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CEQA YEAR IN REVIEW 2019

A SUMMARY OF PUBLISHED APPELLATE OPINIONS UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

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The year 2019 saw several trailblazing opinions, indicating that courts continue to grapple with some of CEQA's core policies. The California Supreme Court weighed in on the threshold question of what is a "project" that is subject to CEQA. In *Union of Medical Marijuana Patients v. City of San Diego,* the court recognized that a decision to enact a zoning ordinance is not necessarily a project if the ordinance cannot foreseeably result in changes to the physical environment. It also ruled, however, that where such an ordinance is capable, at least in theory, of resulting in environmental changes, it is a "project" as defined by CEQA, and therefore must be analyzed further to determine whether it is exempt or necessitates preparation of a negative declaration or EIR.

A court of appeal also addressed the same threshold issue, holding that agency inaction is not a project subject to CEQA—even where the agency's failure to act would result in significant adverse environmental impacts. On a related note, another court confirmed that CEQA is not triggered when an agency's discretionary authority over a project is limited to design review and does not extend to other aspects of the project that might adversely affect the physical environment.

Two courts of appeal addressed another concept that is central to CEQA's application: the level of specificity needed in a project description. One found that an EIR's project description could identify and analyze alternative uses for a proposed project's buildings, an office use and a residential use. Another court ruled, however, that an EIR which described an "outer envelope" for development, while leaving flexibility as to building configurations and uses within that envelope, violated CEQA's fundamental rule that a project description must be accurate, stable, and finite.

The baseline for an EIR's impact analysis once again surfaced as an issue in a case that featured conversion of a vacant apartment building to a hotel. There, the court ruled that the agency did not need to consider housing displacement impacts because the units were unoccupied under the conditions existing at the beginning of environmental review.

Finally, in a blockbuster opinion, a court of appeal held that courts can no longer consider challenges to the adequacy of level-of-service-based traffic analyses. SB 743 dictates that, as of the date of the new CEQA Guidelines requiring use of a vehicle miles traveled standard (December 2018), traffic congestion and delay can no longer be considered a significant environmental impact. Because courts apply the law in effect at the time of their decision, the court held that a challenge to the adequacy of the EIR's level of service-based analysis was moot, even though the agency completed the EIR and issued the project approvals long before SB 743 regulations were adopted.

The following summaries are intended to identify the key issues in the cases decided in 2019. For more detailed summaries, please see our web report at californialandusedevelopmentlaw.com.

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A. EXCLUSIONS FROM CEQA

1. California Supreme Court Clarifies What Is a "Project" Subject to CEQA

Union of Medical Marijuana Patients, Inc. v. City of San Diego
(2019) 7 Cal. 5th 1171

The California Supreme Court found that a City of San Diego ordinance adopted to regulate the establishment of medical marijuana dispensaries was a discretionary "project" subject to CEQA, even though the city had determined the ordinance would not result in any environmental impacts. The court first recognized that not all zoning ordinances are "projects" subject to CEQA. The term "project" in CEQA is limited to activities carried out, supported, or approved by a public agency that may cause either a direct or reasonably foreseeable indirect physical change in the environment. Accordingly, a zoning ordinance that cannot cause a change to the environment is not a project subject to CEQA. However, the court held the ordinance at issue qualified as a project because it was capable, at least in theory, of causing a reasonably foreseeable indirect physical change in the environment. The question for a lead agency when determining whether a proposed activity is a project is whether it "may cause" environmental impacts directly or indirectly, not whether it *will* do so.

The determination whether an activity actually will cause environmental impacts should be made in connection with a categorical exemption determination or in an initial study or other CEQA analysis, not in connection with the preliminary question whether the activity qualifies as a project in the first instance. Because the ordinance would allow a number of new retail businesses of a type not previously allowed in the city, the court concluded it could foreseeably result in changes to the physical environment and therefore was a project subject to CEQA.

2. CEQA Does Not Apply to Agency Inaction

The Lake Norconian Club Foundation v. Department of Corrections and Rehabilitation
(2019) 39 Cal. App. 5th 1044

An agency's failure to maintain a historic building—"demolition by neglect"—is not a "project" subject to CEQA. The California State Department of Corrections had used a former hotel that is listed on the National Register of Historic Places for administrative offices until 2002. The department then left the building vacant due to its unsafe seismic condition, and the structure suffered severe damage during El Niño rains because of the department's failure to repair the building's roof. The plaintiffs claimed the department's ongoing failure to maintain the historic hotel building and protect it from further damage was equivalent to a decision to demolish it. The court held that the department's failure to act was not a "project" subject to CEQA, even if environmental consequences might result, because CEQA applies to actions "undertaken" by a public agency, not to agency inaction.

3. CEQA Review Is Not Triggered by Design Review Requirement

McCorkle Eastside Neighborhood Group v. City of St. Helena
(2018, modified 2019) 31 Cal. App. 5th 80

The court of appeal held the City of St. Helena did not violate CEQA by approving a demolition permit and design review for a multifamily residential project without undertaking CEQA review. Under applicable city ordinances, multifamily dwelling units are permitted uses by right within the city's high-density residential districts, subject only to design review. The court explained that CEQA only applies to a project when the agency has the ability to consider and mitigate the project's environmental

impacts in connection with a discretionary approval. Because the city's discretion under its design review ordinance was confined to building design issues and did not give the city authority to address environmental impacts, CEQA review was not required.

B. EXEMPTIONS FROM CEQA

1. Location Exception to Categorical Exemptions Does Not Apply to Earthquake and Landslide Hazard Zones

Berkeley Hills Watershed Coalition v. City of Berkeley
(2019) 31 Cal. App. 5th 880

The "location exception" to CEQA's categorical exemptions does not apply to earthquake and landslide hazard zones, as they are not "environmental resources" that would be affected by a project. The City of Berkeley found construction of three single-family homes exempt under Guidelines § 15303, which exempts construction of small structures, including up to three single-family residences in urbanized areas. The court of appeal held that the "location exception," which bars a categorical exemption for projects that might impact "environmental resources" of hazardous or critical concern, does not apply to earthquake or landslide hazard zones because such zones are not environmental resources. The court also ruled that no impact on the environment due to the project was shown; the plaintiffs presented only a risk of harm to the project due to the environment.

2. Court Upholds Categorical Exemption for Improvements to Amusement Park

San Diegans for Open Government v. City of San Diego
(2019) 31 Cal. App. 5th 349

The court of appeal upheld the City of San Diego's determination that an amended and restated lease requiring upgrades and improvements to an existing amusement park was exempt from the requirements of CEQA. The city entered into an amended lease that provided for extensive structural repairs and improvements to existing park facilities. The city found the lease exempt from CEQA under the exemption in Guidelines § 15301, which extends to the operation, repair, maintenance and minor alteration of existing structures or facilities involving negligible or no expansion of use. The court rejected the argument that the "unusual circumstances exception" barred use of the exemption, concluding that the claim a significant increase in visitors would occur, leading to significant new traffic and noise impacts, was entirely speculative.

3. City Has Broad Discretion to Find a Proposed Project Consistent With Its General and Community Plans Under the Categorical Exemption for Infill Projects

Holden v. City of San Diego
No. D074474 (4th Dist., Dec. 13, 2019)

Use of an infill exemption (guidelines § 15332) will be upheld if the underlying determination that a project is consistent with a general or community plan has a reasonable basis. A developer sought to demolish two single-family houses and construct seven detached condominium units on a steeply sloped site in a heavily vegetated canyon considered environmentally sensitive. The City of San Diego planning staff originally determined that policies of the general plan and community plan would require a minimum of 16 units on the site, but later concluded that seven units could be allowed, given the site's environmental sensitivity. The city council found the project qualified for the infill exemption and approved a tentative map and site development permit.

Plaintiff argued the project could not be exempted because the infill exemption is limited to projects that are consistent with the applicable general plan designation and policies, and the project was inconsistent with the minimum density standards required by the general plan and the community plan. The court of appeal concluded that the plaintiff's claim boiled down to a single question: whether the city had a reasonable basis for finding the project consistent with its general plan and community plan. The court concluded that the city's determination to approve fewer than 16 units was supported by provisions of the community plan (which is incorporated in the general plan) that allow modifications to its density recommendations as the plan is implemented, as well as regulations for hillside development in the city code. Ultimately, the court found it was clear from the city council's findings that the city thoroughly considered the policies of the general plan, the community plan, and the hillside development regulations, and struck a reasonable balance between efficient use of the land and protection of an environmentally sensitive area.

4. Sustainable Communities Strategy in Regional Transportation Plan Found Sufficient to Support Streamlined CEQA Review Under SB 375

Sacramentans for Fair Planning v. City of Sacramento
(2019) 37 Cal. App. 5th 698

A court of appeal has upheld Sacramento's determination that a high-rise condominium building in the city's midtown area was a transit priority project that qualified for streamlined CEQA review under SB 375. A transit priority project is a project that contains at least 50%residential use, provides a minimum density of at least 20 units per acre, and is located within one-half mile of a major transit stop or transit corridor. Under SB 375, if such a project is consistent with applicable land use and other policies specified for the project area in a California Air Resources Board–approved sustainable communities strategy, and satisfies other specific statutory criteria, the project can qualify for streamlined CEQA review.

The city found that the project qualified for streamlined review under SB 375, in the form of a "sustainable communities environmental assessment" instead of a negative declaration or environmental impact report. The plaintiffs argued that by relying on the sustainable communities' strategy in the regional transportation plan to justify streamlined environmental review under SB 375, the city violated CEQA because the strategy was inadequate and too vague for that purpose. The court rejected that claim, reasoning that under SB 375, a qualifying plan need not regulate land use. Instead, a plan is sufficient if it sets forth a broad strategy and establishes a regional pattern of development that will, if implemented by local agencies, reduce greenhouse gas emissions. "The strategy identified the general location of uses, residential densities, and building intensities in the region, and it forecast where and how future development of those uses could best achieve greenhouse gas emission reductions." That, the court found, was sufficient.

C. NEGATIVE DECLARATIONS

1. City Not Required to Evaluate Impacts of Loss of Rental Units From Already-Vacant Building

Hollywoodians Encouraging Rental Opportunities v. City of Los Angeles
(2019) 37 Cal. App. 5th 768

A lead agency was not required to evaluate the housing-related impacts of converting a vacant building that was formerly used for rental housing into a hotel. Project opponents claimed the City of Los Angeles should have prepared an EIR to evaluate the cumulative effect of the hotel conversion project and similar projects on the loss of rent-stabilized housing units and the displacement of rent-stabilized tenants. But the court of appeal concluded that the baseline for the impact analysis was a

vacant building, not a tenant-occupied rental property. Measured against that baseline, no fair argument could be made that the project would have an adverse impact on the supply of rent-stabilized housing in the area or on displacement of tenants.

D. ENVIRONMENTAL IMPACT REPORTS

1. Project Description May Identify Alternative Development Schemes for a Single Project and Agency May Select a Revised Project Alternative

South of Market Community Action Network v. City and County of San Francisco
(2019) 33 Cal. App. 5th 321

A court of appeal ruled that an EIR's project description may identify alternative development schemes for a single project, and the agency may approve a modified version of the project that incorporates elements of the alternatives reviewed in the EIR. The EIR prepared by the City of San Francisco described two options for a four-acre mixed-use development project, each with a varying mix of office and residential uses. The court found that, even though two alternative uses were described, the EIR evaluated a single project—a mixed-use development involving retention of two historic buildings, demolition of other buildings on the site, and construction of four new buildings. The project description did not fluctuate during the EIR process, and did not, contrary to plaintiffs' arguments, present a "misleadingly small fragment of the ultimately approved project." Instead, "it carefully articulated two possible variations and fully disclosed the maximum possible scope of the project" and thereby "enhanced, rather than obscured, the information available to the public." The court also upheld the city's selection of a plan that did not match either scheme but instead modified one of them by retaining a building that would have been demolished, noting that a basic purpose of an EIR's evaluation of alternatives is to allow consideration of options that may be less harmful to the environment. The court also rejected the plaintiffs' other CEQA claims relating to the EIR's analysis of cumulative impacts and impacts related to traffic, wind, shadow and shade, and open space.

2. Project Description Based on an Outer Impact Envelope Violated CEQA's Requirement for an Accurate, Stable and Finite Project Description

Stopthemillenniumhollywood.com v. City of Los Angeles
(2019) 39 Cal. App. 5th 1

In sharp contrast to the decision in *South of Market Community Action Network,* a different appellate court ruled that a project description designed to allow flexibility as to future uses and project features within an outer "impact envelope" violated CEQA's requirement for an accurate, stable, and finite project description. A developer submitted an application for a master land use permit that included detailed site plans, including the location, heights, elevations, and uses of each of several proposed buildings. Three years later, the developer submitted another application that was similar in some ways to the original application but did not include the same level of detail. It did not specify the type, amount or location of the mix of uses proposed within the site; instead, it presented "a concept plan and several land use scenarios" and was designed to create an "impact envelope" within which a range of development scenarios would be permitted. It also included a "land use equivalency program" that would allow the developer to change uses by transferring development floor area among parcels within the project. The court held that the project description was not "accurate, stable and finite" and therefore failed to comply with CEQA. Also rejected was the argument that the EIR's analysis of a "worse-case" scenario was sufficient.

The court found that by analyzing the impacts of an "impact envelope" for a concept plan with a range of development scenarios instead of the impacts for a defined project, the EIR failed to fulfill CEQA's informational purpose. As the court

put it: "The draft EIR does not describe a building development project at all. Rather, it presents different conceptual scenarios that Millennium or future developers may follow for the development of this site. These concepts and development scenarios—none of which may ultimately be constructed—do not meet the requirement of a stable or finite proposed project." Further, because no additional CEQA review was required, the court held that the EIR inappropriately deferred the environmental assessment of the project. Without the requirement for further environmental review, the EIR failed to ensure that the final configuration of the project would not result in new or more significant environmental impacts.

3. A Public Agency Has No Obligation to Adopt Formal Mitigation Measures Until It Approves or Carries Out a Project

Center for Biological Diversity v. California Department of Conservation
(2019) 36 Cal. App. 5th 210

The California State Legislature required that the Department of Conservation, Division of Oil, Gas and Geothermal Resources (DOGGR) prepare an EIR to provide detailed information regarding potential environmental impacts of well stimulation in the state that may occur at existing and future wells. Well stimulation includes enhanced oil and gas production through hydraulic fracturing as well as other means. DOGGR prepared and certified an EIR that programmatically evaluated the impacts of well stimulation throughout the state. However, DOGGR did not approve a specific project in connection with certification of the EIR and did not adopt mitigation measures or a monitoring and reporting program. The court of appeal ruled that the EIR complied with the requirements of the applicable legislation and CEQA, and that, under the circumstances before it, a public agency has no obligation to adopt formal mitigation measures until such time as the agency approves or determines to carry out a project.

4. The Potential Loss of Close and Convenient Shopping Is Not an Environmental Issue Requiring Review Under CEQA

Chico Advocates for a Responsible Economy v. City of Chico
(2019) 40 Cal. App. 5th 839

CEQA is concerned with physical changes in the environment; loss of close and convenient shopping is not within CEQA's ambit. The City of Chico approved expansion of an existing Walmart store. The EIR for the project included an urban decay analysis examining whether there would be sufficient market demand to support the project without affecting existing retailers so severely as to cause or contribute to physical deterioration and urban decay. The court of appeal upheld the EIR and rejected the plaintiff's arguments that the EIR used an unnaturally constrained definition of "urban decay" and that it should have treated the loss of "close and convenient shopping" as a significant environmental impact. The court recognized that social and economic changes must be addressed under CEQA if they will cause changes in the physical environment, but an economic or social change by itself is not considered an impact on the environment. Although the loss of close and convenient shopping could affect some Chico residents psychologically, such effects are not, by themselves, environmental impacts.

5. Traffic Delay May Not Be Treated as a Significant Environmental Impact

Citizens for Positive Growth & Preservation v. City of Sacramento
No. C086345 (3rd Dist., Dec. 19, 2019)

Automobile delay (as measured solely by roadway capacity or traffic congestion) cannot constitute a significant environmental impact, even for projects that were approved before the new CEQA guidelines on transportation impacts were certified in December 2018. SB 743 directed that the Office of Planning and Research develop guidelines for assessing transportation

impacts based on vehicle miles traveled. SB 743 also provided that, upon certification of implementing guidelines, "automobile delay, as described solely by level of service [LOS] or similar measures of vehicular capacity or traffic congestion shall not be considered a significant impact on the environment." The SB 743 guidelines (CEQA Guidelines § 15064.3) were approved on December 28, 2018. In this case, which involved a challenge to the traffic analysis in a general plan EIR certified in 2015, the court held that the plaintiff's challenge to the adequacy of the EIR's level-of-service-based traffic analysis was moot. The court explained that the provision in SB 743 stating that automobile delay is not a significant environmental impact began to apply when the SB 743 guidelines were certified and thus was the law in effect at the time the court decided the case. As a result, the plaintiff's challenge to the adequacy of the EIR's LOS-based analysis of the general plan's traffic impacts was moot. The court also recognized that because the new VMT guidelines apply prospectively beginning July 1, 2020, unless an agency elects to be governed by them sooner, the EIR was not required to analyze transportation impacts under the new VMT criteria.

6. An EIR Must Provide Reasoned Responses to Comments Proposing Mitigation Measures to Reduce Significant Project Impacts

Covington v. Great Basin Unified Air Pollution Control District
No. C080342 (3rd Dist., Dec. 23, 2019)

An EIR that did not squarely respond to detailed comments recommending additional mitigation measures has been held not to comply with CEQA. Where an EIR identifies impacts as significant and unavoidable, it is not the responsibility of commenters to submit evidence that mitigation measures they propose are feasible; instead it is the lead agency's responsibility to provide substantial evidence showing the commenter-proposed measures are infeasible. The *Covington* case arose from a labor union challenge to a geothermal project that would result in significant emissions of reactive organic gases . Opponents commented that a number of mitigation measures were available to reduce ROG emissions. In its final EIR, the air pollution control district rejected the commenters' proposed measures and stated that all feasible mitigation measures were already included in the EIR. The district then approved the project and adopted a statement of overriding considerations. The court of appeal ruled that the EIR did not adequately respond to commenters' arguments for additional mitigation because it did not show that suggested measures would be infeasible. The court directed that the district "provide a reasoned analysis supported by factual information in response to the mitigation measures proposed by the petitioners."

E. CERTIFIED REGULATORY PROGRAMS

1. Coastal Development Permit Cannot Be Challenged in Court Before Coastal Commission Decides an Appeal

Fudge v. City of Laguna Beach
(2019) 32 Cal. App. 5th 193

A court challenge to a local agency's decision to grant a coastal development permit becomes moot when the California Coastal Commission accepts an appeal of the decision. The City of Laguna Beach had approved a coastal development permit for the demolition of a house in the coastal zone. A neighbor filed an appeal to the coastal commission and also filed a lawsuit against the city challenging the permit. The court ruled that when the coastal commission accepts an appeal, the local agency's decision to issue the coastal development permit is nullified, and any pending lawsuit to challenge the permit becomes moot. If the coastal commission upholds the permit, the project opponent can then file suit to challenge the coastal commission's decision on the appeal.

2. Court Rejects Challenges to Coastal Commission Mitigation Findings

San Diego Navy Broadway Complex Coalition v. California Coastal Commission
(2019) 40 Cal. App. 5th 563

A court of appeal rejected California Coastal Act and CEQA challenges to the coastal commission's approval of expansions at the San Diego Convention Center. Although the court ruled that the plaintiff's claims were time-barred by their failure to sue all indispensable parties to the case within the statute of limitations, it went on to address the merits. The court rejected the plaintiff's challenges to the coastal commission's CEQA findings, first rejecting the argument that CEQA requires findings on mitigation to a "level of insignificance," observing that CEQA "focuses on substantial reduction, not insignificance." The commission's findings acknowledged that the Port of San Diego, which was the CEQA lead agency, had both identified significant unavoidable impacts and "incorporated feasible mitigation measures to minimize adverse impacts"; the court held that these findings met CEQA's requirements.

The court also held that the commission was not required to make findings on the feasibility of a new pedestrian bridge to enhance public access because it had already found other measures effective. Furthermore, substantial evidence supported the commission's conclusion that the proposed pedestrian bridge was infeasible based on its estimated $42 million cost, the lack of availability of such funds, and the inability of the port to guarantee that portions of the bridge outside of its jurisdiction would be constructed.

F. CEQA LITIGATION

1. Court of Appeal Denies Project Opponents a Chance to Relitigate CEQA Claims

Ione Valley Land, Air, and Water Defense Alliance, LLC v. County of Amador
(2019) 33 Cal. App. 5th 165

The court of appeal held that a lawsuit challenging an EIR which had been revised in response to a court decision was barred because issues raised in the suit had been litigated and decided in the prior case. In the original lawsuit, the court ordered the County of Amador to recirculate a revised draft EIR for a quarry project to address traffic issues, but the court rejected the other objections to the EIR that had been raised in the case. The county revised the traffic analysis, recirculated that portion of the EIR, and then recertified the EIR and reapproved the project. The project opponents filed a second lawsuit, claiming the recirculated EIR's analysis of a broad range of issues was deficient. The court of appeal ruled that the plaintiffs' new claims were barred: all of the objections raised in the second case either were included or could have been included in the first lawsuit. Under the doctrine of "res judicata," issues that have previously been litigated cannot be raised again in a second lawsuit.