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Unsubstantiated or Speculative Expert Opinion Is Not Substantial Evidence of a Significant Environmental Impact

*Editors' Note: On January 2, 2019, the California Supreme Court granted a request for depublication of this article. The article was previously published in the California Environmental Impact Review, the 2017 Winter Special Issue.*



The

court's application of the fair argument standard provides several noteworthy takeaways for CEQA practitioners. First, the mere presence of conflicting opinions from purported experts is not enough to require preparation of an EIR. To constitute substantial evidence of a fair argument of a significant impact, an expert opinion must amount to more than unsubstantiated speculation by explaining why a significant impact may occur. The opponents cited comments from purported experts that criticized the geology impact analysis in the MND and asserted that the project may cause soil erosion and negatively affect water quality in a nearby creek. The court found that these expert opinions did not explain how the project features and mitigation measures would be inadequate to protect slope stability and prevent soil erosion. In addition, despite assertions from opponents' experts that the project's groundwater pumping might impact a nearby creek, the court found the evidence showed that the aquifer underlying the project was not in contact with the aquifer underlying the creek, and even if a geologic connection was assumed, there was no evidence the project would have any perceptible effect on the water flowing from one aquifer to the other, and from there to the creek. Second, requiring monitoring and adjustments in the event of unanticipated conditions is not improper deferred mitigation. A condition of approval required monitoring during construction and implementing any additional recommended measures based on actual observed conditions. The court explained: "We see nothing improper in adopting measures that reduce the

project's expected environmental effects to a level of insignificance, but require monitoring and adjustments in the event of unanticipated conditions." Third, while non-expert opinion may constitute substantial evidence of a significant visual impact, such assertions must be supported by accurate descriptions of the project and its potential impacts. In support of their argument that the project would have a significant visual impact, the opponents largely relied on photographs showing that an existing residence on the property was visible from a nearby road. The court held that these lay opinions, based largely on the visibility of an existing structure located on a different part of the property, did not constitute substantial evidence of a fair argument that the project may have a significant visual impact. Finally, locating a project in a very high fire hazard severity zone is not a significant environmental impact. Citing the various fire safety project features and conditions of approval, the court explained that there was no credible evidence that the project would exacerbate fire risk, and any need for additional fire protection services that might exist is not an environmental impact. *Perkins Coie LLP represented Knights Bridge Vineyards in this matter, including securing entitlements for the winery from Sonoma County and successfully defending those entitlements in Sonoma County Superior Court and the Court of Appeal.*