COX CASTLE NICHOLSON

LAND USE & NATURAL RESOURCES

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

This update reports on the twelve California Environmental Quality Act decisions issued by California courts in the second quarter of 2012, including one California Supreme Court decision.

The Supreme Court's *Tomlinson* decision held that, if the lead agency holds a hearing or provide another opportunity to present claims, then petitioners must exhaust administrative remedies before challenging agency decisions based on categorical exemptions from CEQA. In another notable decision, *City of Hayward v. Board of Trustees of the California State University*, the First District Court of Appeal held that CEQA does not shift the burden of providing fire services from cities and counties to project proponents, and held that impacts to fire services are a social impact, not an environmental impact. The remaining cases also discussed several important CEQA topics, including the use of a future baseline, the contents of the administrative record in a CEQA case, and the ministerial nature of lot line adjustments.

Also during the second quarter, the California Supreme Court granted review of two cases reported in previous updates. First, the Court will review *Berkeley Hillside Preservation v. City of Berkeley*, a troublesome case reported in our First Quarter CEQA Case Law Update. Left standing, *Berkeley Hillside* would have dramatically increased the legal and litigation risk associated with the use of categorical exemptions. The Court also granted review of *City of San Diego v. Board of Trustees of California State University*, where the Fourth District Court of Appeal ruled that the California State University could not use budgetary uncertainty as a basis for determining that mitigation measures were infeasible.

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CASES IN THIS ISSUE:

Petitioner Required to Exhaust Administrative Remedies Before Bringing a Lawsuit Challenging a CEQA Exemption Decision. *Tomlinson v. County of Alameda*, 54 Cal.4th 218, 142 Cal.Rptr.3d 539 (June 14, 2012)

In this case, the California Supreme Court confirmed the general rule that project opponents must exhaust administrative remedies by presenting their claims to the lead agency before bringing a lawsuit. Specifically, the Court confirmed that this rule applies when an agency is using a CEQA exemption, just as it applies when an EIR or negative declaration has been prepared.

The case arose out of Alameda County's approval of an 11-unit development in an urbanized, but unincorporated part of the County near the City of Hayward. Project opponents challenged the County's approval of the project on various grounds, but never asserted during the administrative proceedings that the County was not allowed to use the urban infill exemption because it can only be used on projects that are within city limits, and counties do not approve projects within city limits. The trial court rejected this ground for challenging the approval, finding that petitioners had failed to exhaust their administrative remedies, but the Court of Appeal reversed.

The Supreme Court reversed the Court of Appeal, holding that the exhaustion requirement set forth in the CEQA statute "applies to a public agency's decision that a proposed project is categorically exempt from CEQA compliance as long as the public agency gives notice of the ground for its exemption determination, and that determination is preceded by public hearings at which members of the public had the opportunity to raise any concerns or objections to the proposed project."

Andrew Sabey and Michael Zischke, of Cox, Castle & Nicholson LLP, represented the League of California Cities and the California State Association of Counties as friends of the court in this case, and Andrew Sabey argued the case, with the developer's attorney, before the Supreme Court.

Lot Line Adjustments are Ministerial Actions Not Subject to CEQA. *Sierra Club v. Napa County Board of Supervisors*, 205 Cal.App.4th 162, 139 Cal.Rptr.3d 897 (April 20, 2012)

In this case, the Sierra Club challenged Napa County's lot line adjustment ordinance, which allows lot line adjustments under the Subdivision Map Act on parcels that have previously been adjusted, as long as the prior lot line adjustment has been completed and recorded and the adjustment will not result in a nonbuildable parcel becoming buildable. The court held that this provision, which allowed sequential lot line adjustments, was consistent with both the Subdivision Map Act and CEQA.

Under CEQA, the court held that the lot line adjustments are ministerial, noting that Napa County classified them as such and that the CEQA Guidelines authorize agencies to make such classifications. Citing prior case law, the court noted that in considering a lot line adjustment application, the city or county considers only whether the application meets specified criteria, and there is no discretion to impose conditions to mitigate environmental impacts. The court also noted that the Napa ordinance continued the County's pre-existing practices, and did not authorize any increased level of development.

Agreements to Toll CEQA's Statute of Limitations are Valid. *Salmon Protection and Watershed Network v. County of Marin*, 205 Cal.App.4th 195, 140 Cal.Rptr.290 (April 20, 2012)

In this case, the court considered whether a public agency and a party disputing the adequacy of an EIR certified by that agency can enter into an agreement to toll the statute of limitations setting the time period for filing of a CEQA lawsuit to challenge the EIR. The court upheld the validity of such tolling agreements. This is an important decision on a question that some CEQA practitioners have considered uncertain.

The acronym-loving environmental group SPAWN and Marin County entered into a series of tolling agreements, extending the time for a challenge to the County's new general plan. These agreements are often used to allow parties to attempt to settle cases before filing a lawsuit. Here, the parties ultimately did not settle the case, and SPAWN filed their lawsuit within the time allowed by the tolling agreement but outside CEQA's 30-day window for filing lawsuits. A group of property owners who might be affected by the lawsuit intervened and moved to dismiss the lawsuit, arguing that such tolling agreements are invalid because of CEQA's policy that lawsuits should be promptly brought and promptly resolved. The court noted that there

is an equally strong policy favoring settlement of lawsuits, and held that the tolling agreement validly extended the CEQA limitations period.

When an Agency Prepares a Revised EIR in Response to a Writ of Mandate, the Doctrine of *Res Judicata* Bars Further Litigation Over Claims that Were Raised or Could Have Been Raised in the Lawsuit Challenging the Original EIR; Revised EIR Analysis of Alternatives and Agricultural Land Impacts Upheld. *Citizens for Local Government v. City of Lodi*, 205 Cal.App.4th 296, 140 Cal.Rptr.3d 459 (April 24, 2012)

When a court orders an agency to correct defects in an EIR, and issues a writ of mandate to that effect, there is often a second round of litigation over the adequacy of the revised EIR that is prepared in response to the court order. This case applies the doctrine of *res judicata* (meaning "a thing adjudged") to clarify the scope of issues that can be raised when there is a second round of litigation.

The court confirmed the rule that a party cannot re-litigate an issue that was already decided, or that could have been decided, in the first round of litigation. *Res judicata* generally bars re-litigation of a legal claim that was previously adjudicated, and it applies if the claim involves the same parties, the prior decision is final, and the claim that is presented is the same claim that was previously decided. The doctrine also applies to issues that could have been litigated in the original proceeding. Here, the project opponents sought to litigate claims that the local aquifer was overdrafted, that the project had significant water impacts that were overlooked, and that the EIR failed to evaluate cumulative water impacts. The court held that these issues, and the facts on which the claims were based, existed when the first legal challenge was brought, and thus they could not be raised in the litigation over the adequacy of the revised EIR.

The court also upheld the revised EIR against several other challenges, and considered several issues regarding the administrative record. These additional holdings were as follows:

- The court held that the City did not sufficiently justify its claim that 22 emails between City staff and EIR consultants were protected by the deliberative process privilege, and thus not required to be included in the record. The court characterized the City's claim as a "naked assertion" without any explanation of how the documents fit within the deliberative process privilege. The court found that this omission from the EIR was not prejudicial, however. The petitioners had the burden to show prejudice, and generally the omission of a few documents from a large record does not constitute reversible error.

- The EIR included a reasonable range of alternatives. The petitioners argued that there were no alternatives that both met most of the project objectives and reduced significant impacts. The court stated that CEQA does not require this, instead, the sufficiency of the range of alternative is governed by the oft-stated "rule of reason." The EIR was adequate here because there was a detailed explanation of the alternatives that were not evaluated in detail, and the EIR explained why there was no alternative that both met most project objectives and reduced significant effects.

- The court upheld the EIR's analysis of potential urban decay impacts. The court held that EIRs are not specifically required to evaluate blight, because 'blight' is a specific term in redevelopment law, and urban decay is different than blight. Also, the EIR did evaluate urban decay impacts and discuss existing conditions relating to urban decay.

- The court rejected a claim that the EIR should have updated its economic baseline (used for the evaluation of urban decay impacts) because of the substantial change in economic conditions due to the recession. The court found that the City's decision not to update the baseline was supported by substantial evidence, including statements from the City's consultant that such an update would not change the basic conclusions, and that the update would create a "moving target" problem because economic conditions were continuing to change.

- The court held that the EIR included a good faith analysis of impacts to agricultural land. The EIR described the amount of land that would be converted from agricultural use, and evaluated this together with cumulative land conversions. The court also held that the City did not have to adopt a heightened mitigation ratio for farmland impacts, as project opponents advocated. Given that a higher ratio would not avoid the direct conversion of farmland by the project, the City properly found that there were no feasible mitigation measures to offset the loss of farmland.

Use of a Future Environmental Baseline Upheld. *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority*, 205 Cal.App.4th 552, 141 Cal.Rptr.3d 1 (April 17, 2012)

In a case involving a rail line project that would not open for several years, the court held that the use of a future environmental baseline was proper under CEQA. Specifically rejecting the approach in *Sunnyvale West Neighborhood Association v. City of Sunnyvale* (2010) 190 Cal.App.4th 1351, 119 Cal.Rptr.3d 481, the court held that a future baseline may be used where it is supported by substantial evidence.

The court noted that CEQA Guidelines Section 15125(a) states that physical conditions at the time the notice of preparation is issued will "normally" constitute the environmental baseline for measuring the significance of impacts. The court stated that "to state the norm is to recognize the possibility of departure from the norm." The court held that the Supreme Court's baseline decision, *Communities for a Better Environment v. South Coast AQMD*, did not prohibit future baselines, and rejected illusory baseline conditions based on permitted levels of emissions that had never been achieved.

Andrew Sabey and Mike Zischke of Cox, Castle & Nicholson, LLP represented the League of California Cities and the California State Association of Counties as amicus curiae in support of Expo Rail.

Substantial Evidence Test Applies to Subsequent Approval After a Negative Declaration Has Been Adopted for a Project. *Abatti v. Imperial Irrigation District*, 205 Cal.App.4th 650, 140 Cal.Rptr.3d 647 (April 26, 2012)

The CEQA Guidelines include standards for determining when a subsequent EIR is required for a project that has already been reviewed under CEQA, and the application of those standards when the original CEQA document is a negative declaration was upheld in *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467, 277 Cal.Rptr. 481. The petitioners tried to characterize *Benton* as an "outlier" case, and the court rejected that argument, noting that a substantial line of cases has followed *Benton*.

This case involved implementation of the irrigation district's "Equitable Distribution Plan" for handling the allocation of water in times of shortage. The plan was adopted in 2006, following adoption of a negative declaration. The district adopted implementing regulations in 2007, and then adopted further regulations in 2008, along with an environmental compliance report, which included a finding that no further CEQA review was required. Some property owners challenged the 2008 regulations, arguing an EIR should have been prepared because the regulations substantially changed the way water would be allocated. They asserted that the regulations specifically gave higher priority to geothermal users as opposed to agricultural users. The court held that substantial evidence supported the district's determination that no further review was required; in particular, a comparison of the new regulations and the pre-existing regulations showed that they were substantially similar.

Agency's Administrative Record Should Have Included Copies of the Tapes of Hearings and a Submitted Letter, But Sub-Consultant Files Not Required to Be Included; Sub-Consultant Files Also Not Subject to Public Records Act Request. *Consolidated Irrigation District v. Superior Court*, 205 Cal.App.4th 697, 140 Cal.Rptr.3d 622 (April 26, 2012)

In this case, the court considered the scope of the administrative record in CEQA cases, as well as the status of some documents under the Public Records Act. Generally, the scope of administrative records in CEQA cases is broad, and is governed by Public Resources Code section 21167.6. The court made the following rulings regarding whether documents should be included in the record:

- Tape recordings of agency hearings are "other written materials" that should be included in the administrative record.

- Evidence that is submitted to an agency must be "readily available" to be included in the record. Thus if a letter specifically refers to a document that has already been provided, or a document that refers to a web link specific to that document, means that the document should be included in the record. A letter that refers to a general website, however, is not readily available and should not be included.

- The records of sub-consultants are not within the agency's control or ownership, and are not required to be included in the administrative record or released in response to a Public Records Act request.

Court Upheld Attorney Fee Award for a Named Petitioner Who Also Acted as Petitioner's Attorney. *Healdsburg Citizens for Sustainable Solutions v. City of Healdsburg*, 206 Cal.App.4th 988, 142 Cal.Rptr.3d 250 (June 4, 2012)

In this case, the court upheld an award of attorney fees under Code of Civil Procedure section 1021.5 to petitioners' attorney who was also a named petitioner and a member of the nonprofit citizens group that brought the underlying CEQA challenge. In the published portion of the opinion, the court discussed case law regarding the award of attorney fees to a *pro per* litigant in general, and examined the private attorney general doctrine in detail. The court rejected the City's and real parties' challenge to the award, concluding there was no cause for concern that the attorney was self-dealing. Rather, the court found that the attorney was seeking to vindicate an important public interest in ensuring compliance with CEQA while taking the risk that she would not be compensated for her time. In the unpublished part of the decision, the court rejected a number of other challenges, including a claim by the petitioners that the court improperly denied a multiplier to that same attorney on the basis that, under the circumstances, there was some personal interest in the case.

Trial Court Should Not Have Taken Judicial Notice of Caltrans Agreement with Tribe in Upholding Demurrer to CEQA Case; Case Remanded to Trial Court for Determination Whether Tribe is Indispensable Party. *Jamulians Against the Casino v. Iwasaki*, 205 Cal.App.4th 632, 140 Cal.Rptr.3d 484 (April 26, 1012)

In this case, neighbors challenged Caltrans' approval of an agreement with a tribe that provided for CEQA review of an interchange that would ultimately serve development on tribal land. The agreement required Caltrans to conduct a CEQA review for the interchange, and then issue a permit for the interchange if Caltrans determined there had been adequate CEQA compliance. The tribe was named in the lawsuit, and it moved to quash service of the lawsuit on the basis that it could not be sued in state court absent a waiver of sovereign immunity, and that it was an indispensable party, so the lawsuit could not go forward. Caltrans argued that the agreement was not an approval that required CEQA review, and the trial court agreed with Caltrans and upheld a demurrer to that effect.

On appeal, the court stated that the trial judge should not have based its demurrer ruling on the agreement itself, because the demurrer is to be decided based only on the face of the pleadings. The court held that it was error for the trial court to take judicial notice of the agreement, and remanded the case to the trial court with direction that the court should consider the tribe's motion to quash.

Court Bars CEQA Challenge To Post-EIR Approvals "In Furtherance" Of Previously Approved Project. *Van de Kamps Coalition v. Board of Trustees of Los Angeles Community College District (City of Los Angeles)*, 206 Cal.App.4th 1036, 142 Cal.Rptr.3d 276 (June 5, 2012)

In this case, the court clarified that the statute of limitations period to challenge environmental review runs from the agency's initial project approval and is not re-triggered by subsequent approvals that are steps to implement the already-approved project.

This case concerned multiple challenges to approvals related to the historic Van de Kamps Bakery building and proposed development on the bakery's site. The City of Los Angeles certified an EIR to demolish the bakery and replace it with a retail store, but the Planning Commission denied approval of the project. The Los Angeles Community College District later acquired the site and prepared a new proposal to rehabilitate the bakery for educational use and construct another educational building on the site to create a satellite campus. The District prepared an EIR update and two

addenda to analyze the environmental impacts of its proposed satellite campus. By 2008, the District realized it was financially unable to operate the site. Accordingly, in July 2009, it adopted resolutions approving interim use of the property and a five-year lease of part of the bakery by Alliance for College-Ready Public Schools ("Alliance"), another educational entity. The District concluded that additional environmental review was unnecessary because the site would have the same "functionality" as had been planned and reviewed in the prior EIR update and addenda. Almost four months later, in November 2009, the District approved funds to pay an architecture firm to redesign the building to meet Alliance's needs. The following month, the District also approved the purchase of property adjacent to the bakery site, but did not have "current plans" to develop the land. Together, these actions constituted the "2009 approvals" challenged by project opponents on January 11, 2010 ("CEQA I").

While the "CEQA I" lawsuit was pending, the District took additional actions related to re-use of the bakery site. Specifically, it approved a lease with the City of Los Angeles for a portion of the bakery building in May 2010 and an amendment to its contract with the architecture firm in November 2010 (the "2010 approvals"). Project opponents sought leave to amend the petition in CEQA I to include claims based on the 2010 approval, but the trial court denied opponent's request. Accordingly, project opponents filed a second CEQA lawsuit on November 19, 2010 ("CEQA II").

The District demurred to the CEQA II petition, arguing that it was time-barred and duplicative to CEQA I. The trial court sustained the demurrer, holding that the 2010 approvals related back and were part of the 2009 approvals and therefore, the CEQA II petition was filed too late.

The court held that the "limitations period starts running on the date the project is approved by the public agency and is not re-triggered on each subsequent date that the public agency takes some action toward implementing the project." The court relied on the California Supreme Court's ruling in *Save Tara v. City of West Hollywood*, which emphasized that project approval for the purposes of CEQA occurs "when the agency first exercises its discretion to execute a contract or grant financial assistance, not when the last such discretionary decision is made," to support its holding. Using this definition of "project approval," the court agreed with the trial court that the District's July 2009 approval committed the District to renting the site to other entities for educational uses, and for this reason, was the "project" under CEQA. Further, no new statute of limitations was triggered by the 2010 approvals, which the court held were not new projects, but rather were merely subsequent approvals "in furtherance" of the project approved in 2009. The court also agreed with the trial court's finding that project opponents failed to allege a fact necessary for CEQA to require a subsequent or supplemental environmental review because project opponents failed to allege that the 2010 approvals were a "substantial change" to the previously approved project. In short, project opponents failed to state a claim, and more importantly, even if project opponents had stated a claim, the claim would have been time barred.

Court Upheld EIR Against Challenges to Fire Services Analysis and Adaptive Mitigation Program. *City of Hayward v. Board of Trustees of the California State University*, 207 Cal.App.4th 446, 143 Cal.Rptr.3d 265 (June 28, 2012)

In *City of Hayward v. Board of Trustees of the California State University*, the First District Court of Appeal issued an important CEQA decision covering two points that often arise as EIRs are being prepared and litigated. 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 this rule for matters such as school crowding and parking shortages, 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.

This decision evaluated a Program EIR prepared by the 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' 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 had to 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.

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, such that an EIR analysis of school overcrowding could properly be limited to the physical impacts of any new facilities that might be required. Both of these 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 will involve continual study and implementation over time, against a challenge that it is 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 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; 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. Cox, Castle & Nicholson was one of several firms and organizations who requested publication of the decision. Andrew Sabey requested publication on behalf of Cox, Castle & Nicholson.

Court Upheld Air District's CEQA Review for Limits on VOCs in Thinners and Solvents; Review of Alternatives Not Required Because Impacts Mitigated. *W.M. Barr & Co., Inc. v. South Coast Air Quality Management Dist.*, 207 Cal.App.4th 406, 12 Cal. Daily Op. Serv. 7502, 2012 Daily Journal D.A.R. 8977 (June 28, 2012)

In this decision, the Second District Court of Appeal upheld

the "functional equivalent" CEQA review prepared by the South Coast AQMD for a new rule limiting the amount of volatile organic compounds in paint thinners and solvents. As a certified regulatory program under CEQA, the Air District is exempt from the formal requirements to prepare an environmental impact report or negative declaration, and instead the District prepares a document that is the "functional equivalent" of an EIR or negative declaration. Here, the court held that substantial evidence supported the District's determination that all impacts were mitigated to a less than significant level. Given that conclusion, the District's CEQA document was the functional equivalent of a negative declaration, not an EIR, and the District was not required to evaluate alternatives to the new rule in the CEQA document.

This ruling may contrast with the First District's decision in *Friends of the Old Trees v. Department of Forestry* (2012) 52 Cal.App.4th 1383, 61 Cal.Rptr.2d 297, where the court held that functional equivalent documents must evaluate alternatives. In *Friends of the Old Trees*, the document was characterized as a the functional equivalent of an EIR, although the document also concluded that all impacts would be mitigated to a less than significant level.

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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 an attorney in our Land Use and Natural Resources Practice Group.

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