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High Hurdle for EIR Recirculation Claims Set by Appellate Court

In a recently published decision, a California court of appeal rejected a challenge to an EIR alleging the agency was required to recirculate the EIR when a new alternative was proposed after the draft EIR had already been circulated. *South County Citizens for Smart Growth v. County of Nevada*, 2013 WL 5936664 (Cal. App. 3 Dist.) The decision is important because it clearly lays out the heavy burden facing a petitioner bringing such a challenge.

The case involved a proposed shopping center project in Nevada County. When the planning commission held a hearing on the final EIR, the staff recommended a modified alternative to the project. The commission agreed with staff and recommended that the board of supervisors certify the final EIR and approve the staff alternative. The project applicant, responding to the planning commission's concerns, proposed a revised version of the project that was met by the staff's approval. The commission met again, recommended the applicant's modified project to the board of supervisors, and the board certified the final EIR and approved the project.

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

The court next laid out the petitioner's burden of proof when challenging an agency's failure to recirculate after a new alternative was introduced. Not only must the petitioner show that there was evidence that the alternative might constitute significant new information under the tests laid out in the Guidelines, the petitioner also has the burden to show that there was no substantial evidence that would support determination by the agency that the alternative was not significant new information. According to the court, an agency's decision to certify an EIR without recirculating it implies a finding that one or more of these tests is not met. Consequently, a petitioner challenging an agency's decision not to recirculate an EIR must show that no substantial evidence supports a negative finding for each test. The petitioner thus must show that:

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

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

In a related issue, the petitioner also asserted that the county had violated CEQA by failing to make findings regarding the feasibility of the staff alternative. The petitioner argued that because the board did not adopt the staff alternative, it had to make findings that it was infeasible. The court disagreed, ruling that although a lead agency must give reasons for rejecting an alternative as infeasible during the *scoping process*, the staff alternative was proposed well after preparation of the final EIR. At that stage, the county "was only required to find that the staff alternative was not significant new information, a finding that may be implied from its decision

to certify the EIR without recirculating it."

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