

COURT UPHOLDS EXEMPTION FOR RESIDENTIAL PROJECTS THAT ARE CONSISTENT WITH APPROVED SPECIFIC PLANS

In *Concerned Dublin Citizens v. City of Dublin*, (published March 28, 2013), the First District Court of Appeal upheld the city's use of the statutory CEQA exemption for a residential project that is consistent with an existing specific plan. This is the first published opinion to interpret the language of the CEQA exemption contained in Government Code section 65457. The opinion clarifies the standard of review that applies when a petitioner challenges an agency's decision to apply the section 65457 exemption. The opinion also clarifies the relationship between the exemption and CEQA Guideline section 15168, which sets forth the procedure for tiering from a program EIR. The court's clarification of these two controversial issues will allow developers and agencies to rely on the exemption with confidence and should be useful to homebuilders and local agencies considering urban infill and transit-oriented projects.

Petitioners challenged the City of Dublin's decision to exempt the development of a 7.2-acre parcel with 505 apartment units from CEQA pursuant to Government Code section 65457. The parcel was located in the Dublin Transit Village Center Specific Plan area. A program environmental impact report (EIR) for that specific plan was prepared in 2002. The city found that the project was consistent with the 2002 program EIR and therefore qualified for a CEQA exemption under Government Code section 65457.

As an initial matter, the court rejected petitioners' claim that the "fair argument" standard of review, which sets a low bar, was the correct standard to review the city's decision. The court concluded that the "fair argument" standard does not apply to statutory exemptions, such as the one in section 65457, that do not require a determination whether the proposed project will have significant environmental effects.

Instead, section 65457 states that it is inapplicable only if any of the conditions listed in Public Resources Code section 21166 have occurred since the preparation of the program EIR for the applicable specific plan. These conditions include a change in circumstances that would cause the specific plan project to have potentially significant impacts that were not known or previously analyzed at the time the agency prepared the program EIR. Because the exemption under section 65457 turns on whether Public Resources Code section 21166 requires updating the program EIR for the specific plan and not on whether the project may have a significant environmental impact, the court applied the deferential substantial evidence standard of review rather than the non-deferential fair argument standard.

The court also rejected petitioners' claim that "[b]ecause the city elected to prepare a program level EIR in 2002, it cannot now change and exempt itself from the tiered EIRs that must necessarily follow." The court relied on the language of CEQA Guideline 15168, which explains the procedure for tiering from a program EIR, to reach its conclusion. Specifically, subdivision (c) of Guideline 15168 states that if the

Los Angeles

2049 Century Park East, 28th Floor
Los Angeles, CA 90067
P (310) 284-2200
F (310) 284-2100

Orange County

19800 MacArthur Blvd., Suite 500
Irvine, CA 92612
P (949) 260-4600
F (949) 260-4699

San Francisco

555 California Street, 10th Floor
San Francisco, CA 94104
P (415) 262-5100
F (415) 262-5199

agency finds that "no new effects could occur or no new mitigation measures would be required, the agency can approve the activity as being within the scope of the project covered by the program EIR, and no new environmental document would be required." The court concluded that "nothing in section 15168 or any provision mandates a particular level of environmental review in evaluating later projects within the scope of a certified program EIR." Thus, an agency can use a statutory exemption for a later project if one applies. Even if the program EIR contains statements suggesting that subsequent environmental review will occur, such as "[f]uture environmental reviews will be completed on specific development applications," the agency can use all applicable statutory exemptions.

The court rejected petitioners' claim that the Bay Area Air Quality Management District's 2010 greenhouse gas thresholds were significant new information that required the preparation of a supplemental specific plan EIR, which must be completed before the section 65457 exemption can apply. The court held that "the adoption of guidelines for analyzing and evaluating the significance of data d[id] not constitute new information if the underlying information was otherwise known or should have been known at the time the EIR was certified." Therefore, even though the program EIR did not analyze greenhouse gas emissions, the new greenhouse gas thresholds were not "new information" because the potential effects of greenhouse gases were known in 2002 and could have been addressed.

Over the past decade, the legislature has added tiering provisions to CEQA in an attempt to streamline CEQA review, especially for infill and transit-oriented development. But given the uncertainty about how these provisions may be interpreted, developers and agencies have been hesitant to use them. This opinion should give developers and agencies confidence that preparation of a program EIR does not obligate them to undertake any specific type of future environmental review for later actions anticipated by the program, even if environmental thresholds have changed in the intervening years. Instead, the opinion confirms that applicable CEQA exemptions will still apply and a challenge to an agency's use of such an exemption may be reviewed under the deferential substantial evidence standard.

If you have any questions regarding this alert, please contact:

Linda C. Klein at 415.262.5130 or lklein@coxcastle.com

Michael H. Zischke at 415.262.5109 or mzischke@coxcastle.com

Andrew B. Sabey at 415.262.5103 or asabey@coxcastle.com