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2014 CEQA 3rd QUARTER REVIEW

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Welcome to Abbott & Kindermann's 2014 3rd Quarter CEQA update, cumulative for the year. The newer decisions are highlighted in **bold font**. Although the Supreme Court issued its decision on limitations and CEQA (*Tuolumne Jobs & Small Business Alliance v The Superior Court*), the court granted preview in another CEQA case, resetting again the number of CEQA cases pending at the court at six. Among other decisions, the appellate court concluded that the Governor was not subject to CEQA on certain tribal gaming decisions (*Picayune Rancheria v. Brown*), parsed another negative declaration finding only one flaw (*Rominger v. County of Colusa*), and addressed an important litigation question as to when the agency can recover record-related litigation costs (*Coalition for Adequate Review v. City and County of San Francisco*). To read the prior year cumulative CEQA review, click here: 2013

1. CASES PENDING

Six CEQA cases remain pending at the California Supreme Court. The cases and the Court's summaries are as follows:

Sierra Club v. County of Fresno, S219783 (F066798, 226 Cal.App.4th 704)*;* Fresno County Superior Court; 11CECG00706, 11CECG00709, 11CECG00726.) Petition for review after the Court of Appeal reversed the judgment in an action for writ of administrative mandate. This case presents issues concerning the standard and scope of judicial review under the California Environmental Quality Act. (CEQA; Pub. Resources Code, § 21000 et seq.)

Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist., S214061. (A135892; nonpublished opinion; San Mateo County Superior Court; CIV508656.) Petition for review after the Court of Appeal affirmed the judgment in an action for writ of administrative mandate. This case presents the following issue: When a lead agency performs a subsequent environmental review and prepares a subsequent environmental impact report, a subsequent negative declaration, or an addendum, is the agency's decision reviewed under a substantial evidence standard of review (*Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385), or is the agency's decision subject to a threshold determination whether the modification of the project constitutes a "new project altogether," as a matter of law (*Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288)?

Center for Biological Diversity v. Department of Fish & Wildlife, S217763. (B245131; 224 Cal.App.4th 1105; Los Angeles County Superior Court; BS131347.) Petition for review after the Court of Appeal reversed the judgment in an action for writ of administrative mandate. This case presents the following issues: (1) Does the California Endangered Species Act (Fish & Game Code, § 2050 et seq.) supersede other California statutes that prohibit the taking of "fully protected" species, and allow such a taking if it is incidental to a mitigation plan under the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.)? (2) Does the California Environmental Quality Act restrict judicial review to the claims presented to an agency before the close of the public comment period on a draft environmental impact report? (3) May an agency deviate from the Act's existing conditions baseline and instead determine the significance of a project's greenhouse gas emissions by reference to a hypothetical higher "business as usual" baseline?

California Building Industry Assn. v. Bay Area Air Quality Management Dist., S213478. (A135335, A136212; 218 Cal.App.4th 1171; Alameda County Superior Court; RG10548693.) Petition for review after the Court of Appeal reversed the judgment in an action for writ of administrative mandate. The court limited review to the following issue: Under what circumstances, if any, does the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) require an analysis of how existing environmental conditions will impact future residents or users (receptors) of a proposed project?

City of San Diego v. Trustees of the California State University**, S199557**. (D057446; 201 Cal.App.4th 1134; San Diego County Superior Court; GIC855643, GIC855701, 37-200700083692-CU-WM-CTL, 37-2007-00083773-CU-MC-CTL, 37-2007-00083768-CU-TT-CTL.) Petition for review after the Court of Appeal affirmed in part and reversed in part the judgment in a civil action. This case includes the following issue: 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 the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) 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?

Berkeley Hillside Preservation v. City of Berkeley, S201116. (A131254; 203 Cal.App.4th 656; Alameda County Superior Court; RG10517314.) Petition for review after the Court of Appeal reversed the judgment in an action for writ of administrative mandate. This case presents the following issue: Did the City of Berkeley properly conclude that a proposed project was exempt from the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) under the categorical exemptions set forth in California Code of Regulations, title 14, sections 15303, subdivision (a), and 15332, and that the “Significant Effects Exception” set forth in section 15300.2, subdivision (c), of the regulations did not operate to remove the project from the scope of those categorical exemptions?

2. CEQA GUIDELINES UPDATE

On August 6, 2014, OPR released the draft CEQA Guidelines amendments designed to implement Public Resources Code section 21099 (SB 743, Steinberg). This would permit a shift away from the use of traditional LOS significance criteria while shifting the focus to VMT and transportation impacts. The proposed amendments recognize that there land use decisions which can reduce VMT (potentially having a less than significant impact) while others may induce increased VMT by increasing roadway capacity. Given the vast diversity of circumstances, these Guidelines recognize the diversity of planning, land use planning and development dynamics that exists in California. The likely result will be a framework, not a series of hard and fast rules. Public comment has been extended until October 10, 2014.

3. CEQA LITIGATION

A. EXEMPTIONS

***Picayune Rancheria v. Brown* (Sept. 24, 2014, C074506) ___ Cal.App.4th ___.**

Practitioners are familiar with the incredible breadth in the applicability of CEQA to numerous governmental agency actions. Agencies have been admonished by the California Supreme Court against early commitments to projects in advance of environmental review (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116), although non-binding commitments are not "projects' necessitating CEQA review. (*Cedar Fair, Inc. v City of Santa Clara* (2011) 194 Cal.App.4th 1150). Apparently, if you are the Governor you have even less to worry about.

This issue of the Governor's obligation to follow CEQA was brought to a head when a tribe operating an existing casino sued the Governor on CEQA grounds when the Governor concurred in a determination by the United States Department of the Interior that a new casino would be in the best interest of the Indian tribes and would not be detrimental to the surrounding community. Immediately following the concurrence determination, the Governor entered into a gaming compact with the interested tribe *sans* CEQA review, resulting in the CEQA challenge by the tribal gaming competitor. No CEQA worries here according to the trial and appellate court, as the Governor is not subject to the California Environmental Quality Act. The appellate court reached this conclusion based in part on the omission of the Governor from the definition of public agency in CEQA, along with the CEQA carve out created by the Legislature for tribal gaming compacts.

Label me a cynic perhaps, but this decision invites a minor digression about the illusive Holy Grail of CEQA reform. In recent years, the Legislature has responded to the desperate cries for help for a very vulnerable group: the owners of professional sports organizations. Apparently the Legislature is convinced that these downtrodden entrepreneurs are clearly entitled to preferential treatment, but that this treatment should

not be shared with the public at large. Now that it is clear that the Governor is exempt from CEQA, what motivates reform? As the saying goes, "It's good to be the king."

***Tuolumne Jobs & Small Business Alliance v The Superior Court* (2014) 59 Cal.4th 1029.**

The significance of the right of initiative and referendum was not lost on the California Supreme Court in the decision of *Tuolumne Jobs & Small Business Alliance v The Superior Court* S207173. The facts involve Wal-Mart's efforts to expand an existing store. The City of Sonora had processed an EIR, and the Planning Commission recommended approval. Following the Commission recommendation but before City Council action, supporters submitted an initiative which proposed to adopt a specific plan and streamline project approval. Proponents circulated the initiative measure, and 20% of the City's registered voters signed the measure. The City Council postponed its vote on the permits, and pursuant to Elections Code section 9212, authorized preparation of the report which examined among other issues, consistency of the initiative measure with the approvals issued by the planning commission. After reviewing the study, the City Council chose to adopt the measure as submitted by the voters (the Elections Code directs that a city council is to schedule the measure for election or enact it as submitted. The council is not authorized to modify the measure.) A local coalition filed suit challenging the Council's decision to enact the measure without CEQA compliance, and the trial court effectively ruled in favor of the City. On the a basis of a writ petition to the court of appeal, the court of appeal reversed on the CEQA issue determining that the City had to complete CEQA review. In light of a conflict with another published decision (*Native American Sacred Site & Environmental Protection Association v. City of San Juan Capistrano* (2004) 120 Cal.App.4th 961), the California Supreme Court granted review.

The Court noted that the Elections Code makes no mention of CEQA, allows for an expedited environmental and general plan consistency evaluation, and is structured around very short time frames. For example, once the initiative measure is ready for city council action, the council can delay the measure for up to 30 days for purposes of considering a study regarding the measure's effects. There is no room in the schedule to integrate CEQA's requirements and still comply with the limitations of the Elections Code. Given the timing conflicts, the court viewed CEQA compliance as effectively nullifying one of a city council's options of directly adopting a citizen measure. (Elections Code section 9214(a). The court also observed that under the Elections Code, the city council is not authorized to modify the measure. This limitation would be at odds with one of CEQA's purposes which is to integrate feasible mitigation into a project.

In the end analysis, the court held that CEQA does not apply to measures submitted to the council who in turn, puts the measure on the ballot for passage by the voters or when directly enacted by the city council.

North Coast Rivers Alliance v. Westlands Water District **(2014) 227 Cal.App.4th 832.**

Execution of interim short term (two year) water delivery contracts between Westlands Water District and the United States Bureau of Reclamation Central Valley Project were approved based upon a CEQA exemption for grandfathered projects. The Westlands Water District held contracts dating back to the 1960's for delivery of federal water. Given the approvals and infrastructure built or committed to prior to the enactment of CEQA, the appellate court concluded that the approval of the interim contracts pending federal EIS preparation was appropriate exempt from CEQA review based upon the exemptions for ongoing projects (Guidelines section 15261) and for existing utilities (Guidelines section 15301(b).

Citizens for Environmental Responsibility v State of California (March 26, 2014, C070836) 224 Cal.App.4th 1542.

The 14th District Agricultural Association operates the Santa Cruz County fairgrounds outside of Watsonville. [link http://www.santacruzcountyfair.com/fairgrounds-history] Built in 1941, this facility hosted agricultural, rodeo and county fairs for many years. In 2009, the county sheriff's association approached the Association about hosting a three day rodeo as a fundraiser. Using a Class 23 CEQA Exemption (CEQA Guidelines section 15023; normal operations of existing facilities,) the Association approved the use of the fairgrounds for the rodeo, but for other reasons, that particular rodeo event was cancelled. Around the same time, the Regional Water Quality Control Board took interest in the site due to downstream stream contamination, potentially as a result of runoff from the horse and cattle facilities. The Association began gathering water quality samples, determining that the water entering the fairgrounds site from upstream was of lower quality than the water leaving the site. Unrelated to the water quality investigation, during its many years of operation, the Association had evolved its manure management plan, shifting from one of storing wastes on site to daily removal during events. The Association approved a written Manure Management Plan ("MMP") about 6 months before the deputy sheriffs proposed its rodeo in 2009.

In January 2011, the deputy sheriffs proposed a two day rodeo. Opposition on CEQA and animal cruelty grounds developed. In April, the Association's Board directed its consultant to assess the viability of the Class 23 exemption for approving the deputy sheriff's request. The consultant affirmed the suitability of a class 23 exemption, and in May, the Board approved the exemption and the sheriff's request. The rodeo activity contemplated 1500 attendees, 500 horses (maximum of 100 onsite at any time) and 250 cattle/stock (maximum 50 onsite at any time.)

The opponents sued, and the trial court ruled for the Association, finding the Class 23 exemption to be appropriate, and rejecting the arguments concerning unusual circumstances and that the exemption was invalid on the grounds that the agency relied upon mitigation (the MMP) as a basis for utilizing the exemption. Like the trial court, the court of appeal upheld the use of the exemption.

The appellate court observed that the MMP was not a mitigation measure, but was an practice of the Association independent of the sheriff's rodeo. Accordingly, it was not a measure proposed or necessitated by the project. (The significance of this issue is that a lead agency cannot mitigate its way into an exemption. *Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098). Turning next to the Class 23 exemption, the appellate court concluded that it was appropriate for the lead agency to evaluate the proposed sheriff's rodeo against other similar Fairground events, and not as against a broader range of public buildings and grounds. The court then analyzed the opposition's "unusual circumstances" argument, finding that there was nothing unusual about the facts surrounding water quality, surrounding zoning and land uses or as to the scope of the activity.

In this case, the court's common sense interpretation and application of CEQA Guidelines section 15203 was just good CEQA horse sense. Ride on!

Save the Plastic Bag Coalition v. City and County of San Francisco (2014) 222 Cal.App.4th 209.

The city determined that the ordinance was categorically exempt from CEQA review under Class 7 and 8 exemptions because the ordinance was a regulatory action that would protect natural resources and the environment. The court held that the ordinance was a police-power regulatory action to which the categorical exemptions applied. The ordinance did not fall within the unusual circumstances exception in Guidelines section 15300.2(c) because global impact studies regarding the life cycle of various types of bags did not constitute substantial evidence supporting a fair argument that the ordinance would have a significant impact on the environment. Moreover, the ordinance was not a retail food safety measure and thus, was not preempted under the California Health & Safety Code because the provisions relating to single-use articles did not demonstrate legislative intent to preempt local regulation of single-use checkout bags.
Comment: The ongoing fight over plastic bags maybe resolved by pending litigation in 2014.

B. NEGATIVE DECLARATIONS

***Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690.**

The Adams Group Inc. owned four adjacent parcels totaling 159 acres bordered by a Southern Pacific Railroad right of way and track, agricultural land, and two county roads (the Adams Property). In 2001, the county amended the designation of the Adams Property from Ag-Industrial to Industrial and its zoning district from Exclusive Agriculture to Industrial. In 2009, the Adams Group applied for tentative map to subdivide the Adams Property into 16 parcels. No development of the parcels was proposed in the application, although the purpose of the application was stated to be financial in nature. Ninety-three (93) acres of the 159 acres proposed for division were in agricultural production at the time of the application.

The county prepared an initial study and then a mitigated negative declaration (MND) on the grounds there could be potentially significant impacts on cultural resources. However, after circulating the first MND and receiving public comment from the Romingers regarding agricultural resources, traffic, odor, noise and water supply, the county determined a water supply assessment should be conducted. The Romingers submitted additional comments on the first initial study noting the county's failure to also analyze air quality, odors, greenhouse gas emissions, and noise. Almost a year later, the county issued a revised initial study and MND; however, this time, the county's review determined that the project could have a potentially significant impact on air quality, cultural resources, and hydrology/water quality, but that such impacts could be mitigated to less than significant levels. The Romingers submitted a letter critiquing the revised MND and arguing that the county failed to provide the full 30-days for the public to review the MND.

At a hearing on the revised MND, the planning commission considered the Romingers' comments but adopted the revised MND and approved the project. The board of supervisors denied the Romingers' appeal and also voted to adopt the revised MND and approve the project. The Romingers filed a petition for writ of mandamus. The trial court denied the Romingers' petition on the grounds that the subdivision was not a project under CEQA. The Romingers appealed.

On appeal, the Third Appellate District looked at whether the subdivision was a project under CEQA, whether the common sense exemption applied, whether the county's failure to publish the MND for a full 30 days was subject to the provisions of CCP section 12 and prejudiced the Romingers, whether the county failed to look at the project as a whole, and finally, whether there was substantial evidence of a fair argument as to any impacts requiring an EIR to be prepared. A discussion of each issue is outlined below.

First, the appellate court held that the Adams Property subdivision was a project under CEQA as a matter of law because section 21080(a) of the Public Resources Code states that CEQA applies to the approval of tentative subdivision maps.

Next, the appellate court held that the project was not subject to the common sense exemption. The common sense exemption applies "[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…." 14 Cal. Code Regs. §15061, subd. (b)(3). Here, the appellate court reasoned that because the subdivision application clearly stated that the parcels were being subdivided for the purpose of financing and creating lots for lease or sale, that was the evidence necessary to support a reasonable possibility that the creation of smaller parcels will lead to development and thus, potentially significant effects on the environment.

On the issue of the county's failure to provide a full 30 days' notice, the court of appeal considered two key sub-issues: (1) whether the 30-day public review period was

governed by Code of Civil Procedure (CCP) section 12, as is the case with an NOD; and 2) considered whether the county's failure to publish the MND for less than 30 days was prejudicial. On the first, sub-issue, the appellate court concluded that CCP section 12 does not apply to the 30-day timeframe in section 21091, subdivision (b) because "there is no need to invoke CCP 12 to avoid doubt or confusion…." In short, it appears the court is saying that because the 30-day timeframe in 21091 does not eliminate the public's right to comment up and to the close of the public hearing on the project, it isn't necessary to invoke the strict interpretation under CCP 12. On the second, sub-issue regarding the county's failure to provide a full 30 days for the comment period on the MND, the court of appeal made an important distinction between finding harmless error and a prejudicial abuse of discretion. Specifically, the traditional harmless error analysis requires opponents to show that the county would have reached a different conclusion regarding the project if the 30-day public review period (rather than the 27-day review period) had been provided. The standard for showing prejudice looks at the nature of the lead agency's noncompliance to ascertain whether it "precluded informed decision making and informed public participation." In this case, the court of appeal determined that the prejudicial abuse of discretion applied, but held that the Romingers failed to bear their burden of proving any prejudice occurred from the truncated public review period.

Fourth, the court of appeal considered the Romingers' argument that the county's CEQA review failed to look at the project "as a whole." In rejecting the Romingers' piecemealing argument, the court held that:

> The MND analyzed the reasonable scenario that agriculturally related industrial development will occur on the subdivision property. To the extent the Romingers complain that certain specific "permitted uses" – including "food or plastic processing plants or truck terminals"-- could develop on the newly subdivided land without any environmental review, … we find no merit in that complaint.

Next the court of appeal analyzed whether there was a fair argument of significant unmitigated impacts on agricultural land. First, the court held the county was entitled to veer from the Appendix G checklist in the CEQA Guidelines and apply its own thresholds to conversion of agricultural land. In short, the county's application of its home-spun threshold (e.g., whether land is designated as prime, unique, or of statewide importance AND is designated by the County of Colusa General Plan or Zoning Ordinance as Agricultural land) was sufficient under CEQA. Second, the court of appeal discussed the Romingers' argument regarding the county's use of the previous MND adopted to convert the land use designation and zoning of the Adams Property. Noting the county was not outwardly relying upon the previous MND, the court quickly dismissed the Romingers' argument, and reverted to another discussion regarding the thresholds of significance only to hold that the Romingers failed to provide any evidence that conversion of 113 acres of prime agricultural land would constitute a significant impact. The court went on to point out the Romingers' "mistaken proposition that the conversion of *any* prime farmland to nonagricultural use may be considered a significant effect, no matter how much land is being converted or how much farmland remains

unconverted." The evidence in the record suggested that out of the county's 225,000 acres of prime farmland only 113 acres would be impacted by the conversion. The court did not deem this substantial evidence of a fair argument that prime farmland would be significantly impacted.

As for Romingers' claims that the county did not adequately address odor concerns, the court also disagreed. Because no specific industrial or other uses were proposed as part of the project, the county determined the project *could* have a potentially significant odor impact. The county adopted a mitigation measure requiring the applicant to consult with the air district and health department to ascertain which odor control and/or reduction measures would be applicable to the project. The county further requested that all measures be installed in accordance with accepted engineering practice and required that evidence of such installation be provided to the county prior to Certificates of Occupancy being issued. Finally, the mitigation measure dictated that for project that could not fully mitigate odor impacts as determined by the county air and health departments, additional CEQA review would be required. Relentless, the Romingers argued the mitigation was impermissibly deferred and further that the proposed odor control technology was not necessarily available or proven to work. They submitted a letter from an air quality consultant to support their contentions. However, the court held that because the Romingers' air quality consultant did not provide specific information on what uses could produce unmitigable odors, the record did not contain substantial evidence of a fair argument that the project may result in significant odor impacts.

The Romingers also asserted that the initial study and MND failed to properly analyze the project's potential for noise. The appellate court rebuked this claim on the grounds that the Romingers' argument was not clearly supported by substantial evidence.

Air quality was another area that the Romingers alleged the county failed to comply with CEQA. While they posited two arguments, the court only discussed one: whether the MND contained unenforceable and deferred mitigation for air quality impacts. The court of appeal's key holding on this impact area was that "[t]he County's retention of discretion to require the applicant to prepare and submit a fugitive dust control plan does not render this mitigation measure unenforceable because any abuse of that discretion by the county could be remedied through the courts in mandamus."

With regard to greenhouse gas (GHG) emissions, the county found that the project would achieve a 35 percent reduction in business-as-usual emissions through compliance with regulatory measures." The Romingers argued that the county failed to provide a baseline by which to study the GHG emissions and further, that the MND presumed that statewide mitigation measures would reduce project emissions to less than significant. The court rejected both arguments – the first on the grounds that the Romingers did not cite any evidence to support a claim that the project would result in significant GHG emissions, and the second on the grounds that the Romingers failed to illustrate that it would be unreasonable to expect compliance with such standards.

On the issue of water supply, the county found that with well spacing and water management best practices the project would not substantially reduce water supplies. The Romingers argued that the water supply assessment did not support the county's conclusion. However, the court of appeal rejected the Romingers' arguments on the ground that reliance on the current use of the wells had no bearing on well capacity, they made no effort to explain why the county's water supply assessment was faulty, and their consultant's attempt to undercut the county's conclusions on water supply analysis without introducing any new facts or evidence did not constitute substantial evidence of a fair argument that the subdivision would have a potentially significant impact on water supplies.

Despite the court's many holdings against them, the Romingers managed to prevail on one CEQA argument – traffic. The appellate court analyzed the claim that the Romingers' traffic expert presented a fair argument that the subdivision project would have a significant impact on the environment because of the project's traffic impacts. In particular, the Romingers' traffic expert explained that the project's trip generation could have a potentially significant impact on the intersection of County Line Road and Old Highway 99 because of the railway grade crossing and limited line of sight which could cause vehicles to pile into the rear of waiting traffic queues when the crossing gates are down. The county responded that the impacts of a future development are speculative and specific future projects would be subject to further CEQA review in any event. Reiterating the rule on when an expert's testimony constitutes a fair argument the court stated, "the question is whether Smith's opinion constitutes substantial, credible evidence that supports a fair argument that such development may occur and that, as a result, the greater traffic generated by such development may have a significant impact on the environment surrounding the project, and therefore, an EIR was required."

COMMENT

This case has two excellent discussions on when expert testimony constitutes substantial evidence of a fair argument (one regarding traffic and the other regarding water supply).

C. ENVIRONMENTAL IMPACT REPORTS

***Citizens Opposing a Dangerous Environment v. County of Kern* (2014) 228 Cal.App.4th 360.**

A continuing reoccurring question for CEQA practitioners is: when is it appropriate to rely upon the regulatory scheme and permitting steps of independent regulatory agencies? The most ready criticism of that practice is that it involves deferred mitigation. That criticism has to be balanced against the recognition that subsequent to the enactment of CEQA, that there now exists a myriad number of local, state and federal regulatory agencies with special regulations and expertise and CEQA should integrate with existing regulatory practices where issues overlap. As the decision in *Citizens Opposing a Dangerous Environment v. County of Kern* (2014) 228 Cal.App.4th 360 illustrates,

perhaps an easier case can be made for regulatory reliance when a CEQA lead agency relies upon a federal agency with exclusive regulatory authority.

The underlying land use conflict involves applications for a rezoning for wind energy (think turbines) projects and an existing private airport used for glider aircraft. In response to separate applications which would result in 116 turbines, the County of Kern prepared an EIR. The EIR included consideration of conflicts between the turbines (up to 500 feet high) and a nearby private airstrip. The EIR included a mitigation measure which imposed an obligation on the turbine operator to obtain a Determination of No Hazard to Air Navigation from the FAA. The EIR also discussed the role and nature of FAA regulation. The owner of the nearby airport submitted comments on the Draft EIR concerning the potential conflict with glider plane operation, which as an unpowered aircraft has more limited navigational options. Both the turbine applicant and glider pilots desired access to the ridgelines due to the naturally occurring wind conditions. By the time that the Board of Supervisors ultimately approved the project, both the applicant and opponent had submitted expert reports relative to their concerns over potential conflicts. By the time of the Board action, the FAA had made "no hazard" determinations on 102 turbine facilities. The opponents filed a writ of mandate, seeking to overturn the EIR certification and project approval. The trial court denied the writ. On appeal, the opponents focused on the mitigation measure which relied on the FAA review process, arguing that this violated CEQA in several particulars. The appellate court rejected these arguments as well.

First, the appellate court concluded that the mitigation measure calling for federal agency sign off sufficiently avoided or reduced impacts to a less than significant level. The second argument was that the FAA lacked enforcement authority in the event of conflict. However, once the FAA made a safety decision, the County's conditions of approval assured safety through its land use regulations. Appellants also challenged the sufficiency of the County's response to an aviation safety related comment, but the appellate court noted that the comment was untimely under CEQA's rules, and that the County had no obligation to respond. The court of appeal also found that there was substantial evidence in support of the disputed mitigation measure. That evidence consisted of the staff reports and discussion of FAA's regulatory requirements. As to this issue, the court restated the well-understood rule that a reviewing court does not reweigh the evidence in an EIR, and noted that record included expert reports in support of the County's determinations. Finally, the opponents challenged the rejection of an alternative which would have relocated the turbines off the ridgeline and away from the flight paths used by the glider pilots. The appellate court concluded that once the Board of Supervisors had determined the impacts to be adequately mitigated, that the Board was not obligated to further consider alternatives which further reduced impacts.

Town of Atherton v. California High-Speed Rail Authority **(2014) 228 Cal.App.4th 314.**

Programmatic EIRs invariably invoke the uneasy question, of "how much information is enough?" This question is reminiscent of the challenge to the United States Supreme Court in defining obscenity and Justice Potter Stewart's concurring opinion when he acknowledged the difficulty of articulating a standard, writing "I know it when I see it", and then concluding that the movie in question was not obscene. The Third District Court of Appeal recently wrestled with CEQA's equivalent to defining the undefinable, concluding that the level of detail on a programmatic EIR was sufficient.

The most recent treatment of the topic involves the various challenges to the decision of the California High-Speed Rail Authority in certifying a program EIR for a preferred route corridor from the Bay Area into the Central Valley. *Town of Atherton v. California High-Speed Rail* (2014) 228 Cal.App.4th 314. The three CEQA issues which made their way to the Court of Appeal were: (1) did the program EIR improperly defer on the vertical profile options of the alignment; (2) the EIR utilized a flawed revenue and ridership model; and (3) the Authority improperly rejected an alternative offered up by a third party consultant.

For purposes of this litigation, the state's consideration of a high speed rail system dates back to 1993, and looked at three different passes for access from the Central Valley to the Bay Area: Altamount Pass, Pacheco Pass and Panoche Valley, and in this evaluation, Altamont Pass was preferred. That analysis also considered biological and farmland impacts, along with rail system operating characteristics and efficiencies. In 2005, the Authority commissioned a program EIR to examine corridors between Altamont and Pacheco Passes. Following certification, the Town of Atherton and other parties challenged the EIR. In 2008, the trial court agreed with the opponents, and issued a writ setting aside the resolution approving the Pacheco Pass alternative. The court denied a stay against any project level studies.

In 2010, the Authority certified the revised final PEIR, and following re-approval of the Pacheco Pass network alternative, filed a return to the writ in the trial court. The petitioners challenged the return to the writ (*Atherton I*) and opponents filed a new action (*Atherton II*) challenging the sufficiency of the PEIR. The trial court granted partial favorable relief to both the *Atherton I* and *II* petitioners. Dissatisfied with the relief, petitioners in both actions appealed.

On appeal[1], the court of appeal reversed, upholding the sufficiency of the programmatic document. The first CEQA challenge was that the PEIR failed to evaluate the impact of the vertical alignment of the rail as it passed through areas in the Peninsula. This first EIR

[1] The initial issue addressed by the appellate court was whether the state action litigation had been preempted as a result of the federal government taking jurisdiction over the project. The court devotes considerable analysis to this issue, ultimately rejecting the preemption argument.

was a programmatic EIR, and did not include specifics. Those characteristics were evaluated in a second tier EIR (which the trial court had declined to stay following the original trial court proceeding.) In June 2010, the preliminary alternatives analysis report for the second tier EIR carried forward several alternatives: aerial viaduct, berm, at grade, covered trench/tunnel and deep tunnel were carried forward for analysis. Immediately prior to the certification of the revised final PEIR in *Atherton I*, the lead agency issued a supplemental analysis report which identified an elevated structure was the only feasible alternative for the Belmont-San Carlos-Redwood City portion of the corridor. The opponents argued that the evaluated alignment was reasonably foreseeable and should have been included in the programmatic EIR. Relying upon the decisions in *In re Bay-Delta* (2008) 43 Cal.4th 1143 and *Al Larson Boat Shop* (1993) 18 Cal.App.4th 729, the appellate court disagreed, indicating the proper focus was the decision then ripe for review, and the constant updating with new site specific information could result in endless rounds of document recirculation, undermining the purposes of tiering. The court then addressed the dispute over ridership information. Reciting the substantial evidence test, the court characterized this as a dispute among experts and finding sufficient competent evidence in the record, deferred to the lead agency. The final CEQA claim involved consideration of alternatives. The opponents had retained a French engineering company (Setec) to develop additional alternatives. The Authority had rejected those alternatives on the basis that the alternatives were infeasible or similar to alternatives already considered. Procedurally, the court found that one of the alternatives (Altamont) had been addressed and resolved in the *Altamont I* litigation. The final PEIR considered three alternatives for Dumbarton Bridge crossing. The final PEIR noted the relative greater impacts to bay wetlands from these alternatives (as compared to the Pacheco Pass alternative) as well as similarities as to two of these alternatives with alternatives previously evaluated. In a similar vein, the Authority found other Setec alternatives to be similar to alternatives previously evaluated by the lead agency. Turning to three Fremont alternatives, the opponents noted that two were problematic, but challenged the rejection of one on the basis that it would have required Union Pacific right of way acquisition (noting that the lead agency contemplated such right of acquisition for the Peninsula portion.) The court concluded that basis of the rejection was sufficient given the railroad's overall opposition to relinquishing any right of way, and noted that the opponents had failed to show that this alignment was substantially different from alignments already considered.

Lessons learned: First, program EIRs remain valid CEQA tools, although the debate over the level of detail is not resolved with this decision. The lead agency is well-served in documenting the programmatic nature of the decision, coupled with clarity as to what is not being decided. Second, the courts will defer to the lead agency, but to earn that deferment, there needs to be substantial credible evidence in the record. The law presumes such evidence exists, and it is up to the opponents to prove to the contrary. Third and finally, an expansive consideration of alternatives at the outset (with the rationale for why particular ones were not carried forward), may yield significant benefits for the lead agency later on when facing new alternatives volunteered by project opponents.

***Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036.**

In *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, the Court of Appeal for the First Appellate District held that the environmental impact report for the comprehensive plan to redevelop Treasure Island and Yerba Buena Island in the San Francisco Bay, which was labeled a "program EIR" (a) satisfied the substantial evidence standard of review as to all of the required elements of an EIR; (b) addressed the environmental impacts of the proposed project to a degree of specificity consistent with the underlying activity being approved; and (c) properly allows for supplemental review that may be necessary in the future.

Treasure Island is a man-made island consisting of about 404 acres of landfill placed on former tidelands and submerged lands in the middle of San Francisco Bay between San Francisco and Oakland, California. Yerba Buena Island is an adjacent, approximately 160-acre, natural rock outcropping. Treasure Island and the causeway that connects it to Yerba Buena Island were constructed in the late 1930's. During World War II, the United States Department of Defense converted the area into a naval station, which it operated until 1997. The existing conditions on the former naval station cite are characterized by aging infrastructure, environmental contamination from former naval operations, deteriorated and vacant buildings, and asphalt and other impervious surfaces which cover approximately 65 percent of the site. The City and County of San Francisco ("City") and the community have been formulating plans for the reuse of the former naval station since its closure.

In June 2011, after more than a decade of planning, study and community input, the City's board of supervisors unanimously approved a comprehensive plan to redevelop the former naval station and the adjacent Yerba Buena Island (the "Project"). The environmental impact report ("EIR") envisioned the Project as including a new, mixed-use community, including up to 8,000 residential units; up to 140,000 square feet of new commercial and retail space; up to 100,000 square feet of new office space; restoration and reuse of historic buildings on Treasure Island; about 500 hotel rooms; public utilities; 300 acres of parks, playgrounds, and public open space; bike and transit facilities; a new ferry terminal and intermodal transit hub; and a rehabilitated public school building. Construction and buildout of the Project would be phased and anticipated to be completed over an approximately 15- to 20-year period.

Citizens for a Sustainable Treasure Island ("CSTI") filed a writ of mandamus alleging that the City and real party in interest Treasure Island Development Authority ("TIDA") failed to certify a legally adequate ("EIR") for the Project, and therefore violated the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000 *et seq*.). CSTI's principal argument was that the EIR should have been prepared as a program EIR, not a project-level EIR, because there is insufficient detail about various aspects of the Project, including remediation of hazardous materials, building and street layout, historical resources and tidal trust resources, for "project-level" review. CSTI alleged

other defects in the EIR. The trial court denied the petition for writ of mandate. The Court of Appeal for the First Appellate District affirmed.

CSTI's primary argument on appeal was that the City prejudicially abused its discretion by preparing a project EIR instead of a program EIR. Under general CEQA principles, a "project EIR" is prepared for a construction-level project, and should focus primarily on the changes in the environment that would result from the development project and examine all phases of the project including planning, construction, and operation. In contrast, a "program EIR" evaluates the broad policy direction of a planning document, such as a general plan, but does not examine the potential site-specific impacts of the many individual projects that may be proposed in the future consistent with the plan. Program EIRs play a key role in a "tiered" CEQA analysis.

In this case, the EIR stated it is a "project EIR" that analyzes all phases of the Project at maximum buildout. CSTI argued "at best, the EIR constitutes conceptual, program-level CEQA analysis" which functions as a first-tier document, and anticipates later environmental review on specific projects. CSTI claimed the most appropriate way to address the Project is by "tiered environmental review … where, as here, the proposal being advanced is an overarching, conceptual plan or program, the project-level details of which will only become known as they are later formulated and presented in a series of later, project-level proposals intended to implement the conceptual plan or program."

However, the Court of Appeal found that CSTI improperly focused on the EIR's designation rather than its substance "[T]he 'fact that this EIR is labeled a "project" rather than a "program" EIR matters little….'" The court explained:

"Designating an EIR as a program EIR … does not by itself decrease the level of analysis otherwise required in the EIR. 'All EIR's must cover the same general content. The level of specificity of an EIR is determined by the nature of the project and the "rule of reason," rather than any semantic label accorded to the EIR.'"

The court explained that the question is not whether a program EIR should have been prepared for the Project, but whether the EIR addressed the environmental impacts of the Project to a degree of specificity consistent with the underlying activity being approved through the EIR. The court held that the EIR for the Project in this case contained all of the required elements of an EIR that are set forth in Article 9 of the CEQA Guidelines. (The court noted that those requirements are (i) a table of contents or index; (ii) a summary; (iii) a project description); (iv) a discussion of the environmental setting; (v) consideration and discussion of environmental impacts; (vi) consideration and discussion of significant environmental impacts; (vii) consideration and discussion of mitigation measures proposed to minimize significant effects; (viii) consideration and discussion of alternatives to the proposed project; (ix) a discussion of effects not found to be significant; (x) a list of organizations and persons consulted; (xi) a discussion of cumulative impacts; (xii) to a limited extent, a discussion of economic and social effects of the proposed project; and (xiii) revisions to the draft EIR, comments on the draft EIR,

a list of commenters on the draft EIR, and the lead agency's responses to comments on the draft EIR.) The court explained that the level of detail in an EIR is driven by the nature of the project, not the label attached. It is the substance, rather than the form, of the environmental document which determines its nature and validity. The degree of specificity required in an EIR corresponds to the degree of specificity involved in the underlying activity that is described in the EIR. Here, the EIR provided sufficient project-level disclosure and analysis.

The court also held the same substantial evidence standard of review applies to subsequent environmental review for a project reviewed in a program EIR or a project EIR. CSTI was wrong in asserting that the "fair argument" standard automatically applies to subsequent discretionary actions in every case where a program EIR has been prepared. (The court did recognize that the fair argument test is required, however, when an agency attempts to tier its environmental review for a "materially different project onto a prior program EIR.")

Furthermore, the court emphasized that, in reviewing this EIR, it detected no attempt to avoid supplemental review. In fact, the EIR acknowledged the duty to perform supplemental review as the Project builds out over 15 to 20 years, and that duty exists regardless of whether the EIR was prepared as a project EIR, or as a program EIR.

Finally, the court rejected CSTI's additional CEQA challenges, and held that the project description was accurate and stable; that hazardous substance remediation was adequately discussed; that regulatory compliance as mitigation was appropriate; that adding a consultation requirement did not require recirculation; that the EIR contained specific criteria for historic preservation; and that the EIR addressed tidelands protection.

California Clean Energy Committee v. City of Woodland (2014) 225 Cal.App.4th 173.

In *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, the Court of Appeal, Third District, held the City of Woodland's (City) programmatic environmental impact report (EIR) was invalid on the following three grounds: (1) it failed to provide sufficient mitigation measures for urban decay impacts; (2) it failed to properly assess the feasibility of the mixed-use alternative and support the City's rejection of the alternative; and (3) the City did not adequately study and disclose transportation, construction and operational energy impacts in the EIR. The appellate court refused to consider plaintiff's general plan consistency arguments as they were not properly presented to the court.

Background Facts

Real Party in Interest and Respondent, Petrovich Development, LLC, owns 234 acres of agricultural land in Yolo County, on the border of the City of Woodland. The company also owns, previously entitled and developed the Gateway I project, consisting of roughly 49 acres of former agricultural land just adjacent to the proposed development subject of

this CEQA action. The proposed project – Gateway II – was a proposal to annex 154 acres into the City, rezone it from agricultural to general commercial, and develop it into big box retail stores, three 100-room hotels, one sit-down restaurant, three fast food restaurants, an auto mall and office space.

Defendant and Appellant, City of Woodland (City), is a municipal corporation and was the CEQA lead agency which certified an EIR for, and approved the Gateway II project at issue. Notably, the City reduced the project to 61.3 acres and no more than 340,000 square feet of commercial space.

Plaintiff and Appellant, the California Clean Energy Committee (CCEC), is a California non-profit corporation headquartered in Davis which seeks to promote energy conservation, greenhouse gas reduction, and the development of clean-energy resources in California. It actively supports the application of the California Environmental Quality Act (CEQA) to energy conservation and related impacts.

CCEC challenged the City's certification of the EIR and approval of the project pursuant to a petition for writ of mandate. The trial court denied the petition. As discussed in detail below, CCEC appealed on the following four grounds: (1) the trial court erred in holding the Gateway II project was consistent with the City's general plan; (2) the mitigation measures in the EIR were insufficient to address the urban decay that would be caused by the Gateway II project; (3) the City failed to properly considered feasible project alternatives like the mixed-use alternative; and (4) the EIR did not properly identify and analyze potentially significant energy impacts of the Gateway II project. The City cross-appealed contending the trial court erroneously granted CCEC's motion to tax costs, as it should have received its costs for assisting in the preparation of the administrative record. This article does not discuss this latter cost issue as that part of the decision is unpublished.

General Plan Consistency

The petition filed by CCEC did not contain a cause of action under the Planning and Zoning Law. As such, the appellate court held that CCEC failed to preserve the issue of whether the rezoning of the land for Gateway II conflicts with the City's general plan.

Sufficiency of Mitigation Measures Related to Urban Decay

The draft EIR prepared by the City contained an urban decay impact analysis. It looked at the potential urban decay impacts of the project on Downtown Woodland, East of Downtown, and East of I-5. The draft EIR concluded that Gateway II could impact the economic health (e.g., loss of sales) and physical integrity (e.g., more vacancies) of Downtown Woodland in the near term, but that in the long term, Downtown could benefit from the project. The draft EIR proposed the following five mitigation measures to reduce all but one of the impacts to urban decay to a less than significant level: (a) the project applicant must submit a request for a master conditional use permit, which shall indicate the specific project uses shall primarily consist of regional retail uses that do not

include entertainment uses and other uses that would compete with retail in downtown Woodland; (b) project applicant shall submit a market study and urban decay analysis for review and approval of the CDD; (c) prior to issuance of building permits, the project applicant shall contribute funds toward the development of a retail strategic plan, which the City would prepare; (d) prior to issuance of building permits, the project applicant would be required to contribute funds toward the preparation of an implementation strategy for the downtown specific plan. To address urban blight, the City adopted mitigation measure 4.11-3(a) to require that the City coordinate with the current owner of the County Fair Mall "to consider a strategic land use plan for the [] Mall to analyze potential viable land uses for the site." Despite the proposed mitigation measures, Impact 4.11-3 would remain significant and unavoidable according to the draft EIR.

Consideration of Project Alternatives

The draft EIR considered two alternatives: a reduced intensity alternative and a mixed use alternative. The reduced intensity alternative would have limited the project to 295,000 square feet of retail and two auto dealerships on 93 acres or less. This alternative was rejected on the grounds of economic infeasibility as the alternative would not capture leakage sales from uses not already served within the community or develop revenue generating land uses to provide jobs.

The mixed use alternative would also limit the development to 93 acres, but would still include the annexation of the entire 154 acres, however. The alternative would allow for the development of a five-acre site for 100-unit multi-family development (20 units/acre), and would include a local-serving commercial town center with 50 units above the commercial storefronts. The auto mall would be reduced from multiple car dealerships to two. The draft EIR stated that the mixed use alternative would decrease the development of roadways, driveway, and parking areas, as compared to the project, and would reduce the commercial trips generated by the project; however, it would result in increased trips due to the residential component. Thus, the draft EIR *assumed* the transportation and circulation impacts of the alternative would be similar to the proposed project. In the end, the City rejected the mixed use alternative as infeasible because it would have greater environmental impacts than the proposed project with respect to services and utilities.

The appellate court held that the EIR contained no evidence that the mixed use alternative would have similar or greater environmental impacts than the proposed project. As approved, the project was significantly reduced in size from 154 acres to 61.3 acres, yet the City failed to explain why the mixed use alternative of 93 acres was deemed economically infeasible when the project as approved would develop only 61.3 acres. This was a fatal flaw under CEQA.

Energy Impacts Analysis

The draft EIR stated that the project would produce a demand for approximately 10,504,000 kWh of electricity annually and 29,896,000 cubic feet of natural gas annually.

Further, the draft EIR disclosed that the project would generate 40,051 new vehicle trips per day, 40 percent of which would be regional in nature. The draft EIR explained the project would be constructed pursuant to the newest Building Code standards for energy conservation, and concluded on this basis, that the project would have less than significant impacts on energy resources. The EIR never contemplated transportation energy impacts.

During the EIR process CCEC relayed concerns to the City regarding the potential energy impacts of the project. Specifically, CCEC noted that the construction and operation of the project would involve the use of diesel fuel and electricity, but no cumulative evaluation of these energy resources was provided in the draft EIR. Further, as the appellate court felt compelled to highlight, the draft EIR contained less than one page of analysis on energy impacts. While the court noted the high likelihood that a reduction in greenhouse gas emissions would correlate to a reduction in energy impacts, the court also noted that it was not permitted to assume the overlap under CEQA's study and mitigation requirements. The fact that the EIR failed to consider the energy impacts of the 40,451 new vehicle trips per day, and that compliance with the new Building Code standards would only apply to the new commercial buildings (e.g., not the operational and construction energy impacts) was improper under CEQA. Finally, the City's EIR did not identify any investigation into renewable energy options that might apply to the proposed project (e.g., solar panels, wind turbine, etc.).

Exhaustion

A party cannot maintain an action alleging that the EIR does not comply with the environmental quality division of the Public Resources Code "unless the alleged grounds for noncompliance with this division were presented to the public agency orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination." (Pub. Resources Code, § 21177, subd. (a).) " '[T]he objections must be sufficiently specific so that the agency has the opportunity to evaluate and respond to them.' [Citation.]" (*Tracy First v. City of Tracy* (2009) 177 Cal. App. 4th 912, 926 citing to *Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 909 [holding that Tracy First failed to exhaust its administrative remedies with respect to an argument that the alternatives listed in the EIR were flawed despite two comments that the EIR did not provide a reasonable range of alternatives to the proposed project because no reduced-sized alternative was consider].)

The City argued that CCEC failed to challenge one of the urban decay mitigation measures during the EIR process. The appellate court noted that while CCEC did not raise concerns regarding the specific mitigation measure during the administrative process, at least one City resident commented that the mitigation as to urban decay was inadequate. It further noted that the administrative record contained a letter from CCEC stating that the mitigation proposed for urban decay is vague and unenforceable. Based on these facts, the appellate court held that the issue as to whether mitigation measure 4.11-2(a) was sufficient had been properly preserved for review. The court further agreed

with CCEC that the mitigation measure requiring a future market study impermissibly ceded responsibility to the developer and was impermissibly deferred without identifying performance criteria or standards of measurement for the City. Similarly, the appellate court agreed that the payment of a fair share fee for a future urban decay study did not obligate the City to undertake any actual mitigation of urban decay. A commitment to pay a fee without any evidence as to what mitigation will actually occur does not suffice for purposes of CEQA. Finally, with respect to mitigation measure 4.11-3(a) and the requirement that the applicant coordinate with the owner of the County Fair Mall to prepare a strategic land use plan, the court agreed with CCEC that like the urban decay study measure, this measure required nothing more than coordination – it didn't require an actual study, or any action to mitigate urban decay should urban decay of the County Fair Mall result from the project. The City argued that the programmatic nature of the EIR allowed the City to defer studies into the future – when specific subsequent environmental occurs for finite land use proposals. In rejecting this argument, the appellate court noted that "tiering does not excuse a lead agency from adequately analyzing reasonably foreseeable significant environmental effects of the project and does not justify deferring such analysis to a later tier EIR or negative declaration." [225 Cal. App. 4th 173, 200.]

Comment

A lack of any meaningful energy consumption analysis, improperly deferred mitigation for urban decay impacts, and the dearth of an explanation as to why the City was willing to approve a much reduced project but not the mixed-use alternative, were the downfalls in this case. While we've seen a number of cases regarding deferred mitigation and alternatives, this case supplements only a handful of other "energy" cases, and highlights the fact that many agencies are overlooking this important impact area. Whether you're a lead agency or project developer, CEQA (Appendix F), this case and its few predecessors, direct that a thorough discussion of all energy consumption impacts from construction to operation, including transportation energy impacts, be disclosed and discussed in an EIR.

The requests for an order directing depublication of the opinion in the above-entitled appeal were denied on June 25, 2014.

Lotus v. Department of Transportation (2014) 223 Cal. App.4th 645.

As we previously observed in our blog, no good deed goes unpunished. In theory, best practices would suggest that factoring environmental considerations into a project in order to minimize or avoid impacts would promote CEQA's objective of making for better projects. Additionally, conscious CEQA thinking at the front end (as compared to the back end of the process) should open the door to potential CEQA streamlining or simplification. The most recent case to discuss project-shaping illustrates how, by trying to do the right thing by including impact mitigating concepts into a project, the lead agency ended up doing the wrong thing according to the court of appeal.

The lead agency was California's Department of Transportation ("DOT"), and the proposed project was a straightening of State Route 101 as it passes through the Richardson Grove State Park. The existing roadway improvements were off limits to certain sized trucks as that portion of 101 did not meet the standards of the federal Surface Transportation Assistance Act of 1982. DOT's proposed project would eliminate the restriction, but at the same time, potentially impact redwoods located in the required right-of-way or adjacent thereto. The EIR included a discussion of potential impacts to redwoods, including potential physical changes (direct and indirect) to redwood tree roots, compaction of soil on top of roots, cuts and fills. The EIR also identified various construction practices which would be followed by the lead agency (e.g. restorative planting of the former roadbed alignment.) However, these commitments were not noted as mitigation measures. While DOT prepared an EIR, it concluded that the impacts to redwoods would be less than significant. Litigation ensued, and on appeal, the court found two noteworthy faults in the EIR.

First, the EIR lacked a threshold of significance for measure impacts to the redwoods. While the EIR included consideration information about the redwoods and site specific information, the court observed the public lacked any means by which to evaluate the lead agency's determinations. The EIR lacked a threshold of significance or the application of any methodology to assess potential impacts. The court agreed with the appellants that a publication issued by State Parks included relevant information which could have been used as a threshold of significance. While the appellate court concluded that ultimately it was the lead agency's call on selecting the appropriate TOS, the failure to identify a TOS left the agency vulnerable to criticism.

The court then observed that the lead agency's error was compounded based upon its position that the impacts were less than significant based upon practices built into the "description of the project." To this author, this is where the opinion is susceptible to different interpretations. Read in the harshest light, this case would suggest that it is improper for a lead agency (or applicant) to pre-mitigate by adding mitigation into the project description. This seemingly, would discourage the applicant/agency from making early environmental commitments, leading to a contrarian result. However, in footnote 8 of the decision the appellate court acknowledged the fine line between elements of the project intended to avoid or reduce impacts such as a physical action or element added to the project (as an example, the proposed use of a light weight special cement base intended to reduce weight and accordingly compaction underneath) and what must be treated as a mitigation measure. The court noted that if that practice was part of the project (description), it would not make sense to add the same requirement as a mitigation measure. But to put that issue in perspective, the court noted that post design actions (e.g. restorative planting and use of an arborist or special equipment) were a form of mitigation, had to be identified as such, and included in the mitigation monitoring and reporting program. Thus, the court seemed to be drawing a distinction with building physical environmentally beneficial concepts into a project design from other environmental commitments which are in response to a project such as those with an operational element or are implemented post project. This interpretation potentially leads to uneven results. An applicant who mitigates to a stated mitigation ratio at the beginning

of the project perhaps has no impacts. The applicant who satisfies the same mitigation ratio concurrent with the project or after the fact on the other hand may be required to treat this as formal mitigation. Same result, same benefits, uneven consideration.

In the end, it may be that DOT embraced all of the right strategies and built them into the project, but packaged them in a manner which did not meet the court's expectations. Then again, no good deed goes unpunished.

D. SUBSEQUENT ENVIRONMENTAL REVIEW

Citizens Against Airport Pollution v City of San Jose (2014) 227 Cal.App.4th 788.

Last year, we summarized an important CEQA decision illustrating the successful efforts of the City of Napa to rely on its previously certified EIR for its General Plan (certified in 1998) when approving minor general plan amendments. *Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal.App.4th 192 that decision came from the 1st Appellate District. http://blog.aklandlaw.com/2013/12/articles/ceqa/no-new-environmental-review-required-to-increase-housing-densities-in-citys-general-plan/. A similar result occurred in a new decision from the 6th Appellate District involving an airport master plan, based upon an EIR certified in 1997, and updated in 2003.

The facts involved the use of an 8th Addendum to the 1997 San Jose Airport Master Plan EIR (followed by a 2003 SEIR[2]). Between 1997 and 2010, the City had approved and relied upon seven addenda to the 1997 Master Plan EIR. The City, as the lead agency, determined that air passenger projections initially assumed to occur by 2017 would be slower than anticipated (the revised projection was 2017), along with anticipated decreases in previously forecast air cargo and general aviation. The City also anticipated a shift in the general aviation demand, with increases in corporate jet use. As a result, the City, relying upon the 8th addendum to the 1997 EIR, approved an amendment to the Master Plan, including the redevelopment of existing facilities. The addendum concluded that the project would not generate any significant impacts not previously disclosed or result in a substantial increase in the severity of previously identified impacts.

An unincorporated association, Citizens Against Airport Pollution (CAAP) filed a petition for writ of mandamus against the City to set aside the approvals. The trial court ruled for City, and CAAP appealed. In reviewing the challenge to the City's decision to not prepare a subsequent or supplemental EIR, the appellate court applied the substantial evidence standard. That is, a reviewing court would examine the record to determine if substantial evidence supported the City's decision to not recirculate.[3] In support of its

[2] The Court mentions the 2003 SEIR several times in the decision. This decision however appears to be primarily based upon the relationship of the later approvals to the 1997 project approvals and EIR.

[3] Although the City raised the issue of CAAP's failure to exhaust administrative remedies, the appellate court declined to reach the issue as it determined that the City prevailed on the substantive merits.

challenge, CAAP presented five arguments: (1) the 2010 approvals were a new project, (2) noise impacts, (3) greenhouse gas emissions, (4) air quality, and (5) biological (burrowing owl). First, as to "new project" argument, the parties debated whether or not the 1997 EIR was a program EIR (appellant's argument) or a project EIR (the City's assertion.) The appellate court ultimately did not resolve this issue, but in assuming that the 1997 EIR was a program EIR, concluded that the record did not support the requisite argument that the a subsequent EIR was required under Public Resources Code section 21166. The court relied upon its earlier decision in *May v. City of Milpitas* (2013) 217 Cal.App.4th 1307, and distinguished the facts from those in *Center for Sierra Nevada Conservation v. County of El Dorado* (2012) 202 Cal.App.4th 1156 http://blog.aklandlaw.com/2012/05/articles/ceqa/approval-of-oak-woodland-management-plan-and-mitigation-fee-program-based-on-a-negative-declaration-is-overturned-by-third-district-appellate/ .

The court then turned to the argument concerning noise impacts. The addendum concluded that the reduced level of anticipated operations, coupled with the phase out of older, noisier planes, that the evidence supported the conclusion that anticipated impacts would be less than originally forecasted. Reviewing the challenge based upon greenhouse gas emissions, the court followed the decision in *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, agreeing that greenhouse gas emissions was not "new information", and could have been raised in the 1997 or the 2003 SEIR, thereby foreclosing it being raised in a challenge to the 8th addendum. Next, similar to the noise issue, the appellate court concluded that as the project, modified in 2010, would involve fewer operations then already analyzed and accordingly, was not a basis for overturning the addendum. The final issue was the potential impact resulting from a loss of burrowing owl habitat. However, the 1997 EIR included a burrowing owl habitat plan and on that basis, the City had originally concluded that the impacts would be less than significant. As part of the 2010 approval, the City would provide substitute habitat onsite, following the mitigation measures previously approved in 1997. Applying the substantial evidence, the court concluded that there was an insufficient basis to require a subsequent EIR.

E. CEQA PROCEDURE

***Citizens for the Restoration of L Street v. City of Fresno* (2014) 229 Cal.App.4th 340.**

The courts have been clear: the decisionmaking body has to consider the CEQA document before taking action to granting a discretionary approval. A recent court decision examines a variation on that practice when the approving body approved the CEQA document, but lacked the authority under the local code to do. How does the legislative body cure that error?

The facts involve a proposed infill development in the City of Fresno. In June 2011, the City filed a notice of intent to adopt a mitigated negative declaration for the required conditional use permit and tentative map. The notice provided that the project would

require demolition of two older homes located on site. The notice did not reflect that demolition permits were required, or what department or body would grant the demolition permits, or that the Preservation Commission would have any review. In late June, the Preservation Commission conducted a public meeting and ultimately concluded that the buildings were not historical resources. The Commission also approved the mitigated negative declaration. An interested group filed an appeal to the City Council, arguing in part that under the City's rules, the Commission lacked the authority to approve the negative declaration. In early November, the City Council considered the appeal, affirmed the Commission's decision, and upheld the Commission's CEQA findings and determinations. The City then filed a second notice of determination.[4]

Plaintiff then filed suit on CEQA grounds, challenging the City's procedure and the lack of an EIR. Within a few days, the City issued demolition permits and the buildings were demolished. Following a court trial ten months later, the trial court agreed that the City's procedure was in error, that the City Council's action did not cure the error, and ordered the City Council to set aside its decision. The City subsequently filed a return to the writ reflecting that the City Council had held a hearing and approved a revised negative declaration. The plaintiff objected to the return to the writ. On the same day, the City appealed portions of the judgment. The plaintiff filed a cross-appeal.

Reviewing the City code, the court of appeal reached the same conclusion as did the trial court. The city code did not authorize the Commission to act on CEQA documents. To that end, the decision turns on the specifics of the City of Fresno code. As many cities and counties operate with commissions with particular subject matter jurisdiction, this decision has potential relevance. The court of appeal rejected the City's argument that approval of CEQA documents by the Commission could be reasonably implied from the totality of the City Code.

The court of appeal then turned to the City's argument that the appeal proceeding undertaken by the City Council cured whatever errors transpired by the Commission, an argument that is successful in many administrative law contexts. In the CEQA context however, the agency must show that the appellate body's actions met all of CEQA requirements. In this case, the City Council was acting in a limited appellate capacity, and was not the decisionmaking body, as that concept is used in CEQA. Thus, the appeal in this case failed to cure the procedural problem below. The court also noted as flawed that the City Council failed to provide the required CEQA notice of the intent to adopt a negative declaration as well as the failure to adopt the CEQA findings.

Addressing the substantive CEQA issue, the appellate court agreed with the trial court that a reviewing court applies the substantial evidence test to the question of whether or not historical resources are present. To make this argument, the plaintiff/cross appellant effectively asked the court of appeal to reverse its earlier decision on this very issue: *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039. The court of appeal

[4] The decision is silent as to when or if the City acted on the conditional use permit and tentative map.

declined to do so, noting the distinction with the "fair argument" test which otherwise dominates the standard of review for negative declarations.

F. LITIGATION

***Coalition for Adequate Review v. City and County of San Francisco* (September 15, 2014, A135512) ___Cal.App.4th ___.**

In *Coalition for Adequate Review v. City and County of San Francisco* (September 15, 2014, A135512) ___Cal.App.4th ___, the Court of Appeal, First Appellate District, reversed in part and remanded in part, a trial court's denial of the City's ability to recover costs for the record of proceedings where the Coalition failed to include all relevant documents in the record the Coalition elected to prepare, despite the trial court's denial of the petition for writ of mandate.

In 2013, Plaintiffs and Respondents Coalition for Adequate Review challenged the City and County of San Francisco's (City) approvals of various projects under CEQA. The Coalition's petition for writ of mandate was denied. Accordingly, the City filed a memorandum of costs for $64,144 to recover its costs of production (e.g., copying, binding, and page numbering) of the supplemental record it prepared, the costs the Coalition charged the City for a copy of the record prepared by the Coalition, paralegal and planning staff time in reviewing the record for completeness and for preparing the supplemental record, and professional courier costs. The Coalition filed a motion to tax costs – or challenge to the City's motion to recover its costs, which the trial court granted. The City appealed.

The court of appeal reversed the trial court's denial of the City's request for cost recovery on the supplemental record, and remanded to the trial court the issue of *what other costs* would be recoverable by the City. In reversing in part and remanding in part the trial court's grant of the Coalition's motion to tax, the appellate court noted that the cost provision in Public Resources Code section 21167.6(b)(2) places the costs that an agency incurs in preparing the record of proceedings on the *parties, not the public agency*. Additionally, the court of appeal acknowledged that when a petitioner prepares a record, it has a duty to include all relevant documents. To the extent a supplemental record is required to be lodged by an agency to ensure the entire record is before the court, the costs for preparing the supplemental record are recoverable by the agency under section 21167.6(b)(2). Of note in this case, the City had attempted to negotiate with the Coalition about including various key documents in the record, to no avail. As a result, City filed a motion for leave to supplement the record of proceedings, which the Coalition opposed. The City's motion was granted and the City prepared and lodged a supplemental record with the trial court.

In an effort to guide the trial court on remand, the appellate court reviewed the law on what costs are recoverable by the agency when a petitioner prepares the record. The court said the City may claim "reasonable labor costs required to prepare the supplemental record." **However, for the first time in a published opinion, the appellate court**

refused to concede that costs to review a petitioner-prepared record of proceedings for completeness in connection with certification were recoverable, reasoning that such a review is a "chore public agencies face in every case … and if an agency could always claim a sizeable amount for review 'for completeness' or 'certification' that would defeat the Legislature's aim of providing for lower-cost record preparation alternatives." In explaining its decision, the appellate court noted that an agency's review of a record for completeness "can easily blur into review for strategy, implicating the kind of attorney fee award neither authorized nor sought here." In short, the court of appeal did not want to circumvent the provisions of 21167.6 related to reducing petitioners' costs of bringing a CEQA action or allow for the recovery of attorney's fees by an agency where none are awardable under the statute in the first place. On remand, the appellate court ordered the trial court to distinguish between the City's claim for paralegal costs on preparing the supplemental record versus paralegal costs regarding review of the record for completeness.

As to other costs, the court of appeal held that messenger costs related to transferring and retrieving documents from different departments in an effort to prepare the supplemental record were recoverable. It also held that copying and binding costs of excerpts of the supplemental record were recoverable by the City if the trial court determines that they were reasonably helpful to aid the trier of fact. As to the copy of the record prepared for the City by the Petitioners, the City could recover those costs if the trial court determined that the City was reasonably entitled to the additional copy. On the other hand, the court held that postage and express delivery costs are expressly disallowed under Code of Civil Procedure section 1033.5(b). Messenger fees, however, may be allowable at the trial court's discretion.

COMMENT

This case is of first impression insofar as the court ruled that an agency may *not* recover its costs for reviewing a petitioner-prepared record for completeness and/or certification. Additionally, this case highlights the extensive discretion trial courts are given when determining questions of fact as to whether a cost item was reasonably necessary to the litigation, and thus, is recoverable by the agency.

Roberson v. City of Rialto **(2014) 226 Cal.App.4th 1499.**

On July 15, 2008, the City of Rialto approved development of a commercial retail center to be anchored by a Wal-Mart Supercenter. The notice of the initial, July 1, 2008, public hearing before the city council on the project approvals was legally defective because the notice did not indicate that the planning commission had recommended the city council adopt the project approvals. (*See Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877, 890–893.) In August 2008, Rialto Citizens for Responsible Growth, a nonprofit mutual benefit corporation ("Rialto Citizens"), petitioned the trial court to invalidate and set aside the project approvals based in part on the defect in the notice of the July 1 city council hearing. On appeal, the court ruled against Rialto Citizens, holding that the petitioner made no attempt to show in the trial

court, and the trial court did not find, that the defect in the notice was prejudicial, caused substantial injury to any of Rialto Citizens' members, or that a different result was probable absent the defect. (*See Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 916–921.)

Meanwhile, in an entirely separate proceeding, Marcus Roberson petitioned the Superior Court for a writ of administrative mandate invalidating and setting aside the same project approvals by the City of Rialto. In his trial brief, Roberson claimed that the project approvals were invalid only because of the same notice violation that was fully adjudicated in the *Rialto Citizens* case. The trial court denied Roberson's petition, and the Court of Appeal for the Fourth Appellate District affirmed the trial court's judgment, on two grounds. First, Roberson failed to demonstrate reversible error because (a) the record on appeal was inadequate to show the trial court erroneously failed to credit Roberson's "evidence of prejudice" (the record on appeal did not contain either a copy of the tentative decision or a transcript of the court trial, and the judgment contained no factual findings); (b) Roberson failed to explain what comments or testimony he would have submitted to the city council had he known of the planning commission's recommendation to adopt the project approvals; and (c) substantial injury and the probability of a different result is not presumed as a matter of law here, because this case involved a defective notice of a public hearing, and not the complete lack of any notice. Second, the court held that Roberson's defective notice claim was barred by res judicata because (a) Roberston's claim was identical to Rialto Citizens' defective notice claim; and (b) Roberson was in privity with Rialto Citizens, since Roberson never explained to the trial court what "harm to himself" he was seeking to prevent by challenging the project approvals based on the defective notice that differed in any respect from any alleged harm to the community or the public, and since his own declaration in the trial court showed that he was seeking to vindicate the same public interests Rialto Citizens sought to vindicate, and not his private interests.

Citizens for a Green San Mateo v. San Mateo County Community College District (2014) 226 Cal.App.4th 1572.

Details do matter in CEQA litigation as reflected in the latest decision involving the application of the statute of limitations to bar a CEQA claim. *Citizens for a Green San Mateo v. San Mateo County Community College District* (2014) 226 Cal.App.4th 1572. The facts involve a facilities master plan adopted by the San Mateo County Community College District. The chronology begins in 2001 when the District adopted a master plan. The District updated the master plan in 2006. The 2006 plan called for building demolition and reconstruction, and extensive site redevelopment including modification to existing landscaping. A mitigated negative declaration was approved in conjunction with the updated master plan. From 2008 through 2010, the District developed, approved and awarded site specific construction contracts. To differing degrees, these plans and construction contracts referenced tree removal. In late 2010, the District awarded a contract for tree removal which began on December 29, 2010, continuing on into January. Citizens raised concerns in early January, and filed a petition for writ of mandamus against the District on July 1, 2011.

The District challenged the pleadings, arguing the relevant statute of limitations barred the suit. The trial disagreed, and the District appealed. The court of appeal reversed, finding that the suit was barred under both the 30 and 180 day CEQA statutes of limitation.

The Citizens' primary argument was that the tree cutting project was different from the project studied in the earlier master plan and as a result, they were not limited by the prior NOD, but could properly file the claim within 180 days of actual discovery. Not so in the opinion of the appellate court. The court of appeal was satisfied that the initial study adequately described the tree cutting such that the filing of the NOD following approval of the 2006 updated plan effectively triggered CEQA's thirty day statute of limitations. In finding the lawsuit to be untimely, the court emphasized the prior California Supreme Court decision in *Committee for Green Foothills v. Santa Clara County Board of Supervisors* (2010) 48 Cal.4th 32 http://blog.aklandlaw.com/2010/02/articles/ceqa/nods-provide-bulletproof-protection-30-days-after-posting/, which attaches significant importance to the beneficial effects of an NOD in terms of the statute of limitations.

The court then addressed the Citizens' alternative argument that the relevant statute of limitations ran from discovery, and extended for 180 days. As to this issue, the Court found that the relevant commitment to the tree cutting took place in 2010 with the approval of various bid and construction related documents, which also included information on tree removal. Contrary to the Citizens' claim, the relevant triggering period was not to be measured from the award of the tree removal contract.

Comment: The lead agency was able to successfully assert that the later implementation action (tree cutting) was included and part of the project approved as part of the earlier master plan. While the discussion of landscape modification in 2006 was not overly detailed, it included sufficient information in the analysis of the Appellate Court to give full benefits to the 2006 filing of the NOD. Thus, project details disclosed in the initial CEQA do matter in the long run by expanding the scope of coverage protected by the filing of a Notice of Determination.

If you have any questions about these court decisions, contact William Abbott or Katherine Hart. The information presented in this article should not be construed to be formal legal advice by Abbott & Kindermann, LLP, nor the formation of a lawyer/client relationship. Because of the changing nature of this area of the law and the importance of individual facts, readers are encouraged to seek independent counsel for advice regarding their individual legal issues.