

# Recent CEQA Case Law

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# **Definition of a “Project” Under CEQA, Negative Declarations and the Fair Argument Standard**

# CEQA “Project” Definition, Negative Declarations and the Fair Argument Standard

Infrastructure Funding Agreement Not a Project Under CEQA. *Citizens to Enforce CEQA v. City of Rohnert Park*, 131 Cal. App. 4th 1594 (2005).

- Action to approve an item that only deals with funding for future improvements, and does not commit to or approve future improvements, is not a “project” for CEQA purposes.
- City and an Indian tribe planning a casino entered into a Memorandum of Understanding regarding future infrastructure funding, should the casino be approved.
- Petitioners argued that this constituted a “project” under CEQA, much like the approval of a development agreement.

# CEQA “Project” Definition, Negative Declarations and the Fair Argument Standard

- Court held that MOU contained none of the statutorily required provisions of a development agreement.
- MOU pertained only to funding, and any actual development resulting in a physical change in the environment would be separately approved and would undergo its own CEQA review.

# CEQA “Project” Definition, Negative Declarations and the Fair Argument Standard

EIR Required to Evaluate Indirect Impacts of Restrictions on Disposal of Sewage Sludge. *County Sanitation District No. 2 v. County of Kern*, 127 Cal. App. 4th 1544 (2005).

- Court rejected a negative declaration for an ordinance strengthening standards that would apply to the disposal of sewage sludge in a county.
- Agency testimony that stricter standards would result in the disposal of sludge in other areas, resulting in indirect impacts such as increased hauling and associated emissions, and removal of farmland from production.
- Court found that an EIR was required based on declarations of agency staff that a proposed project would result in emissions exceeding the numerical threshold established by the local air district.

# CEQA “Project” Definition, Negative Declarations and the Fair Argument Standard

Separate Negative Declarations for Separate Assignments of Water Rights Upheld Against Project-Chopping, Cumulative Impact and Growth Inducing Impacts Claims. *Sierra Club v. West Side Irrigation District*, 128 Cal. App. 4th 690 (2005).

- Two negative declarations evaluated agreements to transfer water to city of Tracy.
- Court noted that the two agreements were approved by different agencies and were entirely independent of each other.

# CEQA “Project” Definition, Negative Declarations and the Fair Argument Standard

- Sierra Club argued that the water rights assignments would have significant cumulative impacts, but the court noted that the initial studies for both assignments had concluded that both project would not contribute to any potential cumulative impact.
- Court rejected the claim that the negative declarations failed to evaluate whether the water assignments would induce growth.
- Court noted that the water assignments were approved pursuant to a general plan that had already evaluated growth, and the assignments would not induce any growth that was not already planned and evaluated.

# CEQA “Project” Definition, Negative Declarations and the Fair Argument Standard

Mitigated Negative Declaration for Housing Project Rejected On the Basis of Traffic and Wildlife Impact Claims. *Mejia v. City of Los Angeles*, 130 Cal. App. 4th 322 (2005).

- Court of Appeal rejected a mitigated negative declaration for a small housing project in Los Angeles.
- Court held that project opponents had submitted a sufficient fair argument that the project could result in significant traffic and wildlife impacts.
- On wildlife, earlier biotic study was, together with some personal observations from neighbors, sufficient substantial evidence of a significant biological impact.

# CEQA “Project” Definition, Negative Declarations and the Fair Argument Standard

- On traffic, City had adopted a threshold requiring traffic studies for projects over 40 units. Under the fair argument standard, existence of threshold does not relieve lead agency of responsibility to consider submitted evidence under the fair argument standard.
- When a threshold of significance applies to an impact, it is clear that the fair argument standard still applies, but it is not clear whether lead agencies and courts are to evaluate a proffered fair argument without any reference to the threshold, or whether a project opponent must present a fair argument that the threshold will be exceeded.

# CEQA “Project” Definition, Negative Declarations and the Fair Argument Standard

Initial Study is Only Required to Briefly Describe Environmental Setting and Social Impacts are Insufficient to Require Preparation of an EIR. *Lighthouse Field Beach Rescue v. City of Santa Cruz*, 131 Cal. App. 4th 1170 (2005).

- Case involved the approval of a plan that allowed off-leash dogs on a popular beach.
- Negative declaration included an initial study that very briefly discussed existing off-leash dog use on a particular beach.
- Petitioners argued that the initial study was insufficient and that an EIR was required because off-leash dogs would bother and inconvenience people using the beach.

# CEQA “Project” Definition, Negative Declarations and the Fair Argument Standard

- Court held that this was a social, not a physical impact.
- Also, it was appropriate for the city, in a brief environmental setting discussion in the initial study to identify the existing environmental setting without specific or detailed reference to the extent to which off-leash dog use contributed to that setting.

# CEQA “Project” Definition, Negative Declarations and the Fair Argument Standard

Whether a limitation on development is a CEQA “project” when there is a reasonable argument that a project will displace housing. *Muzzy Ranch Co. v. Solano County Airport Land Use Commission*, California Supreme Court Case No. 5131484. PENDING BEFORE SUPREME COURT.

- Supreme Court will consider whether an activity is a “project” subject to CEQA when there is an argument that the activity will result in environmental impacts by displacing housing demand to other areas.

# CEQA “Project” Definition, Negative Declarations and the Fair Argument Standard

- Airport land use commission adopted an airport land use plan for the area surrounding an air force base. Plan was designed to ensure that future land uses would be compatible with aircraft activity. The plan froze future residential development within a 600 square mile zone to the level permitted under current general plans and zoning ordinances.
- Landowner claimed that adoption of the plan was a “project” requiring some level of CEQA review, because the plan had the potential for causing indirect environmental impacts, by displacing housing development from the airport zone to other parts of the region.

# CEQA “Project” Definition, Negative Declarations and the Fair Argument Standard

- Court of Appeal held that the landowner need present only a “reasonable argument” that the plan could result in indirect physical impacts, and that the landowner met this burden by showing that the adoption of the plan could result in housing displacement.

# CEQA “Project” Definition, Negative Declarations and the Fair Argument Standard

Extent of Cal State University Mitigation Obligations. *City of Marina v Board of Trustees*, California Supreme Court Case No. S117816. PENDING BEFORE SUPREME COURT

- Court will evaluate the relationship between CEQA requirements and particular provisions of law governing the state university system.
- In particular, when CSU has proposed a public project, does the agency's exemption from taxation (Cal. Const., art. XIII, 13) and from special assessments without legislative approval (*San Marcos Water Dist. v. San Marcos Unified School Dist.* (1986) 42 Cal. 3d 154) preclude requiring CSU to agree to provide funds to mitigate the environmental impacts that are identified in the environmental impact report prepared for the proposed project?

# **Court Decisions Relating to Environmental Impact Reports**

# Court Decisions Relating to Environmental Impact Reports

## California Supreme Court Confirms CEQA Does Not Expand Coastal Commission Jurisdiction. *Sierra Club v California Coastal Commission*, 35 Cal. 4th 839 (2005).

- Court held that the Coastal Commission lacks jurisdiction under the California Coastal Act to “leverage” its coastal zone permitting authority to a portion of a development project outside the coastal zone.
- This case arose out of a housing development in Los Angeles, to be constructed on top of a bluff, outside the “coastal zone,” except for an access road.

# Court Decisions Relating to Environmental Impact Reports

- Sierra Club contended that the Commission must consider impacts within the coastal zone that are caused by the portion of the project outside the coastal zone.
- Sierra Club also argued that the Commission violated CEQA, asserting that CEQA requires the Commission to evaluate and disclose the impacts of the “whole project,” including both those aspects of the project outside the coastal zone and those inside the zone.
- Court held that CEQA cannot be used to expand the Commission’s authority beyond the limits set forth in the Coastal Act.

# Court Decisions Relating to Environmental Impact Reports

EIR Upheld Against Claimed Urban Decay Impacts.  
*Anderson First Coalition v. City of Anderson*, 130 Cal. App. 4th 1173 (2005).

- Court considered the environmental impact report for the Anderson Marketplace, a 26.5 acre retail center that includes a Wal-Mart Super Center (a Wal-Mart store combined with a supermarket that is open 24 hours). Repeating the tactic used in the *Bakersfield Citizens* case, project opponents submitted studies and asserted that the project would cause urban decay in the city's central business district.

# Court Decisions Relating to Environmental Impact Reports

- The EIR evaluated this issue and concluded the project would not cause such urban decay. The EIR relied on an economic analysis that evaluated the project's impact on other businesses, and that report concluded that the city's downtown contains smaller stores typically serving local residents, while the Wal-Mart would be geared toward the regional market and would also attract customers who are currently shopping in other towns.
- The Anderson court distinguished Bakersfield Citizens, where the lead agency had responded to urban decay comments by claiming that such impacts were economic and outside the scope of CEQA's required environmental review. In the Anderson case, however, the city did not dismiss the submitted evidence as outside the scope of CEQA, but instead studied the claims.

# Court Decisions Relating to Environmental Impact Reports

- Under these cases, when a lead agency is presented with credible evidence of potential environmental impacts due to possible urban decay, the agency should evaluate that issue in the EIR, and determine based on the evidence before the agency whether or not the claimed impact is significant.
- The Anderson case contains two additional holdings of importance to CEQA practitioners. First, the court rejected as inadequate the “fair share” mitigation set forth in the EIR for cumulative traffic impacts. The mitigation fee as adopted was less than the project’s fair share of the actual cost of a required interchange, and also was not tied to an enforceable plan providing for construction of the interchange.

# Court Decisions Relating to Environmental Impact Reports

EIR Upheld Against Historic Resources Claims. *Lincoln Place Tenants Assn v. City of Los Angeles*, 2005 Cal. App. LEXIS 1092 (2005).

- 1993 EIR determined that housing units to be demolished were not significant historic resources, and the city approved the project.
- After seven years of litigation over affordable housing issues, City was issuing demolition permits, new CEQA claims were asserted against the issuance of the demolition permits.

# Court Decisions Relating to Environmental Impact Reports

- Court held that properties eligible for historic registers are not automatically significant historic resources under CEQA. Instead, under Public Resources Code section 21084.1, they are presumed to be historic resources unless a preponderance of the evidence shows otherwise.

# Court Decisions Relating to Environmental Impact Reports

EIR used improper threshold for biological impacts, and did not adequately analyze traffic impacts. *Endangered Habitats League v County of Orange* (filed June 29, 2005, published July 29, 2005, Fourth Appellate District Case No. G034416).

- Court rejected an EIR and project approvals for two area plans that were adopted in an area already governed by a specific plan.
- Approval of the area plans and an accompanying amendment to the specific plan were invalid, because they were not consistent with mandatory policies in the governing county general plan.

# Court Decisions Relating to Environmental Impact Reports

- Court also rejected the EIR's traffic analysis, for the same reasons, holding that the EIR traffic analysis could not be sustained, because it side-stepped the method of analysis required by the general plan.
- On biological impacts, EIR set forth a threshold of significance pursuant to which an impact on a species would be significant if the harm to that species was of such a magnitude that the species' population would drop below self-sustaining levels, or the species would become threatened or endangered. Court held that this threshold was impermissibly narrow, because CEQA Guideline 15065 sets forth specific thresholds for biological impacts, and those thresholds are broader (including, for example, projects that reduce the number or restrict the range of a listed species).

# Court Decisions Relating to Environmental Impact Reports

- Court also held that the EIR impermissibly deferred mitigation of construction noise impacts, because the developer was required to prepare a noise study including mitigation if it would be needed, and the noise study requirement did not specify any performance standards to be met.

# Court Decisions Relating to Environmental Impact Reports

Long Term Water Supplies, and the Standard of Appellate Review in CEQA Cases. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, California Supreme Court Case No. 5132972. PENDING BEFORE SUPREME COURT.

- Supreme Court will be evaluating how an EIR should evaluate long term water supplies, and also the standards that apply when a Court of Appeal is reviewing a trial court decision.
- Court of Appeal examined the intersection between land use planning and water supplies, and upheld a lead agency's reliance on long-term water supplies where the final availability of the water has not been confirmed but the water supply is planned and has been evaluated.

# Court Decisions Relating to Environmental Impact Reports

- Much of the EIR's analysis of proposed future surface water supplies was based on the multi-jurisdictional Water Forum Plan, a significant water policy project that evaluates water resources and future water supply needs for the region, as well as a separate EIR prepared for the Water Forum Plan.
- Court of Appeal held that an EIR provides an adequate analysis of water supply issues if the EIR identifies and analyzes potential water supply sources even though the final availability of those water sources is not confirmed.

# Court Decisions Relating to Environmental Impact Reports

- Supreme Court will also evaluate the standard of review in this case. The Court of Appeal, citing both CEQA and non-CEQA court cases, had stated that a party challenging a project approval must set forth a fair statement of the facts of the case, and failure to do so forfeits that party's evidentiary claims about the decision being challenged.
- Also, when on appeal, even though the appellate court reviews the case anew, the appellant must explain why the trial court decision upholding the EIR was incorrect, rather than simply restating the arguments that were already made to the trial court.

# Court Decisions Relating to CEQA Litigation

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Record Preparation Cost Incurred by Real Party Not Recoverable. *Hayward Area Planning Association v. City of Hayward*, 128 Cal. App. 4th 176 (2005).

- CEQA authorizes the respondent lead agency to prepare the administrative record, and also allows the petitioner challenging a project to elect to prepare the record.
- Statute does not authorize the real party in interest (typically the developer of the project at issue) to prepare the record.
- The court determined that, when a real party does prepare the record, the real party cannot recover the record preparation costs from the petitioner.

# Court Decisions Relating to CEQA Litigation

Attorneys' Fees Awarded Because Project Approval Set Aside. *Protect Our Water v. County of Merced*, 2005 Cal.App. LEXIS 988 (2005).

- In an earlier phase of this case, the Court of Appeal set aside approval of a surface mining project on the basis that the administrative record was grossly inadequate.
- On this later appeal, the Court ruled that project opponents were entitled to attorneys' fees because they had successfully obtained a court order setting aside the project approvals.

# Court Decisions Relating to CEQA Litigation

Award of Attorneys' Fees to Neighbors Upheld Even Though Project Ultimately Re-Approved. *Bowman v. City of Berkeley* (2005, July 20, 2005, First District Case No. A105000).

- In this followup to the Bowman negative declaration case, the court upheld an award of attorneys' fees to neighbors who were challenging the senior housing project, even though the neighbors ultimately were not successful.
- Prior to the negative declaration case that went up on appeal, the neighbors initially prevailed in their argument that the first approval of the project was done without a fair hearing, in violation of their due process rights.

# Court Decisions Relating to CEQA Litigation

- Court held that they had conferred a public benefit by obtaining a new hearing, and further input into the project.
- Court also rejected claims that they were primarily acting to protect their own property interests, and thus were not entitled to fees. (It is significant to note that the fee award in this case had been reduced by the trial court. The neighbors originally sought approximately \$100,000 in fees and costs and were awarded about \$18,000).

# Court Decisions Relating to CEQA Litigation

Upholding Trial Court Decision Denying Attorneys' Fees to CEQA Litigants. *Citizens of La Habra v City of La Habra* (filed June 23, 2005, published July 25, 2005, Fourth Appellate District Case No. G034014). PENDING BEFORE SUPREME COURT.

- Court of Appeal upheld denial of petitioner's motion for attorneys fees.
- Petitioners had challenged a mitigated negative declaration for a proposed Costco retail warehouse.

# Court Decisions Relating to CEQA Litigation

- Trial court ruled for petitioners on one of several issues, finding that the negative declaration required revision.
- Trial court denied attorneys fee motion, finding that it would be unfair to award fees under a private attorney general theory because petitioners had prevailed only on one small issue, and there was no significant public benefit to a large class of persons.
- Court of Appeal affirmed.