

## Mitigated Negative Declaration Inadequate for Mixed-Use Project

The Second District Court of Appeal held that a project's potentially significant environmental impacts required preparation of an EIR rather than the mitigated negative declaration adopted by the City. *Save the Agoura Cornell Knoll et al. v. City of Agoura Hills et al.*, 46 Cal.App.5th 665 (2020). The project consisted of 35 residential apartment units plus retail, restaurant, and office space on an 8.2-acre site located in Agoura Hills. The City approved a Mitigated Negative Declaration for the project, finding no substantial evidence of a significant effect on the environment because the project incorporated mitigation measures it believed would reduce potential impacts to a less-than-significant level.



### 1. Impacts on Cultural Resources

The court of appeal determined the MND's mitigation measures were insufficient to avoid or reduce potential impacts to archeological and tribal cultural resources to a less-than-significant level. The proposed measures, it found, lacked an analysis of whether the resources within the proposed construction site could be avoided. Nor did the measures specify performance criteria for evaluating the feasibility of avoidance as an alternative to excavation. Further, substantial evidence provided by an expert in Native American archeology and history demonstrated that the project could likely cause significant permanent damage to the site and the proposed data recovery program was inadequate to mitigate that damage.

### 2. Impacts on Sensitive Plant Species

The project site contained three special-status plant species that would be significantly impacted by project grading, landscaping, and fuel modification activities. The court found that, even with the proposed mitigation measures, the project could still have a significant impact on these sensitive plant species. It concluded that the mitigation measures improperly deferred formulation of certain mitigation efforts, failed to describe specific performance criteria to ensure that mitigation would be effective, relied on outdated botanical surveys of the area, and did not provide feasible alternatives if proposed salvage and replanting efforts failed.

### 3. Impacts on Native Oak Trees

The court determined that there was substantial evidence in the record that the MND did not adequately analyze the significant impacts that the project might have on the site's oak trees and did not effectively mitigate those potential impacts. The mitigation measures were deemed inadequate because they did not address the risk that mass grading might disrupt the subsurface water flow at the project site and cause a water deficit to the site's oak trees. The measures also failed to address the long-term survival of the retained or replacement oak trees whose natural source of water would be reduced by mass grading and did not include any provisions for mitigating the water loss. Additionally, it could not be presumed that the offsite planting of oak trees through an in-lieu fee payment was a feasible alternative to onsite replacement of oak trees in their native habitat, because there was substantial evidence that previous attempts at this type of restoration had failed.

### 4. Impacts on Aesthetic Resources

The site also contained an aesthetically distinct knoll covered with oak trees that would likely need to be removed for the development. The court rejected the argument that petitioners had failed to exhaust administrative remedies as to their aesthetic resource claims, finding that several individuals and groups raised issues about the project's aesthetic impacts during the public comment period, which was sufficient to preserve the claims. Additionally, the City was fairly apprised by experts of the concerns about water loss to these oak trees from mass grading and the concern that the MND's in-lieu fee measure would not effectively mitigate the project's impacts to the oak trees. As with the other onsite oak trees, the court found substantial evidence that the potential subsurface water deficit would jeopardize the oak trees on the knoll, and payment of the in-lieu fee could not reduce the adverse impacts on this aesthetic resource.

### 5. Attorneys' Fees

Appellants argued that the trial court erred in awarding attorney's fees because the petitioner failed to provide adequate notice of its claims to the Attorney General ten days of filing a pleading as required by law. The court found that although petitioners did not serve the Attorney General with the first amended petition, they properly served notice of their original petition, which did not materially differ from the amended pleading, thereby giving the Attorney General ample opportunity to intervene. The court also noted that a petitioner's failure to comply with this notice requirement "was not an absolute bar; to a fee award. The court also ruled that the real party in interest should be responsible for half the fee award because it actively participated in the defense of the litigation.

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