section 65457's exemption by the express statement in its approval resolution that the project "was consistent with the certified EIR for the [specific plan] adopted on June 3, 2008." The court further concluded that the 30-day limitations period under section 65457 is not contingent upon the filing of an NOE, but runs from the date of the agency's decision to approve to project. As a result, the city's subsequent filing of an NOE declaring the project exempt—whether under the same or different grounds as those cited by the council in its resolution approving the project—did not extend or recommence the running of the statute of limitations. Based on this

reasoning, the court found that the petition was time-barred under section 65457's 30-day limitations period, as it was filed 36 days after the city council's decision to approve the project.

4. UNDER THE BROWN ACT, A PLANNING COMMISSION'S APPROVAL OF A CEQA DOCUMENT IS A DISTINCT ITEM OF BUSINESS THAT MUST BE EXPRESSLY DISCLOSED ON THE AGENDA

***San Joaquin Raptor Rescue Center v. County of Merced*, 216 Cal. App. 4th 1167 (2013)**

The Ralph M. Brown Act requires a legislative body of a local agency to post, at least 72 hours before a regular meeting, an agenda containing a "brief general description of each item of business to be transacted or discussed at the meeting." This appellate court decision clarifies that a local agency seeking to approve a project and adopt a CEQA document for the project must disclose both items on the agenda.

The county timely posted a planning commission meeting agenda that listed as a single item of business the commission's consideration of a subdivision application. The agenda stated that "[t]he action requested is to approve, disapprove or modify the application," but did not mention the commission also would be considering adoption of a mitigated negative declaration for the project. At the meeting, the commission approved the application, and, by a separate motion, adopted the mitigated negative declaration.

The petitioners sent the commission a letter alleging it violated the Brown Act agenda requirement and demanding that the commission "cure and correct" the violation by rescinding both actions. Simultaneously, the petitioners appealed the commission's actions to the board of supervisors. The petitioners filed a lawsuit after the commission denied their request. While the case was pending, without conceding a Brown Act violation, the board of supervisors granted the appeal and directed the commission to rescind the project approval and adoption of the mitigated negative declaration. The commission did so, and then properly re-noticed the agenda, re-approved the project, and re-adopted the mitigated negative declaration.

The trial court found a Brown Act violation and awarded attorneys' fees to the petitioners. Hoping to avoid the fee award, the county appealed, but the court of appeal upheld the Brown Act ruling. The court concluded adoption of the mitigated negative declaration was "plainly a distinct item of business, and not a mere component of project approval," because it involved a separate action by the commission and concerned discrete issues of CEQA compliance. The Brown Act's purposes of facilitating public participation would be "impaired" if a public agency could refuse to disclose it would be considering approval of a CEQA document.

The court also rejected the county's assertion the public would have "implicitly understood" that CEQA documents would "likely be considered" at the time of project approval. The court explained that even if this was the case, that would not make the agenda legally adequate. This is because the Brown Act specifically "mandates that each item of business be described on the agenda, not left to speculation or surmise." The court observed that the commission could have complied with this requirement "by simply adding a few words, such as 'and consider adoption of a mitigated negative declaration' regarding the project."

5. PETITIONER NEED NOT EXHAUST ADMINISTRATIVE REMEDIES AS TO EXEMPTIONS LEAD AGENCY DOES NOT CITE UNTIL FINAL HEARING

***Save the Plastic Bag Coalition v. County of Marin*, 218 Cal. App. 4th 209 (2013)**

Where a lead agency does not reveal until its final hearing date which CEQA categorical exemptions the agency is applying to a project, a petitioner need not exhaust administrative remedies by raising objections that are specific to those exemptions.

In *Save the Plastic Bag*, the petitioner challenged the county's reliance on the Class 7 and 8 "regulatory action" categorical exemptions, claiming the county's approval of an ordinance was not "regulatory action." The county argued the petitioner was barred from making this argument in court because the petitioner had not raised it

during the county's proceedings. But the court held that because the county had not cited the Class 7 and 8 exemptions until the last hearing on the ordinance, no exhaustion requirement applied. The court reasoned the petitioner "could not be expected to raise all possible arguments concerning the applicability of a categorical exemption when it was unclear which exemptions the country intended to claim."

6. COURT HAS DISCRETION TO ALLOW AGENCY REGULATIONS APPROVED IN VIOLATION OF CEQA TO REMAIN IN PLACE, IN LIGHT OF THE REGULATIONS' ENVIRONMENTAL BENEFITS, WHILE AGENCY TAKES CORRECTIVE ACTION TO COMPLY WITH CEQA

***POET LLC v. California Air Resources Board,* 218 Cal. App. 4th 681 (2013)**

Agencies promulgating regulations under a certified regulatory program may not bypass CEQA's environmental review procedures by approving the regulations prior to completion of the environmental review. However, the decision in *POET* demonstrates that a court has discretion to consider the regulations' environmental benefits and allow the regulations to remain in place while the agency takes corrective action to comply with CEQA.

In *POET*, the largest U.S. ethanol producer and a citizen concerned about zero emission vehicles sued to challenge the Air Resources Board's approval of Low Carbon Fuel Standard (LCFS) regulations. The case alleged three CEQA violations:

- First, that ARB improperly approved the regulations before completing its environmental review.
- Second, that ARB improperly "split the decision-making authority" to approve and disapprove regulations from responsibility for completing the environmental review.
- Third, that ARB impermissibly "deferred" mitigation of potential increases in emissions of oxides of nitrogen (NOx) resulting from the use of biodiesel.

The court of appeal agreed with all three claims.

Factual Background of the Case. The LCFS regulations require reduction in the carbon content of transportation fuels sold or supplied in the state. Adopting these regulations was among the "early action measures" meant to facilitate the implementation of AB 32.

The regulations calculate carbon content based on the full fuel cycle (from "seed-to-wheels") and fuel pathways (the steps involved in producing, transporting, and using fuel). The regulations used a statistical model for measuring carbon content that incorporated the "indirect land use effects" of biofuels, such as increased conversion of land to farmland for crop cultivation. This resulted in the failure of certain biofuels to meet the 2020 LCFS standards for gasoline, which negatively affected the demand for such fuels.

In an effort to comply with the CEQA duties under a certified regulatory program, ARB presented environmental information about the regulations in an extensive staff report. In April 2009, after a public hearing, ARB adopted a resolution that "approved for adoption" the proposed LCFS regulations. It also released a press statement after the hearing indicating it had adopted the regulations. Pursuant to the resolution, the Executive Officer subsequently addressed the comments raised on the environmental issues, although the resolution prohibited him from making substantive changes to the regulations.

The Court's Ruling. The court of appeal began its analysis by stating that an agency acting under a certified regulatory program remains subject to CEQA. The court stated that "[b]efore granting any approval of a project subject to CEQA, every lead agency or responsible agency shall consider a final EIR or negative declaration ***or another document authorized by these guidelines to be used in the place of an EIR or negative declaration***."

(Court's emphasis.) The court concluded that "another document" includes environmental documentation for a certified regulatory program.

The court next turned to the issue of whether the April 2009 ARB resolution constituted an "approval" under section 15352(a) of the CEQA Guidelines. The court observed that the test established by the Supreme Court in *Save Tara v. City of West Hollywood,* 45 Cal. 4th 116 (2008), for defining when an "approval" occurs should be extended to certified regulatory programs. Under this test, courts look to the "surrounding circumstances to determine whether, as a practical matter, the agency has committed itself to the project . . . so as to effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered."

Applying the *Save Tara* test, the court found that ARB's April 2009 resolution impermissibly committed the agency to the adoption of the regulations before the Executive Officer's completion of the environmental assessment. The court rejected ARB's contention that the resolution was merely an "initial approval," and that the regulations did not take effect until after environmental analysis was concluded. The court emphasized that once ARB adopted its resolution, the regulations "had significant bureaucratic momentum." It also reasoned that the resolution barred the Executive Officer from considering alternatives and mitigation measures that CEQA would require to be considered, including the alternative of not going forward with the regulations.

According to the court, the Executive officer's lack of decision-making authority created another CEQA defect, by separating the project approval from the environmental review. This separation, the court reasoned, is inconsistent with the purpose served by an environmental assessment, because it insulates the decision-maker from the debate and resolution of the environmental issues. The CEQA policy against such separation applies with equal force "whether the environmental review document is an EIR or a documentation prepared under a certified regulatory program."

The court found another CEQA defect in the mitigation of NOx emissions. ARB indicated it would conduct "an extensive testing program" to "establish specifications to ensure there is no increase in NOx." But according to the court, this was not an adequate performance standard to justify a deferral of the particulars, since it "established no objective performance criteria for measuring how the stated goal will be achieved."

The judicial remedy. Despite these deficiencies, the court allowed ARB to continue to implement the regulations while it took the necessary actions to comply with CEQA. In so doing, the court cited the environmental benefits the regulations would provide, noting: "we will avoid the irony of violations of an environmental protection statute being used to set aside a regulation that restricts the release of pollutants into the environment."

This last holding is especially newsworthy as it reflects the courts' growing willingness to tailor remedies in CEQA cases based upon equitable considerations.

7. ALLOWING EMINENT DOMAIN PROCEEDINGS TO CONTINUE WHILE AGENCY COMPLETED CEQA REVIEW DID NOT CONSTITUTE AN ABUSE OF DISCRETION

***Golden Gate Land Holdings LLC v. East Bay Regional Park District,* 215 Cal. App. 4th 353 (2013)**

The court of appeal upheld a judgment requiring the park district to vacate its decision to use a CEQA exemption. But as in *POET*, the court allowed the district's accompanying resolution initiating condemnation proceedings to stand.

By the time the case reached the court of appeal, there was no dispute that the park district had failed to comply with CEQA. The district commenced proceedings to acquire land to be used as part of a state park ringing the San Francisco Bay, which will include a bay trail. The district had determined its action to be exempt from CEQA under Guidelines section 15325, which covers the acquisition of parcels for the purpose of open space protection. While the district's acquisition purposes did include open space protection, the project as a

whole would include physical construction and use of the bay trail segment, as well as relocation of existing parking—activities that do not fit within the stated exemption. For that reason, the trial court ruled the project, taken as a whole, was not exempt from CEQA.

The issue before the appellate court was limited to whether the trial court exceeded its authority by fashioning a remedy that vacated the district's reliance on the exemption, but that also allowed the resolution initiating condemnation proceedings to stand—so long as the district completed its CEQA review before actually acquiring the property. The court's analysis centered on Public Resources Code section 21168.9, which states that if a court finds that a public agency has failed to comply with CEQA, it shall enter an order that includes a mandate that the determination be voided "in whole or in part."

Based on this provision, the court of appeal confirmed that a judicial finding of CEQA noncompliance will not always halt all work on the project. The question on appeal, then, was whether the trial court abused its discretion in allowing the district's condemnation resolution to stand.

The appellate concluded there was no abuse of discretion. The court reasoned the park district could have—under section 15004(b)(2)(A) of the CEQA Guidelines—entered into an acquisition agreement that conditioned its future use of the site on CEQA compliance. The court reasoned such an agreement was not materially different from commencing condemnation proceedings. Moreover, initiating condemnation proceedings did not commit the district to complete the acquisition process, as the proceedings could be abandoned prior to a final judgment of condemnation. Under these facts, the court upheld the trial court's judgment allowing the district to continue with condemnation, so long as it completed its CEQA review prior to final acquisition.

8. COSTS OF SOME HEARING TRANSCRIPTS NOT RECOVERABLE

***San Diego Citizenry Group v. County of San Diego*, 219 Cal. App. 4th 1 (2013)**

Some lead agencies facing CEQA litigation prepare transcripts of numerous public hearings on the project and include those transcripts in the administrative record for the convenience of the court and the parties. In this case, the court held that transcripts of hearings held prior to the final hearing on the project need not be included in the record under Public Resources Code section 21167.6(e)(4), because the transcripts were not presented to the board of supervisors prior to that body's decision. Accordingly, the court held that the county could not recover from the petitioner the cost of preparing those transcripts.

9. COURT GRANTS RELIEF FROM FAILURE TO CALENDAR CEQA'S 90-DAY DEADLINE FOR REQUEST FOR HEARING

***Comunidad en Accion v. Los Angeles City Council,* 219 Cal. App. 4th 1116 (2013)**

A court of appeal held that a trial court improperly denied relief to a CEQA petitioner whose attorney failed to meet CEQA's mandatory 90-day deadline for requesting a hearing on the merits. The appellate court reinstated the petitioner's CEQA claims under the authority of Code of Civil Procedure section 473, holding that the attorney's failure to calendar the deadline constituted excusable neglect.

The petitioner's request for hearing was due on September 8, 2010, but the petitioner's attorney "inadvertently omitted the 90-day hearing request from his personal calendaring system."

On September 14, 2010, the respondents moved to dismiss the CEQA claims pursuant to Public Resources Code section 21167.4(a), which provides that in a CEQA case, "the petitioner shall request a hearing within 90 days from the date of filing the petition or shall be subject to dismissal on the court's own motion or on the motion of any party interested in the action or proceeding." The petitioner belatedly filed its request for hearing on September 15 and sought relief from dismissal under Code of Civil Procedure section 473, which allows such relief on grounds of "mistake, inadvertence, surprise, or excusable neglect."

The trial court denied relief under section 473 and granted the motion to dismiss. Distinguishing earlier (non-CEQA) cases finding that calendaring errors constituted excusable neglect, the trial court held that "electronic litigation calendar reminders are now ubiquitous and the failure to use one fell below the standard of care."

The appellate court reversed, noting that the petitioner's attorney had committed one error in an otherwise diligently prosecuted case, and that the respondents were not prejudiced by the petitioner's late filing of the hearing request because the administrative record was not ready at that time.

H. CASES PENDING BEFORE THE SUPREME COURT

1. CAN A CITY ENACT VOTER-INITIATED LEGISLATION WITHOUT FIRST COMPLYING WITH CEQA?

Tuolumne Jobs & Small Business Alliance v. Superior Court
Supreme Court No. S207173 (Review granted Dec. 7, 2012)

In *Tuolumne Jobs & Small Business Alliance,* the California Supreme Court will decide whether a city council may opt to enact an initiative measure rather than place it on the ballot, without first complying with CEQA. The Supreme Court has identified the following questions for review:

> (1) Must a city comply with CEQA before adopting an ordinance enacting a voter-sponsored initiative pursuant to Elections Code section 9214(a)?
>
> (2) Is the adoption of an ordinance enacting a voter-sponsored initiative under Elections Code section 9214(a) a "ministerial project" exempt from CEQA pursuant to Public Resources Code section 21080(b)(1)?

Project proponents often ask whether there is a way to shortcut the CEQA timeline or head off CEQA litigation. In *Tuolumne Jobs & Small Business Alliance*, the court of appeal blocked what had looked like a potential path around CEQA: use of the procedure that allows voter-initiated legislation to be adopted by a city council or board of supervisors without placing the legislation on the ballot.

The *Tuolumne* court emphatically rejected the claim CEQA did not apply, stating: "Environmental review can be avoided when the voters choose to bypass it, not when the lead agency chooses to bypass the voters."

Supporters of expanding a Wal-Mart store had presented the Sonora City Council with a qualified voter-sponsored initiative measure. The city council chose to enact it, rather than place it on the ballot. It did not certify an EIR or take any other steps to comply with CEQA, relying on an earlier appellate decision holding that such an action is not subject to CEQA.

Voter-sponsored ballot measures are not subject to CEQA both because requiring compliance with CEQA would impair the power of the electorate to legislate by initiative and because a city council's decision to place a qualified voter-sponsored measure on the ballot is a ministerial act. *Native American Sacred Site & Environmental Protection Assn. v. City of San Juan Capistrano*, 120 Cal. App. 4th 961 (2004), had expanded on this rule, holding that a qualified voter-sponsored measure is also exempt from CEQA when the council elects to adopt the measure itself (as allowed by the Elections Code) rather than put it on the ballot.

The court of appeal in *Tuolumne* disagreed with this holding and ruled that a city council's choice to enact legislation rather than place it on the ballot is a discretionary act. The court reasoned that no fixed criteria dictate whether the city must adopt the legislation or not; rather, this decision is a policy choice based on the city council's judgment about the pros and cons of the measure and the costs of an election.

2. IS THE POSSIBILITY OF A SIGNIFICANT EFFECT ENOUGH TO DISQUALIFY PROJECTS FROM FITTING WITHIN CATEGORICAL EXEMPTIONS?

Berkeley Hillside Preservation v. City of Berkeley
Supreme Court No. S201116 (Review granted May 23, 2012)

In perhaps the most controversial CEQA decision of 2012, the court of appeal in *Berkeley Hillside Preservation* invalidated building permits for a single-family home, ruling that the project did not qualify under CEQA's categorical exemptions for construction of a single-family residence or for infill development. In May 2012, the California Supreme Court decided to review the court of appeal's decision.

The city had decided that none of the exceptions to the categorical exemptions applied, including the exception for significant effects on the environment "due to unusual circumstances." The trial court agreed, ruling that while there was evidence significant impacts might occur, it had not been shown that the impacts were due to unusual circumstances.

The court of appeal rejected this interpretation of the "unusual circumstances" exception, ruling that the circumstances that might result in significant environmental impacts do not matter. According to the court, the possibility a project will have a significant effect on the environment "is itself an unusual circumstance" that bars the use of a categorical exemption. The court concluded an EIR was required.

The court of appeal's decision is difficult to square with either other court decisions that have addressed the issue, or the plain meaning of the CEQA Guidelines. The decision effectively erases the reference to usual circumstances from the exception and then applies the "fair argument" test to the use of a categorical exemption.

An untold number of activities are found exempt under one or more of the categorical exemptions every year. Because the court of appeal's decision could severely limit the situations in which categorical exemptions can be used, it has attracted an unusual amount of attention, particularly from public agencies.

3. CAN A STATE AGENCY FIND A MITIGATION MEASURE IS ECONOMICALLY INFEASIBLE IF THE LEGISLATURE DECLINES TO APPROPRIATE FUNDING FOR MITIGATION PURPOSES?

City of San Diego v. Board of Trustees of California State University
Supreme Court No. S199557 (Review granted Apr. 18, 2012)

In the latest of a string of CEQA cases that the California Supreme Court has taken involving the California State University system, the following issue is presented for review:

> Does a state agency that may have an obligation to make "fair-share" payments for the mitigation of off-site impacts of a proposed project satisfy its duty to mitigate under CEQA by stating that it has sought funding from the Legislature to pay for such mitigation and that, if the requested funds are not appropriated, it may proceed with the project on the ground that mitigation is infeasible?

The court of appeal in *City of San Diego* reviewed the EIR for a plan to expand the California State University San Diego campus. The court made the following rulings:

- *Available sources of funding for mitigation not considered*. To mitigate off-site traffic impacts, the EIR recommended measures consisting primarily of "fair share" payments by CSU toward the costs of building various traffic improvements. However, the EIR concluded that any fair share contributions by CSU would be conditioned upon obtaining funds from the California Legislature for that purpose. The EIR explained that "if the Legislature does not provide funding, or if funding is significantly delayed, all identified significant impacts would remain significant and unavoidable."

The court of appeal ruled, however, that in deciding whether funds are available for mitigation, state agencies such as CSU are not limited to legislative appropriations earmarked for that purpose. CSU erred because it did not consider other sources of funds besides specific legislative appropriations that might be available for mitigation.

- *Improper deferred mitigation*. With respect to other traffic issues, the court found that a traffic mitigation measure that required consultation with other agencies to develop a transportation demand management program constituted an improper deferral of mitigation. The mitigation set only a "generalized goal" of reducing vehicle trips, without establishing a specific performance standard that must be achieved.

- *Impacts on transit facilities not examined*. The court found that CSU's treatment of the project's effects on transit facilities constituted another CEQA defect. Although the EIR acknowledged that the project would increase transit use, it did not analyze the project's effects on local transit facilities, including "whether the capacity of the trolley station and system may be exceeded and thereby cause rider congestion at the station, denigration of trolley service, infrastructure, and rolling stock, and additional infrastructure and operating costs." The court ruled this was an environmental impact that should have been studied.

4. IS MITIGATION REQUIRED FOR IMPACTS ON PUBLIC SERVICES?

City of Hayward v. Board of Trustees of California State University
Supreme Court No. S203939 (Review granted Oct. 17, 2012)

The California Supreme Court granted review, and then deferred briefing pending the Court's resolution of the *City of San Diego v. California State University* case.

In *City of Hayward*, the city sued to challenge the EIR for a California State University Hayward campus master plan. The court of appeal's ruling answered two important, recurring CEQA questions: (1) whether CEQA requires funding of mitigation for a project's effects on public services; and (2) whether an adaptive mitigation program for traffic and parking impacts improperly defers decisions about mitigation. The court of appeal answered no to both questions.

- *No mitigation required for impacts on public services*. With the master plan's increase in campus population, the city would need eleven fire fighters, a new fire station, and additional equipment to maintain response times and service levels. The court of appeal rejected the city's argument that an increased demand for emergency services, and the lengthened response times that would result, was an environmental impact requiring mitigation. The court noted that providing fire and emergency medical services is the city's legal responsibility. While campus expansion will increase the demand for those services, this is an economic effect, the court said, not an environmental effect that must be mitigated under CEQA. As the court put it, there is no legal support for the claim "that CEQA shifts financial responsibility for providing fire and emergency response services to the sponsor of a development project."

- *Adaptive transportation demand plan is adequate mitigation*. The second question before the court of appeal involved the legal adequacy of a transportation demand management plan for mitigating traffic and parking impacts, which included a menu of measures to be put in place in stages, evaluated and then adjusted as conditions evolved. Ruling that the plan did not improperly defer decisions about

mitigation, the court highlighted the following components of the plan that made it sufficiently concrete to pass legal muster:

- performance goals;
- identification of the types of transportation demand management policies to be evaluated;
- an implementation plan, including timelines;
- monitoring of effectiveness of measures as they are deployed; and
- an enforceable commitment to mitigation.

It is not yet clear how the *City of San Diego* case will affect the *City of Hayward* decision, if at all.

5. DOES CEQA REQUIRE ANALYSIS OF EFFECTS OF THE ENVIRONMENT ON THE PROJECT, OR IS CEQA LIMITED TO EFFECTS OF THE PROJECT ON THE ENVIRONMENT?

California Building Industry Ass'n v. Bay Area Air Quality Management District
Supreme Court No. S213478 (Review granted Nov. 26, 2013)

At last, the California Supreme Court has announced its intention to address a question that has vexed CEQA practitioners for decades:

> Under what circumstances, if any, does CEQA require an analysis of how existing environmental conditions will impact future residents or users (receptors) of a proposed project?

In *CBIA v. BAAQMD*, the court of appeal rejected a CEQA challenge to a local air district's published significance thresholds for assessing air pollution impacts.

The district first adopted the thresholds in 1999 to provide guidance to Bay Area public agencies in their analysis of air pollution impacts. In 2009, the district proposed changes to the thresholds, in its revised "CEQA Air Quality Guidelines," to address new information about the effects of small particulates, toxic air contaminants, and greenhouse gases. The changes prompted concerns among housing advocacy groups and public agencies that application of the proposed thresholds would hamper development of housing in urban infill locations.

The CBIA's suit alleged the air district violated CEQA by failing to review the potential environmental impacts of the revised thresholds before adopting them. The court of appeal disagreed, finding that adoption of the thresholds was not subject to CEQA. In its primary holding, the court of appeal found that CEQA Guidelines section 15064.7 dictates the procedures for adopting thresholds of general use, and does not require completion of a CEQA document as part of that regulatory process. The court reasoned that CEQA compliance would not have generated substantially different information than the studies, testimony and evidence the air district considered during its hearings on the proposed thresholds.

As an alternative basis for its decision, the court of appeal held that adoption of the thresholds was not a "project" subject to CEQA because environmental changes that might result from their adoption were too speculative to be considered "reasonably foreseeable" under CEQA. Although the court acknowledged that the new significance thresholds might lead to residential development projects being displaced from infill locations into outlying areas, the court viewed the chain of causation as too attenuated to warrant CEQA review.

The court of appeal declined to address the claim that the thresholds were contrary to established case law by treating impacts of existing air pollution on a proposed project's occupants as an impact on the environment.

The court found it unnecessary to reach this issue, reasoning there were circumstances in which the thresholds could lawfully be applied, which defeated CBIA's facial challenge.

The Supreme Court has identified this last question as the key issue for its review.

Contributing Authors:

Marc R. Bruner, 415.344.7171

Julie Jones, 415.344.7108

Stephen L. Kostka, 415.344.7006

Barbara J. Schussman, 415.344.7168

Christopher Tom, 415.344.7047