

## COURT OF APPEAL CONFIRMS THAT THE SCOPE OF SUBSEQUENT CEQA REVIEW IS LIMITED BY THE SCOPE OF THE AGENCY'S SUBSEQUENT APPROVAL

A recent Court of Appeal decision has clarified some of the uncertainties regarding the scope of subsequent CEQA review, when an agency is considering a limited follow up approval for a project after earlier approvals and earlier certification of an EIR or negative declaration. Some CEQA practitioners (and many project opponents) have presumed that, once a project requires *any* subsequent discretionary approval, it is subject to subsequent CEQA review for the full range of potential environmental impacts. This presumption has been particularly problematic for projects requiring minor discretionary subsequent approvals (such as site plan approvals or design reviews) to implement earlier policy decisions that were subject to full CEQA review. In these cases, approving agencies and project opponents alike have used CEQA as a mechanism for reopening prior decisions in connection with minor implementing approvals. In the recent case *San Diego Navy Broadway Complex Coalition v City of San Diego* the court significantly limited the scope of subsequent CEQA review required for many of these later implementing approvals. In brief, the court held that the scope of CEQA review is limited by the extent to which the agency has discretion to modify or change the project in connection with the subsequent implementing approval. In other words, if the follow up approval is limited to design review issues, then the follow up CEQA review, if any, should be limited to environmental impacts that are related to design review.

In 1992, the City of San Diego certified an EIR and approved a development agreement for a major mixed-use waterfront project in downtown San Diego. The development agreement established a development plan and urban design guidelines, but required the developer to secure future approval of the construction documents as consistent with the development plan and design guidelines. In 2006 and 2007, the developer submitted its construction plans for approval, and the City determined that no further CEQA review was required in connection with approval of the construction plans.

The San Diego Navy Broadway Complex Coalition challenged the City's decision, arguing that, because the City had discretionary authority to consider the aesthetics of the project in connection with the construction plan approval, the City had to prepare a subsequent EIR to evaluate the impacts of the project on global climate change.

Citing to precedents such as *Friends of Westwood* and *Mountain Lion Foundation*, the court noted that CEQA applies only to discretionary projects, where the lead agency has the ability to meaningfully address the environmental concerns that might be identified through CEQA review. In the context of subsequent CEQA review, the court noted that "it is nonsensical to require an agency to prepare a subsequent or supplemental EIR unless the agency has the authority to take action that would respond to any concerns that might be raised in the updated EIR." The court found that, even assuming that the City had discretionary authority at the construction plan approval stage to alter

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the aesthetics of the project (an interpretation that the City had previously conceded during the administrative process), the Coalition had failed to show that the City had authority to modify the project in accordance with a proposed updated EIR so as to reduce the impact of the project on global climate change. Under these circumstances, the court concluded that there was no basis for requiring a subsequent EIR to address global climate change.

The *San Diego Navy Broadway Complex Coalition* decision confirms an important principle in CEQA, and applies that principle in the context of subsequent review under CEQA. Contrary to the argument that, once there is a discretionary subsequent approval, any significant environmental impacts must be considered in a subsequent CEQA review, this decision establishes that the scope of subsequent CEQA review is limited by the scope of the agency's discretion in connection with the subsequent approval. If the scope of subsequent approval discretion is limited to aesthetics, the scope of subsequent CEQA review is likewise limited to environmental impacts capable of being addressed through aesthetic controls. Although this case involved a circumstance where the scope of subsequent approval discretion was limited by a development agreement, the legal principle should be equally applicable to circumstances where the scope of subsequent approval discretion is limited by other controls, such as a zoning or subdivision ordinance or specific plan.

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