COX CASTLE NICHOLSON

LAND USE & NATURAL RESOURCES

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COX, CASTLE & NICHOLSON LLP 2012 FIRST QUARTER CEQA CASE LAW UPDATE

This update reports on the five California Environmental Quality Act (CEQA) decisions issued by the California courts in the first quarter of 2012. One of these decisions, which is particularly notable, is the First District's opinion in the *Berkeley Hillside* case, which dramatically increases the legal and litigation risk associated with the use of categorical exemptions to CEQA analyses. The affected property owner and the city are seeking review from California Supreme Court. A number of depublication requests are also pending with the California Supreme Court.

The *Flanders Foundation* case reiterates the importance of responding to comments in an EIR. *Sierra Nevada Conservation* holds that an EIR may still be required after a Program EIR has been prepared if the Program EIR did not analyze all aspects of the implementation plan. *Consolidated Irrigation District* holds that a water district had standing to bring a CEQA lawsuit. Lastly, *No Wetlands Landfill Expansion* holds that CEQA decisions by local enforcement agencies are not appealable to County Board of Superiors.

Categorical Exemption For Single Family Home Rejected Based on Claimed Soils Impacts; Court Holds a Fair Argument of Impact Alone Can Preclude Reliance on a Categorical Exemption. *Berkeley Hillside Preservation v. City of Berkeley* (2012) 203 Cal.App.4th 656, 137 Cal.Rptr.3d 500 (petition for review filed; requests for depublication pending).

In this case, the First District Court of Appeal made it more difficult to rely on categorical exemptions, and opened up those exemptions to easier legal attack. The court invalidated the City of Berkeley's approval of height and setback modifications for a project to replace an existing hillside residence with a large single-family home and a ten-car garage. The city determined that the project qualified for two CEQA categorical exemptions: one for infill development and another applicable to small structures. Opponents challenged the city's use of the categorical exemptions, claiming that the project would be one of the largest homes in Berkeley and, therefore, the "unusual circumstances" exception for categorical exemptions from CEQA applied, precluding use of a categorical exemption. The opponents also presented

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CASES IN THIS ISSUE:

Berkeley Hillside Preservation v. City of Berkeley

Flanders Foundation v. City of Carmel-By-the-Sea

Center for Sierra Nevada Conservation v. County of El Dorado

Consolidated Irrigation District v. City of Selma

No Wetlands Landfill Expansion v. County of Marin

technical evidence that project grading would increase the probability of seismic lurching in a landslide hazard zone. These findings were contradicted by other expert opinions in the administrative record.

First, the court found that the project opponents presented substantial evidence that the proposed home was unusually large. The court dismissed, as irrelevant, evidence that five homes immediately surrounding the property were nearly as large. The court stated that whether a circumstance is unusual, triggering the exception for significant effects due to unusual circumstances, must be judged not by their circumstances in the vicinity of the project, but by typical circumstances relating to such projects. Prior decisions involving the infill exemption, including a prior First District decision, had focused on the circumstances nearby the project site.

Significantly, the court held that the "unusual circumstances" exception, which precludes use of a categorical exemption, applies whenever there is substantial evidence of a fair argument of a significant environmental impact. In this case, the evidence presented by the opponents' geotechnical engineer met the fair argument standard, despite assertions from other experts that those concerns were based on a misreading of the project's plans. In the court's opinion, the fact that proposed activity may have an effect on the environment alone is an unusual circumstance precluding use of the categorical exemption.

This case is a departure from the two-part test established in *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 278, 42 Cal.Rptr.3d 537, which disallowed a categorical exemption only when a potentially significant impact is the result of an unusual circumstance. Under that two-part test, the first question is whether there is an usual circumstance, and the agency's determination of that issue is reviewed under the deferential substantial evidence standard. Then, if there is such an unusual circumstance, whether there is a significant effect is evaluated, in most cases, under the fair argument standard. Under *Berkeley Hillside*, every potentially significant impact is itself an unusual circumstance.

Note: The property owner and city jointly filed a petition for review. On behalf of various industry organizations, Andrew Sabey and Michael Zischke of Cox, Castle & Nicholson LLP filed letters supporting review and depublication. Several other organizations have also filed letters supporting review or depublication.

Failure to Respond to a Comment That Raises a Significant Environmental Issue Can Result in the Setting Aside of an Otherwise Valid EIR. *Flanders Foundation v. City of Carmel-By-the-Sea* (2012) 202 Cal.App.4th 603, 135 Cal.Rptr. 221.

In this case, the Sixth District Court of Appeal considered an EIR certified by the City of Carmel to support the sale of the historic Flanders Mansion and the surrounding park. The court upheld the EIR against most of the arguments propounded by the project opponents, but found one fatal flaw: the EIR provided no response whatsoever to a comment suggesting that the city consider, as an alternative, selling the mansion with a smaller parcel of land. Because the comment raised a significant environmental issue and because the comment related to an unmitigated significant impact (the loss of park land) and a smaller parcel might reduce that impact, the EIR needed to include a response to the comment.

The court upheld the EIR in all other respects. First, the city was not required to analyze the potential impacts of various ways that a potential purchaser might use the property, including potential use for affordable housing under the Surplus Land Act. That Act requires public agencies selling properties to provide a right of first refusal to public agencies who might use the land for affordable housing or park purposes. The court held it was speculative that any agency would decide to spend millions of dollars to buy and restore the mansion and accept the burden of extensive mitigation measures and conservation easements for the purpose of using the property for affordable housing. The court also held the city was not required to include an economic feasibility analysis prepared to evaluate the economic feasibility of various alternatives in the EIR. Noting that an EIR focuses on environmental issues, the court followed a substantial line of other case law in holding that economic feasibility analyses do not need to be included in EIRs. The court also held that substantial evidence supported the city's findings that various alternatives were economically feasible. This evidence included the economic feasibility analysis.

Finally, the court upheld the statement of overriding considerations adopted by the city when it approved the

project. That statement indicated that each of the listed project benefits was a separate and independent basis for the override finding, and the court cited this language in holding that it did not need to consider each individual override, as long as any one of them supported the city's decision. The court found that the key benefit of the project was the restoration of the property and upheld the override on this basis.

EIR Required for Oak Woodland Fee Program; Prior General Plan EIR Did Not Evaluate Fee Program Impacts. *Center for Sierra Nevada Conservation v. County of El Dorado* (2012) 202 Cal.App.4th 1156, 136 Cal.Rptr.3d 351.

In this case, the Third District Court of Appeal concluded that El Dorado County improperly relied on a negative declaration in adopting its Oak Woodland Management Plan, which included a mitigation fee program. This is the second decision evaluating woodland fees in El Dorado County, the first being *California Native Plant Society v. County of El Dorado* (2009) 170 Cal.App.4th 1026.

The Oak Woodland Fee Program was prepared to implement provisions of the County General Plan. In 2004, the County certified a Program EIR to support that new general plan. The Program EIR considered impacts to oak woodlands and anticipated development of an Oak Woodland Management Plan in the future. The Program EIR concluded that the new general plan would result in significant and unavoidable impacts to oak woodlands, even after implementation of the Oak Woodland Management Plan.

In 2008, the County adopted the Oak Woodland Management Plan. The Oak Woodland Management Plan required new development to mitigate impacts to oak woodlands in one of two ways: Option A required adherence to certain canopy retention standards and replacement of oak woodland habitat at a 1:1 ratio; Option B required payment of a mitigation fee.

The County determined that no further environmental review was required to support adoption of the Oak Woodland Management Plan because implementation of the plan would not create any greater environmental impacts than those disclosed in the Program EIR. The court rejected the city's finding because the Program EIR did not analyze key aspects of the plan and fee mitigation program, including selection of the types of oak woodlands to be targeted, measurement methodology, the fee rate and how funds generated by Option B would be used. Accordingly, the court concluded that a new EIR was required to fully analyze the potential environmental impacts of the Oak Woodland Management Plan and Option B fee program.

Public Agency Need Not Have Jurisdiction Over a Resource to Establish a Beneficial Interest. *Consolidated Irrigation District v. City of Selma* (2012) 204 Cal.App.4th 187, 138 Cal.Rptr.3d 428.

In this case, a local irrigation district challenged the City of Selma's reliance on a mitigated negative declaration in approving a residential subdivision on approximately 44 acres of former agricultural land. The irrigation district contended that an EIR was required because, among other impacts, the subdivision would have a cumulative impact on groundwater resources. The Fifth District Court of Appeal upheld the trial court's ruling that an EIR was required. In making this ruling, the court upheld the trial court's order to augment the administrative record, found that the irrigation district had standing, and found that the irrigation district's proffered fair argument was supported by substantial evidence.

Administrative Record: Following certification of the record, the district claimed that the city failed to include four documents that it claimed had been submitted to the Planning Commission. The city refused to include two of the documents because it had no record that they had been submitted. The court, citing *Madera Oversight Coalition v. County of Madera*, found that the district's position was credible and the city's was not, particularly in light of the fact that no minutes had been kept by the city and it had not kept files of the two other documents the city admitted had been submitted. Based on this evidence, the court concluded that the staff member's declaration was sufficient evidence to permit the record to be augmented with the additional documents.

Standing: The city argued that because the district is a public agency, it can only establish a "beneficial interest" in a CEQA proceeding if the project affects a natural resource over which the agency has jurisdiction. The court rejected

this approach and found that the Water Code grants the district power to pursue CEQA litigation to pursue its beneficial interests. The court rejected the city's claims that public agencies must prove an extra step, namely that it has jurisdiction over the affected natural resource to have a beneficial interest. The court applied the general principle that public agencies with a stake in the outcome of another agency's CEQA proceedings have a sufficient beneficial interest to establish standing to challenge a CEQA approval. The court found that because the district operates water canals and a groundwater recharge program in the vicinity of the project, which the district claimed would be adversely affected, the district had a sufficient beneficial interest to have standing.

Substantial Evidence Supporting a Fair Argument: The city contended that certain items submitted by the district did not have sufficient credibility to constitute substantial evidence and that, as lead agency, the city has discretion to make this determination. The court recognized that lead agencies do have the ability to disregard materials that are not credible. However, it noted that the lead agency must "identify that evidence with sufficient particularity to allow the reviewing court to determine whether there were legitimate, disputed issues of credibility." Here, the court concluded that the city provided no citations in the record that anyone at the city - staff, the Planning Commission, or the City Council - addressed the credibility of any evidence presented during the administrative process. Without this threshold showing, the court concluded that there was no basis for disregarding any evidence offered during the proceedings when applying the fair argument standard.

CEQA Decisions by Local Enforcement Agencies Acting Under the Integrated Waste Management Act Are Not Appealable to County Boards of Supervisors. *No Wetlands Landfill Expansion v. County of Marin* (2012) 204 Cal.App.4th 573, 138 Cal.Rptr.3d 873.

Generally, CEQA provides that the certification of an EIR by a nonelected decision making body of a local lead agency must be appealable to the agency's elected decision making body. (Public Resources Code § 21151(c)). This statutory provision does not apply, however, when the agency does not have an elected decision-making body. This is often true in the context of state agency decisions (see *El Morro Community Association v. California Dept. of Parks & Recreation* (2004) 122 Cal.App.4th 1340, holding that this provision did not apply), but is only occasionally true in the local agency context.

No Wetlands Expansion is an example of the situation where a local agency does not have an elected decision-making body. In this case, the First District Court of Appeal upheld the County of Marin's determination that certification of an EIR by the County's local enforcement agency under the integrated waste management statutes could not be appealed to the Board of Supervisors. Marin Environmental Health Services (Marin EHS) is the local enforcement agency under the Integrated Waste Management Act, and Marin EHS issued the initial permit for the landfill and approved the permit revisions, supported by an EIR that Marin EHS certified. An association of local residents and environmental groups attempted to appeal the certification of the EIR to the County Board of Supervisors. The County rejected the appeal because Marin EHS acts as the designated representative for CalRecycle, a state agency, which is the designated representative for the County under the Integrated Waste Management Act, and therefore no appeal to the Board is available.

The court held that CEQA did not require the Board to consider the appeal. Under the Integrated Waste Management Act, Marin EHS is a separate and distinct legal entity from the County and the Board has no role or authority to issue, evaluate, or limit permits and the Board does not act as the hearing panel in the event of an administrative appeal. Accordingly, the Board is not the decision making body of Marin EHS pursuant to CEQA and it may not consider an appeal of the EIR certification.

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If you have any questions regarding any of the foregoing decisions or need assistance with any land use, natural resources or real estate matter, please contact any of the authors listed for this quarterly CEQA case law update.

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