



Land Use and CEQA Litigation Update

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CEQA Litigation Update

Cases Reported from April 1, 2024 through August 31, 2024

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I. Introduction

The appellate court California Environmental Quality Act (“CEQA”) case load seems to have slowed in recent months,¹ and with the exception of the People’s Park student housing case, none of the below cases present substantive changes to the law. However, the below cases address a range of important procedural and substantive CEQA issues.

II. Case Summaries

A. *Save the Capitol, Save the Trees v. Department of General Services* (2024) 101 Cal.App.5th 1237

Holding: Department of General Services failed to demonstrate that its Revised EIR – prepared as a result of the Court of Appeal’s earlier writ of mandate – actually corrected the deficiencies identified by the Court and fulfilled the writ’s requirements.

Practice Tips: If your city is in the unfortunate position of having to file a writ return, you must carefully consider the writ language and what the writ has directed the city to do in order to discharge it. Upon writ issuance, consider confirming and clarifying the terms with the court to avoid future confusion. And be mindful of the writ when overseeing the preparation of the revised CEQA document or approach to environmental review because a petitioner does not have to file a separate action to challenge your return.

Summary:

This case involves a State Department of General Services (“DGS”) project to demolish an existing building (the “Annex”) attached to the historic Capitol building and construct a new one, as well as construction of a new visitor center and parking garage. In *Save Our Capitol! v. Department of General Services* (2023) 87 Cal.App.5th 655, Petitioner challenged the adequacy of the project’s EIR and the Court agreed, issuing a writ of mandate directing DGS to revise and recirculate deficient portions of the EIR including the project description, historic resources and aesthetics chapters, and alternatives analysis.

DGS filed a return on the writ stating that it had partially decertified the EIR, vacated project approvals as required by the writ, certified a Revised EIR, and reapproved the project without the visitor center. Save the Trees (“STC”) challenged the writ return on the grounds that the Revised EIR did not adequately address the project description. DGS argued that the writ language required the trial court to determine that the Revised EIR actually remedied the deficiencies. The trial court ultimately discharged the writ, and STC appealed that discharge order.

The Court of Appeal reversed, stating that certification of the Revised EIR was “not enough” to discharge the writ since “there has not yet been an adjudication as to the adequacy” of the Revised EIR. Since there had been dispute over STC’s ability to challenge the writ return itself rather than simply proceeding with a new writ action, the Court noted that when a writ directs an

¹See CEQA Litigation Update (Cases Reported from August 1, 2023 through March 31, 2024), accessible at [https://www.calcities.org/docs/default-source/city-attorneys-spring-conference/land-use-and-ceqa-litigation-update-\(1\).pdf?sfvrsn=91894c1f_3](https://www.calcities.org/docs/default-source/city-attorneys-spring-conference/land-use-and-ceqa-litigation-update-(1).pdf?sfvrsn=91894c1f_3)

agency to take a specific action and the return states that the court's mandate has been carried out, a petitioner may challenge the writ return. The Court also stated that CEQA requires the trial court to retain jurisdiction *until the agency has complied with CEQA* under Pub. Res. Code Section 21168.9(b).

B. Make UC a Good Neighbor v. Regents of University of California (2024) 16 Cal.5th 43

Holding: The California Supreme Court upheld the UC Regents' Long Range Development Plan ("LRDP") EIR as having adequate noise and alternatives analysis after the Legislature adopted AB 1307 in direct response to the Court of Appeal's opposite conclusions.

Practice Tips: Lobbying works! CEQA is the law, but this case reminds us that the Legislature can change it. We may see more changes to CEQA like this as the Legislature continues to attempt to address the housing crisis. However, we note that it took a state agency (the UC Regents) to effectuate this particular change. Our cities – particularly smaller ones – may not be in as prime of a position as the UC Regents were to obtain the needed legislative relief.

Summary: The University of California campuses are required to adopt LRDPs to determine whether and what types of infrastructure is needed to support its student population. Berkeley's UC Regents ("Regents") adopted the 2021 LRDP which anticipated construction of approximately 11,700 housing units or "beds" that would accommodate around 14,000 new residents (students, faculty, and staff). The 2021 LRDP also estimated that approximately 8,000 more would be added to the UC population by 2036 which would not be provided with university housing. A petitioner group ("Petitioner") challenged the adoption and the Regents' EIR for the project which analyzed both the potential programmatic environmental impacts associated with implementing the overall plan and the potential site-specific environmental impacts for two housing developments, one of which would be located in People's Park in the City of Berkeley.

The First District Court of Appeal held that the EIR violated CEQA because it did not adequately analyze (1) noise impacts on surrounding neighborhoods ("social noise" impacts), or (2) sufficient alternative locations for the project. The Supreme Court granted the Regents' request for review on these adequacy issues and denied Petitioner's request for review of the Court of Appeal's determination that population increases due to university enrollment were not part of the 2021 LRDP project such that the EIR would have needed to analyze an alternative where enrollment was capped.

In response to the Court of Appeal's decision, the Legislature adopted AB 1307 after the Supreme Court granted review but before the case was heard. AB 1307 amended CEQA by adding statutory language stating: "For purposes of [CEQA], for residential projects, the effects of noise generated by project occupants and their guests on human beings is not a significant effect on the environment." (Pub. Res. Code § 21085.) Further, AB 1307 specifically noted that "institutions of public higher education shall not be required, in an environmental impact report prepared for a residential or mixed-use housing project, to consider alternatives to the location...of the project" if the site was less than five acres surrounded by urban uses and had been evaluated in an EIR for the most recent LRDP. (Pub. Res. Code § 21085.2(b).)

The Supreme Court thus overturned the Court of Appeal's decision and held that AB 1307's new CEQA provisions applied to both the specific People's Park development project and the 2021 LRDP.

C. *Nassiri v. City of Lafayette* (2024) 103 Cal.App.5th 910, 323 Cal.Rptr.3d 168

Holding: The court held that a 12-unit residential project qualified for the CEQA infill exemption and that substantial evidence supported the City's findings that the project site had no value as habitat for endangered species and that the project would not result in significant air quality impacts.

Practice Tips: Always confirm that the administrative record contains substantive responses to retained experts. The court will defer to an agency's conclusions as long as they are based on substantial evidence, and an agency will always win a battle among experts (even an army of NIMBY experts).

Summary:

This case involved a neighbor challenge to the demolition of a vacant building and construction of a 12-unit condo complex (the "Project") in the City of Lafayette. The 03-acre Project site included a creek running along the south side. After an extensive public review process involving Planning Commission, Design Review, and City Council hearings, the City Council approved the Project and determined that the Project was exempt from CEQA under CEQA Guidelines section 15332 – the infill exemption.

During the Project hearings, a neighbor ("Nassiri") retained an expert who submitted comments throughout the hearing process to argue that the project was not exempt. The City nonetheless concluded that Nassiri had not provided substantial evidence to support the claim that the project was not exempt. While the trial court initially granted Nassiri's writ petition, after the publication of the *Protect Tustin Ranch v. City of Tustin* (2021) 70 Cal.App.5th 951 decision (holding that a "project site" is limited to the project footprint in the infill exemption context), the trial court granted a motion for a new trial and denied the writ petition in its entirety. The Court of Appeal affirmed the trial court's decision.

The infill exemption requires that "[t]he project site has no value as habitat for endangered, rare or threatened species." (CEQA Guidelines § 15332(c).) The court held that the substantial evidence supported the City's finding that the project site was not known to have any value as habitat for rare species. Both the City's and Nassiri's experts had confirmed sightings of certain species (the oak titmouse and the Nuttall's woodpecker), but the court concluded that there was evidence demonstrating that these are not "rare" species for purposes of CEQA and that Nassiri had only demonstrated that these may be species "of special concern." Additionally, the court determined that substantial evidence supports the City's finding that the Project would not result in a significant effect to air quality because Nassiri's report did not accurately reflect the scope of construction of the Project and because the developer's report adequately responded to and refuted Nassiri's report.

D. *Westside Los Angeles Neighbors Network v. City of Los Angeles* (2024) 104 Cal.App.5th 223

Holding: A “decision-making body” is any person or group of people within a public agency permitted by law to commit an agency to a definite course of action for a project, and thus the City’s Planning Commission properly certified the EIR for a multi-component project even though the Commission only had the authority to approve one of the components and the other component required further discretionary review by the City Council. Additionally, the City’s finding that one of the project components was exempt from CEQA was supported by substantial evidence.

Practice Tips: In certain circumstances, a Planning Commission may be a “decision-making body” that can approve a project and certify an EIR. But please note that many cities have local rules and regulations that would preclude or otherwise thwart this scenario (e.g. requiring all EIRs to be approved by the City Council; making the Planning Commission a recommending body if a project component or entitlement requires City Council approval; elevating all project entitlements to the highest approval authority). And we think these are *good* local rules – a large part of this case could have been avoided had both of the approvals simply been made by the City Council with a recommendation from the Planning Commission rather than having the Commission take action on one component. Finally, this case is an example of a scenario where the City *prepared an EIR* which found significant impacts, but then also declared part of the project to be *exempt from CEQA*. While the court found in the City’s favor here, this is an uncommon approach and we are still slightly perplexed at the court’s findings (and, frankly, the approach itself).

Summary:

This case involved a complicated fact pattern but generally concerns the City of Los Angeles’ certification of an EIR for the Westside Mobility Plan (“WMP”) which includes short- and long-term plans to address congestion and mobility in the Westside area. The WMP has six components, three of which are at issue in the lawsuit – two specific plans (collectively, the “Fee Program Updates”) and the Streetscape Plan.

The City released a Draft EIR in May of 2014 that analyzed the Fee Program Updates. The Draft EIR stated that its analysis was limited to the potential environmental impacts of the Fee Program Updates as the WMP’s other components, including the Streetscape Plan, were not subject to CEQA review. The City published the Final EIR sixty days later. The Final EIR strangely concluded that the Fee Program Updates would have significant and unavoidable impacts to air quality, noise and vibration, and transportation, but that they were also statutorily exempt from CEQA under Pub. Res. Code section 21080(b)(8).

In March of 2018, the City certified the Final EIR, determined that the Fee Program Updates were both statutorily exempt from CEQA (under Pub. Res. Code section 21080(b)(8)) and categorically exempt from CEQA (under CEQA Guidelines sections 15301, 15304, and 15308). The City also adopted the Streetscape Plan, recommended the Fee Program Updates to be adopted by the City Council, and filed a NOD and NOE for the Project.

Petitioners challenged the EIR and the findings of the NOE. After some procedural back-and-forth involving amended petitions, the trial court ultimately denied the writ petition, determining that:

- the Planning Commission was a “decision-making body” with authority to certify the EIR;
- substantial evidence did not support the City's determination that the Fee Program Updates are statutorily exempt from CEQA;
- substantial evidence supported the City's determination that the Streetscape Plan is categorically exempt from CEQA;
- Petitioner did not demonstrate the Streetscape Plan falls within the unusual circumstances exception to the application of categorical exemptions; and
- the EIR was legally adequate.

The Court of Appeal upheld the trial court’s decision denying the petition. The court first held that the Planning Commission had authority to certify the EIR because the CEQA Guidelines state that a “decision-making body” is any person or group of people within a public agency permitted by law to commit an agency to a definite course of action for a project. The fact that a project has multiple components that may be approved by different bodies does not change the analysis. Because this “project” involved unique overlap between the approvals (i.e. adoption of the Fee Program Updates component is required to *implement* the Streetscape Plan component), and because the Planning Commission had the authority to adopt the Streetscape Plan and commit to a “definite course of action,” the court found that the Planning Commission was thus authorized to certify the EIR and “approve” (the court actually put the word “approve” in quotation marks here) the overall project despite the additional discretionary approval needed by the City Council to adopt the Fee Program Updates.

Finally, the court held that the Streetscape Plan was categorically exempt from CEQA under Guidelines section 15301 because it involved minor alterations to existing rights of way and does not expand the use of those rights of way.

E. Center for Biological Diversity v. County of San Benito (2024) 104 Cal.App.5th 22

Holding: Petitioners were not time-barred from filing a CEQA lawsuit within 30 days of the Notice of Determination filed after the final decision to approve the project following an appeal to a higher approval authority.

Practice Tips: Despite the holding in this case (which is neither surprising nor particularly noteworthy), we still recommend filing NODs (and NOEs!) early and often. Had Petitioners failed to file a timely or otherwise legally sufficient appeal, the Planning Commission’s decision could have been final.

Summary:

This case involves a mixed-use, roadside development project in San Benito County that included a gas station, convenience store, restaurant, amusement buildings and exhibits, motel, banquet hall, outdoor pool and movie screen, and outdoor event center on 26 acres west of Highway 101. During the project’s planning process, site surveys showed some tribal cultural

resources for the Mutsun people (the “Tribe”). Following the Planning Commission’s certification of the EIR and approval of the project on October 12, 2022, the County filed a Notice of Determination (“NOD”) on October 14, 2022.

The Center for Biological Diversity (“CBD”) and the Tribe appealed the Planning Commission’s decision to the County Board of Supervisors which subsequently denied the appeals, approved the project, and certified the EIR on November 8, 2022. On November 10, 2022, the County filed another NOD for Board of Supervisors actions. On December 9, 2022 both the CBD and the Tribe filed separate writ petitions, and the real parties in interest filed a demurrer, joined by the County, stating that the petitions were time-barred under Pub. Res. Code section 21167(c) because they were filed more than 30 days after the *first* NOD filed on October 14, 2022. The trial court sustained the demurrer without leave to amend.

The Court of Appeal reversed. The court stated that CEQA requires the local agency to file a NOD “within five working days *after the approval or determination becomes final.*” (Pub. Res. Code § 21152(a).) However, the County Code expressly allows for a 10-day period within which the Planning Commission decision can be appealed to the Board of Supervisors (i.e. the Planning Commission decision is *not final* until expiration of the 10-day appeal period). Because CBD and the Tribe timely appealed the Planning Commission approval, the project was not actually approved until the Board of Supervisors acted on the appeal. Thus, the *second* NOD, filed on November 10, 2022, started the 30-day statute of limitations period and the CBD and Tribe petitions were timely filed.

F. Upland Community First v. City of Upland (2024) --- Cal.Rptr.3d ----2024 WL 4182599

Holding: Substantial evidence supported the City of Upland’s finding that a 201,096-square-foot delivery service warehouse would not have significant greenhouse gas emission impacts.

Practice Tips: This is a relatively rare MND-related victory, so it is important to remember that thorough responses to MND comments and bolstering the MND record can help the document withstand scrutiny. However, this case was focused on the MND’s thresholds of significance rather than actual impacts, so we still remain wary of using MNDs when a scoped EIR might be the more “bulletproof” CEQA document option.

Summary:

In April 2020, the City of Upland approved a 201,096 square-foot “warehouse/parcel delivery service building” to be located on 50.25 acres near a local airport (the “Project”). The City also approved a mitigated negative declaration (“MND”) for the Project.

Petitioner claimed the project violated CEQA because a fair argument could be made that the project would have significant greenhouse gas (“GHG”) emissions impacts as well as impacts related to traffic and air quality. Thus, Petitioner claimed the City should have prepared an EIR and specifically noted that the City used two quantitative thresholds of significance for measuring the Project’s cumulative impacts on GHG emissions: (1) a threshold of 10,000 metric tons of carbon dioxide equivalent per year (MTCO₂ e/yr.), and (2) a lower threshold of 3,000

MTCO₂ e/yr. in a supplemental GHG analysis prepared in response to comments on the draft MND claiming that the 10,000 MTCO₂ e/yr. threshold was too high and should only be used for large, industrial projects with primary stationary-source GHG emissions (e.g., power plants, factories). Petitioner argued that the lower threshold was appropriate for mixed-used commercial/industrial projects, with primary mobile-source GHG emissions (such as the Project). The trial court ordered the City to set aside its resolutions approving the MND and the Project, solely “for the purpose of addressing the sufficiency of evidence supporting the City's threshold of significance for GHG emissions under CEQA.”

On appeal, the City and Real Party in Interest argued that substantial evidence supported the City's use of both the 10,000 MTCO₂ e/yr. and 3,000 MTCO₂ e/yr. quantitative thresholds of significance for GHG emissions. Alternatively, even if substantial evidence did not support the City's use of either quantitative threshold, substantial evidence supported the City's determination that the project's GHG impacts would be less than significant based on a qualitative, performance-based standard because the Project is consistent with the City's 2015 climate action plan. The Court of Appeal agreed and held that substantial evidence supported the City's finding that the Project would not have significant impacts on GHG emissions. Specifically, substantial evidence supported the City's use of the 3,000 threshold for measuring the significance of the Project's impacts on GHG emissions and demonstrated that the Project's GHG emissions would be below the 3,000 threshold. Finally, the court concluded that due to this evidence, it would not reach the question of the Project's compliance with the 10,000 threshold or consistency with the climate action plan (except it did state that the City had forfeited the latter argument as it was not raised at the trial court).