

LAND USE & NATURAL RESOURCES

CLIENT ALERT

NOVEMBER 8, 2012

NEW COURT DECISION CREATES UNCERTAINTY OVER HOW CEQA APPLIES TO COUNCIL ACTIONS ON VOTER-CIRCULATED INITIATIVE MEASURES

In the latest of a series of cases that evaluate the relationship between California's voter initiative process and the California Environmental Quality Act (CEQA), the Fifth District Court of Appeal ruled that a city or county may not avoid impact review under CEQA by approving a voter-circulated initiative petition itself, without either submitting the matter to the voters or certifying an environmental impact report (EIR) for the required approvals. *Tuolumne Jobs & Small Business Alliance v. Superior Court of Tuolumne County* (October 30, 2012). In 2004, the Fourth District came to the opposite conclusion in *Native American Sacred Site & Environmental Protection Assn. v. City of San Juan Capistrano* (2004) 120 Cal.App.4th 961, holding that legislative bodies have no discretion under the Elections Code when presented with an initiative signed by a sufficient number of voters, and thus a council or board approval of such a measure is not subject to CEQA.

The Fifth District's decision creates uncertainty in an area of CEQA that had seemingly been settled. Developers have, in the past, relied on the constitutional and statutory provisions governing initiative petitions to obtain legislative land use approvals such as a general plan amendment or the adoption of a specific plan or a rezoning for proposed projects without CEQA review. Once the city certifies that proponents of an initiative have collected the required number of signatures, the city council is required under Elections Code § 9214 to either adopt the initiative as written, or to place the measure on the ballot for approval by the electorate. Elections Code § 9116 sets forth the same process for county boards of supervisors.

In 2001, the California Supreme Court confirmed that action by the voters is not subject to CEQA, and also held that a city council or county board must comply with CEQA before it places measures on the ballot under the Elections Code provisions allowing for council-sponsored measures. *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165. Following *Sierra Madre*, the one issue that was not certain was whether a council or board must comply with CEQA when the council or board decides to adopt a voter-sponsored measure without placing it on the ballot. The Fourth District Court of Appeal resolved that uncertainty in *Native American Sacred Site* when it held that no CEQA review is required when the council or board decides to adopt the measure itself, without calling an election. The Fourth District based its decision on the primacy of the initiative power, and the fact that a board or council has no discretion to change the proposed measure in response to environmental concerns; it can only adopt the measure "as is" or place it on the ballot for voter adoption.

The Fifth District Court specifically considered the *Native American Sacred Site* case and simply reached

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the opposite conclusion. The *Tuolumne Jobs* case arose out of the proposed expansion of an existing Wal-Mart store. An EIR had been prepared for the project and the Planning Commission had recommended approval, but before the project was heard by the City Council, an initiative measure was proposed, and the requisite number of signatures was gathered. The initiative was presented to the Council as an alternative means of approving the expansion project, and the City Council then voted to adopt the measure. In reviewing this action, the Fifth District held that the only way to avoid CEQA review is to place the initiative on the ballot for voter approval; the city or county cannot approve the initiative as an ordinance without first conducting CEQA review. The Court recognized that voter initiatives have primacy under the state constitution, but stated that when a measure has been submitted with the required number of signatures, it can only be exempt from CEQA if the voters approve it. If the council elects to enact the measure, it is exercising a discretionary power to approve the project and thus is subject to CEQA.

Given this split of authority between *Native American Sacred Site* and *Tuolumne Jobs*, there is now substantial legal uncertainty regarding CEQA's application to council or board adoption of voter initiatives. It is likely the Supreme Court will be asked to review and/or depublish the *Tuolumne Jobs* decision, but for now this is another area of CEQA practice that is uncertain and governed by conflicting court decisions.

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