

COURT UPHOLDS EIR AGAINST CHALLENGES TO FIRE SERVICES ANALYSIS AND ADAPTIVE MITIGATION PROGRAM

In *City of Hayward v. Board of Trustees of the California State University*, the First District Court of Appeal issued an important California Environmental Quality Act (CEQA) decision covering two points relating to the scope of environmental impact reports (EIRs). First, following prior case law, the court confirmed that public services impacts such as fire protection are not CEQA environmental impact issues, unless the expansion of public services required by a particular project itself has environmental impacts. Prior court decisions had confirmed that matters such as school crowding and parking shortages are not environmental impacts under CEQA, and the *Hayward* decision applied the rule to fire protection services and response times. Second, the court confirmed that an adaptive mitigation program can be adopted for impacts on traffic, and such adaptive mitigation does not constitute improper deferred mitigation under CEQA.

The particular EIR at issue was a Program EIR prepared by California State University-East Bay for a long range master plan. The master plan proposed to accommodate campus growth through infill development of new facilities and replacement of seismically deficient or functionally obsolete facilities. New and expanded facilities would be accommodated within the campus's existing land use configuration. The Program EIR also included project-specific evaluation of two building projects: a 600-bed student housing project adjacent to existing dormitories; and a parking structure to replace existing surface parking.

First, the court provided important clarification of the requirements for analysis and mitigation of impacts to public services. The EIR determined that the increase in campus population pursuant to the master plan would result in a need for 11 additional firefighters and one additional fire station; and the EIR found that the physical impacts of this station would be less than significant because it would be located on a small site in an infill area. The court first upheld this analysis of the impacts of the new fire station, because substantial record evidence supported that conclusion.

The important part of the fire services ruling dealt with the City's claim that Cal State must mitigate the need for additional fire protection services (as opposed to the impacts of the new station). The court rejected the City's argument that the increased demand for fire services was itself an environmental impact that required mitigation, stating:

Although there is undoubtedly a cost involved in the provision of additional emergency services, there is no authority upholding the city's view that CEQA shifts financial responsibility for the provision of adequate fire and emergency response services to the project sponsor. The city has a constitutional obligation to provide adequate fire protection services.

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On this point, the court followed *Goleta Union School Dist. v. Regents* (1995) 37 Cal.App.4th 1025, which held that school overcrowding was a social impact, not a physical environmental impact, and that an EIR analysis of school overcrowding could properly be limited to the physical impacts of any new facilities that might be required. Both cases hold that an impact on public services in itself is not a physical environmental impact required to be evaluated under CEQA; instead, the question is whether the response to that services impact – such as the construction of new facilities – will have significant environmental impacts.

Second, the court upheld an adaptive traffic mitigation plan, which contemplated continual study and implementation over time, against a challenge that it improperly deferred mitigation. Generally, CEQA requires that environmental impacts be studied and mitigated early in the process. It is not sufficient mitigation to simply call for a future study to determine later what is appropriate mitigation. However, an adaptive mitigation program that sets out adequate performance measures can be appropriate and sufficient mitigation. In this case, the master plan anticipated that a significant increase in traffic and parking would accompany the increase in campus population. The plan detailed a range of sustainable transit policies to reduce use of single-occupant cars as part of an a Transportation Demand Management Program. The EIR included mitigation requiring funding, implementation and monitoring of the TDM Program. The court held the TDM Program did not constitute improperly deferred mitigation because it enumerated specific measures to be evaluated, it incorporated quantitative criteria, and it set specific guidelines for completion of the parking and traffic study and timelines for reporting to the city on the implementation and effectiveness of the measures that will be studied.

Cal State did not prevail entirely, however. The court rejected the EIR's analysis of impacts on nearby parks as not supported by substantial evidence. The EIR stated that student use of the parks was nominal and would continue to be so, but the Court found that there was no analysis to support this conclusion.

This decision was originally unpublished. Andrew Sabey of Cox, Castle & Nicholson requested publication of the decision, and several other organizations also submitted publication requests.

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