



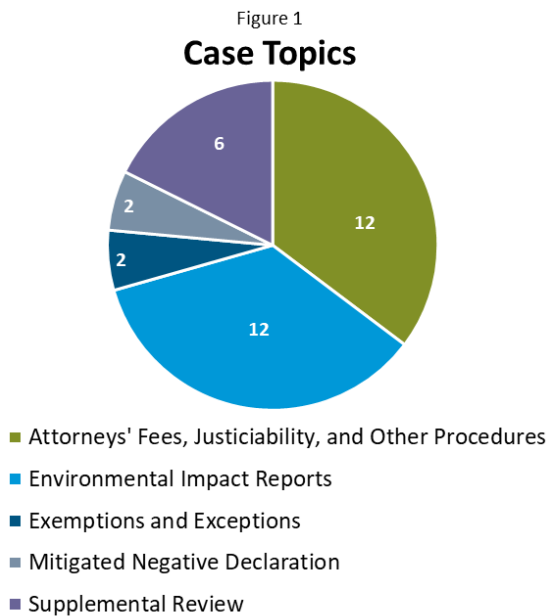
CEQA Case Report

Understanding the Judicial Landscape for Development
2020 Year in Review

CEQA Case Report: Understanding the Judicial Landscape for Development

Public agencies prevailed in 68% of CEQA cases analyzed.

Latham & Watkins is pleased to present its fourth annual CEQA Case Report. Throughout 2020 Latham lawyers reviewed each of the 34 California Environmental Quality Act (CEQA) appellate cases, whether published or unpublished. Below is a compilation of the information distilled from that annual review and a discussion of the patterns that emerged. Latham's webcast discussing this publication and the key CEQA cases and trends of 2020 is [available here](#).



In 2020, the California Courts of Appeal issued 34 opinions that substantially considered CEQA. Additionally, the California Supreme Court issued one opinion, and the Ninth Circuit Court of Appeal issued one opinion. Significantly, in *Protecting Our Water & Environmental Resources v. County of Stanislaus*, the California Supreme Court held that Stanislaus County could not categorically classify the issuance of all well construction permits as “ministerial.” The Supreme Court explained that the plain text of the local code, which incorporated state standards, gave the County health officer significant discretion to deviate from general well permitting standards; therefore, the County’s blanket classification of well permits as ministerial violated CEQA.

Other key cases from 2020 include:

- *Save the Agoura Cornell Knoll v. City of Agoura Hills*, in which the Court of Appeal concluded that conflicting evidence in the record for a mixed-use development project required preparation of an environmental impact report, rather than a mitigated negative declaration, and that failure to raise a statute of limitations in a general demurrer or answer forfeits the defense.
- *Environmental Council of Sacramento v. County of Sacramento*, in which the Court of Appeal concluded that project completion can be presumed for CEQA purposes and that the project description for a master planned community did not need to speculate whether a portion of the project would actually be built.
- *King & Gardiner Farms, LLC v. County of Kern*, in which the Court of Appeal held that agricultural land conversion mitigation measures violated CEQA because conservation easements did not create new agricultural land to replace the land lost.
- *Parkford Owners for a Better Community v. County of Placer*, in which the Court of Appeal held that a petitioner’s challenge to a self-storage facility project was moot after the project was already completed due to the petitioner’s failure to take steps to maintain the status quo pending the resolution of its claims.
- *Golden Door Properties, et al. v. County of San Diego*, in which the Court of Appeal held that San Diego County’s adoption of a Climate Action Plan to reduce greenhouse gas emissions violated CEQA by improperly deferring mitigation and failing to provide specific performance standards.

- *Golden Door Properties, LLC v. Superior Court*, in which the Court of Appeal concluded that a lead agency must maintain and include in the record all written materials, including correspondence, relevant to its CEQA compliance and project evaluation.
- *San Francisco Taxi Coalition v. City and County of San Francisco*, in which the Ninth Circuit Court of Appeal concluded that local regulations prioritizing certain taxi medallion holders did not constitute a “project” under CEQA, despite the claim that the regulations would potentially increase the number of passenger-less trips that taxi drivers took as well as the general demand for rides.

Of the 34 appellate CEQA cases, 15 were published and 19 were unpublished. Figure 1 (*previous page*) shows all 34 cases sorted by topic. An equal number of cases focused on Environmental Impact Reports (EIRs) and Attorneys’ Fees, Justiciability, and Other Procedures, which includes issues such as mootness, statutes of limitations, waiver, and *res judicata*. Each topic was the focus of 12 of the 34 cases, or 35%. This represents a moderate shift from 2019, when the plurality of CEQA cases (44%) centered around Attorneys’ Fees, Justiciability, and Other Procedures, and 31% of cases focused on EIRs. In 2020, six cases focused on Supplemental Review, two cases focused on Exemptions and Exceptions, and two focused on Mitigated Negative Declarations.

Figure 2 (*right*) shows the distribution of cases among California’s six appellate districts, as well as the percentage of cases in each district where the public agency prevailed. As was the case in 2018 and 2019, the Sixth District was the only district in which the public agency prevailed in all cases. Unlike in 2019, in which public agencies did not prevail in a single case in the Fifth District, in 2020 the Fifth District saw public agencies prevail in half of its four cases.

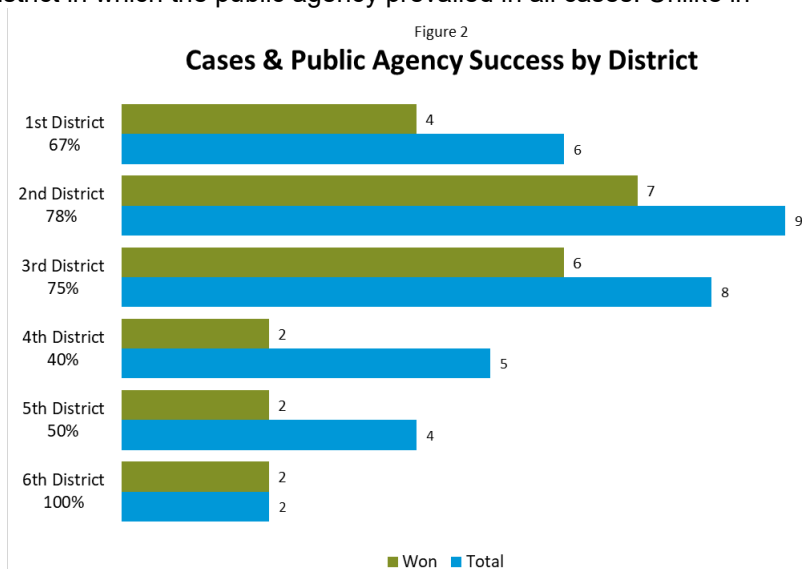
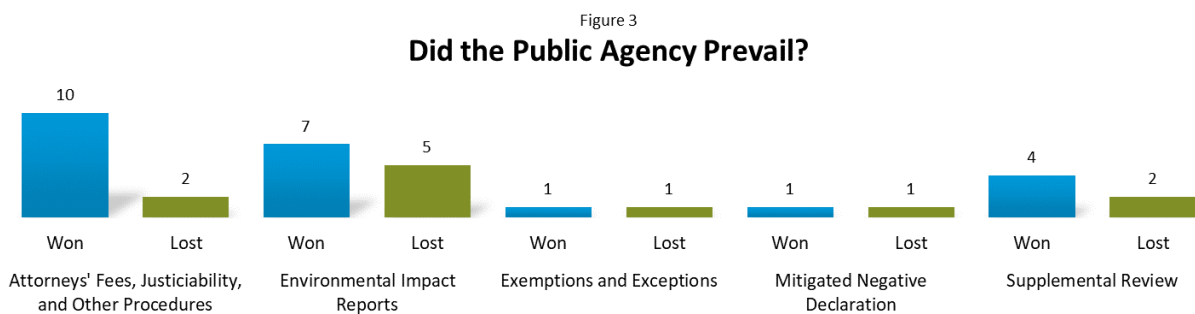


Figure 3 (*below*) separates cases by topic and shows whether the public agency prevailed in each type of case. For purposes of this summary, if the public agency lost on any issue, then it was deemed not to have prevailed. Overall, public agencies prevailed in 23 of the 34 cases, or 68% of the time, down slightly from a 71% win rate in 2019 but consistent with the 65% win rate in 2018. The public agency prevailed in 83% of Attorneys’ Fees, Justiciability, and Other Procedures cases and in 58% of EIR cases.



For insights and commentary on environmental issues and developments impacting business in California, the rest of the US, and the world, please visit Latham’s [Environment, Land & Resources blog](#).

If you have any questions about this *CEQA Case Report*, please contact one of Latham's California Project Siting & Approvals lawyers listed below or the Latham lawyer with whom you normally consult:

James L. Arnone

james.arnone@lw.com
+1.213.891.8204
Los Angeles

Daniel P. Brunton

daniel.brunton@lw.com
+1.858.523.5421
San Diego

Nikki Buffa

nikki.buffa@lw.com
+1.714.540.1235
Orange County

Marc T. Campopiano

marc.campopiano@lw.com
+1.714.755.2204
Orange County

Peter J. Gutierrez

peter.gutierrez@lw.com
+1.213.485.1234
Los Angeles

John C. Heintz

john.heintz@lw.com
+1.213.891.7395
Los Angeles

Lauren E. Paull

lauren.paull@lw.com
+1.213.891.7385
Los Angeles

Maria Pilar Hoye

maria.hoye@lw.com
+1.213.891.7540
Los Angeles

Lucas I. Quass

lucas.quass@lw.com
+1.714.755.8132
Orange County

Natalie C. Rogers

natalie.rogers@lw.com
+1.858.523.3941
San Diego

Winston P. Stromberg

winston.stromberg@lw.com
+1.213.891.8983
Los Angeles

Taiga Takahashi

taiga.takahashi@lw.com
1.858.523.3987
San Diego

We thank the *CEQA Case Report* Editorial Team:

Diego Enrique Flores, Lauren Glaser, Kevin Homrighausen, and Samantha K. Seikkula

We gratefully acknowledge the following associates who assisted with this publication:

Jessie Alice Cammack

Tiana Baghdikian

Michelle Cornell-Davis

Jennifer Garlock

Nathaniel Lawrence Glynn

Mekbeb Negash Hagos

Erin Marie Hallagan

Carolyn Hudson

Brian Francis McCall

Julie Miles (Gantz)

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Sophie M. Stocks

Jack Vanderford



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2020 CEQA CASE SUMMARIES

Attorneys' Fees, Justiciability, and Other Procedures

	Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status	Page Number
1	<u>Anderson v. City and County of San Francisco</u>		1 st		1
2	<u>Canyon Crest Conservancy v. County of LA</u>		2 nd		2
3	<u>Citizens for a Responsible Caltrans Decision v. DOT</u>		4 th		4
4	<u>Coalition for a Equitable Westlake MacArthur Park</u>		2 nd		6
5	<u>Golden Door Properties, LLC v. Superior Court</u>		4 th		8
6	<u>Golden State Environmental Justice Alliance v. City of LA</u>		2 nd		11
7	<u>Golden State Environmental Justice Alliance v. City of LA</u>		2 nd		12
8	<u>Mary Jack v. City of Los Angeles</u>		2 nd		13
9	<u>Parkford Owners for a Better Community v. County of Placer</u>		3 rd		14
10	<u>Paulek v. City of Moreno Valley</u>		4 th		16
11	<u>Save Historic Roseville v. City of Roseville</u>		3 rd		18
12	<u>SPM Fairfield LLC v. City of San Juan Capistrano</u>		4 th		19

Environmental Impact Reports

	Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status	Page Number
13	<u>CBE v. SCAQMD</u>		2 nd		20
14	<u>Coalition to Save San Marin v. Novato Unified School Dist.</u>		1 st		22
15	<u>Environmental Council of Sacramento v. County of Sacramento</u>		3 rd		23
16	<u>Friends of the Santa Clara River v. County of LA</u>		2 nd		25
17	<u>Golden Door Properties, et al. v. County of San Diego</u>		4 th		26
18	<u>Granville Homes v. City of Fresno</u>		5 th		31
19	<u>Gulli v. San Joaquin Area Flood Control Agency</u>		3 rd		32
20	<u>King & Gardiner Farms, LLC v. County of Kern</u>		5 th		33
21	<u>Novaresi v. County of Placer</u>		3 rd		36
22	<u>Save Our Rural Town v. County of Los Angeles</u>		2 nd		37
23	<u>Sierra Club v. County of Fresno</u>		5 th		38
24	<u>Villas at Santana Park Homeowners Assn. v. City of San Jose</u>		6 th		41

Exemptions and Exceptions

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status	Page Number
25 Assn. of Irrigated Residents v. Cal. Dept. of Conservation		5 th		42
26 Protecting Our Water & Environmental Resources v. County of Stanislaus		Supreme Court		43
27 San Francisco Taxi Coalition v. City & County of San Francisco		9 th Circuit	Federal	46
28 Save Berkeley's Neighborhoods v. Regents of Univ. of Cal.		1 st		47



Mitigated Negative Declarations

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status	Page Number
29 Citizens for Smart Development in Amador County v. County of Amador		3 rd		49
30 Save the Agoura Cornell Knoll v. City of Agoura Hills		2 nd		50

Supplemental Review

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status	Page Number
31 Community Venture Partners v. Marin County Open Space District		1 st		53
32 Martis Camp Community Association v. County of Placer		3 rd		54
33 Santa Clara Valley Water District v. San Francisco Water Quality Control Board		1 st		56
34 Stein v. Alameda County Waste Management Auth.		1 st		59
35 Tahoe Residents United for Safe Transit v. County of Placer		3 rd		60
36 Willow Glen Trestle Conservancy v. City of San Jose		6 th		61

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
1 Anderson v. City and County of San Francisco		1 st	

[Anderson v. City and County of San Francisco](#), California Court of Appeal, First Appellate District, Division Two, Case Nos. A143974, A147800, A148454 (December 30, 2020).

The Court of Appeal affirmed the trial court's judgments regarding decades-long litigation surrounding a bicycle path project. The City of San Francisco (City) adopted a plan in 1997 to make its streets more bicycle-friendly (Project). The City updated the Project a few years later and determined that no further CEQA review was needed. Rob Anderson, along with groups Ninety-Nine Percent and the Coalition for Adequate Review (Petitioners), filed a petition for writ of administrative mandate to overturn that decision. In 2006, the trial court ruled in favor of Petitioners, finding that the City needed to comply with CEQA. In 2010, the trial court approved an updated plan, overruling Petitioners' objections. Petitioners appealed in 2013, and the Court of Appeal held that the Board of Supervisors (Board) did violate CEQA when it certified the environmental impact report (EIR) for the updated plan. The City and Petitioners engaged in later litigation, and Petitioners appealed: (i) the denial of Petitioners' motion for judgment, (ii) the grant of the City's motion to strike \$1,813 in claimed costs, (iii) the discharge of a writ in favor of the City, and (iv) the awarding of Petitioners' attorney fees of \$153,346, which was much less than the amount sought.



The Court of Appeal affirmed all of the trial court judgments. The Court held that the public was not denied the opportunity to participate in the CEQA process and that Petitioners had only demonstrated an error in the process by which the EIR was certified, not an error in connection with the EIR itself. The Court determined that the \$1,813 in claimed costs was properly disallowed, as Petitioners were not the prevailing party. The Court further found that the trial court's discharge of a writ in favor of the City was not an abuse of discretion. Finally, the Court held that the trial court's awarding of attorney fees was proper, because they represented the attorney's reasonable compensation. Specifically, the hourly rate the trial court set was reasonable and Petitioners had prevailed on findings, not on the majority of the appeal.

Disposition

The Court of Appeal affirmed the trial court's judgments.

- Opinion by Justice Richman, with Presiding Justice Kline concurring.
- Trial Court: San Francisco County Superior Court, Case No. CPF-05-505509, Judge Teri L. Jackson.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
2 Canyon Crest Conservancy v. County of LA		2 nd	

[Canyon Crest Conservancy v. County of Los Angeles](#), California Court of Appeal, Second Appellate District, Case No. B290379 (February 19, 2020).

- *Bringing a viable CEQA claim alone is not sufficient to show enforcement of an important right affecting the public interest.*
- *If a project proponent rescinds its application with an agency due to ongoing litigation and there is no evidence that the agency would change its approach or conduct further CEQA review if the project proponent reapplied, the litigation cannot be held to have conferred a significant benefit on the general public.*

Background for Appeal

Stephen Kuhn sought to build a single-family residence on his undeveloped property (Project) in Los Angeles County (County). Because the property was located on a steep hillside and construction would require the removal of a protected coastal oak tree, Kuhn applied for a minor conditional use permit and an oak tree permit from the County. The County prepared an initial study and negative declaration and found that there was no substantial evidence that the Project would result in a significant impact on the environment.

A nonprofit organization established by two of Kuhn's neighbors, Canyon Crest Conservancy (Conservancy), objected to the County's actions. The Conservancy obtained an opinion from its own arborist stating that the impacts to the oak trees were understated. The Department of Regional Planning adopted the negative declaration, and the Conservancy appealed to the Regional Planning Commission. The Regional Planning Commission approved Kuhn's application, at which point the Conservancy appealed to the County Board of Supervisors. After additional hearings, the County Board of Supervisors issued its final approval of the Project on March 21, 2017. The Conservancy then filed its petition for writ of mandate.

The Conservancy moved for a preliminary injunction on April 17, 2017, which the trial court granted, finding that granting the stay would not be against the public interest, as the oak woodland and natural interests identified by the Conservancy could be irreparably harmed if the approval of the Project was not stayed. The trial court judge cautioned the parties that granting the stay "in no way is a determination on the writ. It is my determination on what I have at this point in time and whether a stay is in the public interest."

In December 2017, Kuhn sent a letter to the County requesting that the County vacate the Project approvals "to end the litigation." The Department of Regional Planning recommended that the Board of Supervisors vacate the Project approvals, but stated that the "application will remain on file, and if the applicant wishes to pursue the application, it will be processed in accordance with all relevant regulations."

The Conservancy then filed a request to dismiss the case, which the trial court did without prejudice the same day.

The Conservancy filed a motion for attorney fees pursuant to Code of Civil Procedure section 1021.5, seeking a total award of \$281,544. To obtain fees under section 1021.5, the moving party must establish

(i) they are a “successful party,” (ii) the action has resulted in the enforcement of an important right affecting the public interest, (iii) the action has conferred a significant benefit on the public or a large class of persons, and (iv) an attorney fees award is appropriate in light of the necessity and financial burden of private enforcement.

The County and Kuhn opposed the motion. The trial court held a hearing and denied the motion, finding that the Conservancy had failed to establish any of the prongs under section 1021.5. The Conservancy appealed.

A Viable CEQA Claim Alone Is Not Sufficient to Establish the Enforcement of an Important Right Affecting the Public Interest

The Conservancy contended that it was successful in ensuring the Project was not built without adequate CEQA review and that such success was sufficient to satisfy the “important right” requirement. The Court of Appeal disagreed. It found that all indications during the underlying proceedings and ensuing litigation suggested that the County felt it and Kuhn had acted properly and there was no evidence to suggest the County would make any changes in reviewing proposals for the Project in the future.

The Court distinguished the cases the Conservancy cited, noting that while each of those cases resulted in a plaintiff obtaining vindication in court, the Conservancy did not achieve such a result and the County had conceded no error.

The Conservancy further argued that bringing a viable CEQA claim alone is sufficient to satisfy the important right requirement. The Court found that this assertion was unsupported by any authority and ignored the statutory requirement that a party not only *allege* an important right but actually *vindicate* that right by way of litigation.

Without a Change Made by the Public Entity as a Result of the Lawsuit, the Moving Party Cannot Show a Significant Benefit on the General Public



The Conservancy argued that its lawsuit required the County to reconsider the proposed Project under CEQA, thereby enforcing important legislative policy and benefitting the public. The Court found that (i) not every case involving an alleged statutory violation is one that confers a “significant benefit on the general public,” (ii) the Conservancy’s lawsuit was dismissed without any agreement by the County that it would reconsider the Project in a different manner, and (iii) the individual members of the Conservancy admitted that their concern was the effect of the Project on their personal property, not the effect on the broader general public. Therefore, the Court held that the Conservancy could not establish that their lawsuit conferred a significant benefit on the general public.

Disposition

Accordingly, the Court of Appeal affirmed the trial court’s judgment.

- Opinion by Justice Collins, with Justice Manella and Justice Currey concurring.
- Trial Court: Superior Court of Los Angeles County, Case No. BS167311, Judge Mary Strobel.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
3 <i>Citizens for a Responsible Caltrans Decision v. DOT</i>		4 th	

[Citizens for a Responsible Caltrans Decision v. California Department of Transportation](#), California Court of Appeal, Fourth Appellate District, Case No. D074374 (March 24, 2020).

- *Streets and Highways Code Section 103 does not exempt lead agencies from complying with CEQA at the project level.*
- *Equitable estoppel can be raised to rebut a statute of limitations defense if a lead agency acts contrary to its public representations.*

Background for Appeal

In 2005, the California Department of Transportation (Caltrans) issued a notice of preparation of a joint environmental impact report / environmental impact statement (EIR/EIS) for the construction of two freeway interchange ramps connecting a federal interstate and a state route (Project). The Project was one of several components of a larger freeway improvement project (North Coastal Corridor Project), which sought to improve vehicle and railroad transportation from La Jolla to Oceanside. While conducting joint environmental review under CEQA and the National Environmental Policy Act (NEPA) for the Project, Caltrans was concurrently reviewing the environmental impacts of the larger North Coastal Corridor Project.

On January 1, 2012, the Legislature enacted Street and Highways Code Section 103, which provided for integrated review by the California Coastal Commission of a public works plan (PWP) for the North Coastal Corridor Project, rather than a project-by-project approach.

In April 2012, Caltrans circulated the draft EIR/EIS for the Project. The draft EIR/EIS stated that, following circulation of the final EIR/EIS, Caltrans would issue a Notice of Determination (NOD) under CEQA and a Record of Decision under NEPA if it approved the Project.

In October 2013, Caltrans issued a final EIR/EIS for the North Coastal Corridor Project. In that final EIR/EIS, Caltrans stated that Section 103 was not intended to eliminate project-specific CEQA or NEPA review, but rather provide for integrated review by the Coastal Commission.

In June 2014, Caltrans issued a PWP for the North Coastal Corridor Project, which the Coastal Commission approved later that year. The PWP confirmed that it was not intended to supplant CEQA's required review process.

In June 2017, Caltrans issued a final EIR/EIS for the Project. Like the draft EIR/EIS, the final EIR/EIS stated that, if Caltrans decided to approve the Project, Caltrans would issue an NOD and a Record of Decision in compliance with CEQA and NEPA, respectively. However, the final EIR/EIS also included apparently inconsistent language: that, under Section 103, the Project need not independently comply with CEQA, and that, under Section 103, environmental review should be considered in light of the North Coastal Corridor Project's approved PWP. As a result, Caltrans approved the Project and filed a notice of exemption (NOE) on July 12, 2017, two days before the public review period under NEPA began for the final EIR/EIS.

Even though Caltrans filed the NOE, it determined that public disclosure of the Project's anticipated impacts was desirable, and solicited public comment on the final EIR/EIS from July 14, 2017, to August

14, 2017. An environmental group (Petitioner) first became aware of the NOE on September 28, 2017, after the applicable 35-day statute of limitations under CEQA had run. Petitioner requested that Caltrans either rescind the NOE or agree to a 180-day statute of limitations. Caltrans refused to accommodate either request.

On November 1, 2017, Petitioner filed a petition for writ of mandate and declaratory relief, alleging that (i) Caltrans improperly relied on Section 103 as an exemption from CEQA, and (ii) Caltrans should be estopped from relying on the 35-day statute of limitations. The trial court granted Caltrans' demurrer without leave to amend and subsequently dismissed the petition with prejudice. Petitioner timely appealed.

Streets and Highways Code Section 103 Did Not Exempt Project-Level CEQA Compliance

Caltrans argued that Section 103's regulatory framework exempted it from abiding by CEQA's reporting requirements in light of the already released PWP for the North Coastal Corridor Project. The Court of Appeal disagreed, concluding that Section 103 did not exempt Caltrans from complying with CEQA by preparing and circulating an EIR before approving the Project. The plain, "unambiguous" language of Section 103 indicated that exemption from CEQA compliance applied to the Coastal Commission's approval of long-range development plans, but not to Caltrans for its project-specific approvals. Nothing in the language of the statute supported Caltrans' interpretation that the exemption applied to a lead agency. The Court also explained that no case law supported Caltrans' position. Even though Section 103 provided that approvals, reviews, and permitting for the North Coastal Corridor Project components should be conducted on an expedited basis, the Legislature did not intend that those projects be exempt from CEQA's EIR requirement.

Caltrans Was Equitably Estopped From Raising the 35-Day Statute of Limitations on Demurrer

The Court also held that Petitioner alleged sufficient facts showing that Caltrans was equitably estopped from relying on the 35-day statute of limitations. To assert equitable estoppel, a party must demonstrate that (i) the party to be estopped was apprised of the facts, (ii) that party intended their conduct to be acted on, (iii) the asserting party was ignorant of the true state of facts, and (iv) the asserting party relied on the other party's conduct to its injury. The Court determined that Petitioner's allegations and supporting documents raised, at a minimum, a disputed question of fact as to the elements of equitable estoppel. The representations made by Caltrans in its 2012 draft EIR/EIS, the 2014 PWP, and the 2017 final EIR/EIS — including statements about subsequent project approval coming in the form of an NOD — were sufficient to state a claim as to those elements at the pleading stage.

Disposition

Accordingly, the Court of Appeal reversed the trial court's judgment and remanded the case with directions to sustain and overrule the demurrer.

- Opinion by Acting Presiding Justice Benke, with Justice O'Rourke and Justice Dato concurring.
- Trial Court: San Diego County Superior Court, Case No. 37-2017-00041496-CU-MC-CTL, No. 37-2017-00041547-CU-TT-CTL, Judge Judith F. Hayes.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
4 Coalition for an Equitable Westlake MacArthur Park		2 nd	

[Coalition for an Equitable Westlake/MacArthur Park v. City of Los Angeles](#), California Court of Appeal, Second Appellate District, Case No. B293327 (April 2, 2020).

- *The statute of limitations to challenge a facially valid notice of determination (NOD) under CEQA is 30 days.*
- *Substantive CEQA challenges in connection with an NOD may be raised if one of two exceptions to the 30-day statute of limitations applies: the NOD is facially invalid, or the NOD is filed before the project is approved.*

Background for Appeal

Adrian Jayasinha and the Walter and Aeshea Jayasinghe Family Trust (collectively, Real Parties) filed various applications seeking approvals from the City of Los Angeles (City) to construct a mixed-use project in the Westlake/MacArthur Park area of Los Angeles (Project). On March 3, 2017, the City's Advisory Agency approved the Project's vesting tentative tract map (Tract Map) and certified a mitigated negative declaration (MND) for the Project. On March 15, 2017, the City filed an NOD advising that it had approved the Tract Map, that an MND had been certified with mitigation measures made part of the approval, and that "the filing of this notice starts a 30-day statute of limitations on court challenges to the approval of the project pursuant to Public Resources Code Section 21167."

In October 2017, the City's Planning Commission found that the Project was assessed in the MND and that no further CEQA documentation was required. The Planning Commission then approved conditional use permits and made other approvals for the Project, and issued a determination letter that set an appeals deadline of November 21, 2017. Meanwhile, two tenants of an existing building at the Project site appealed the Planning Commission's decision to the City Council. In its January 31, 2018, meeting, the City Council denied the appeals and also approved general plan amendments for the Project.

In March 2018, the Coalition for an Equitable Westlake/MacArthur Park (Petitioner) filed a petition for writ of mandamus to challenge approval of the MND, alleging that (i) a CEQA violation by arguing that the City had "failed to disclose, analyze, and mitigate the Project's significant adverse environmental impacts in multiple areas," (ii) the mitigation measures adopted were inadequate, and (iii) an environmental impact report (EIR) was required. The City and Real Parties filed a demurrer, which the trial court sustained on the grounds that Petitioner's claims were time-barred because Petitioner had failed to seek writ relief within 30 days after the March 15, 2017, NOD was filed and because Petitioner had failed to exhaust administrative remedies. The trial court denied leave to amend, and Petitioner appealed.

The Statute of Limitations to Challenge a Facially Valid NOD Under CEQA Is 30 Days

The Court of Appeal did not address the failure to exhaust argument but agreed with the trial court that Petitioner's CEQA claims were time-barred. The Court ruled that the NOD filed in connection with the Advisory Agency's certification of the MND was facially valid because it complied with CEQA Guidelines Section 15075 by including an accurate description of the Project, the identities of the lead agency and Project applicant, the date of Project approval, the required statements of findings regarding the Project's environmental impact, a statement of need for mitigation measures as a condition of Project approval, and the address where the relevant approvals could be examined. As such, the statute of limitations for

challenges to this NOD commenced on March 15, 2017, when the NOD was filed, and Petitioner's suit was not timely as it was filed nearly a year later.

Substantive CEQA Challenges to an NOD May Only Be Raised Within the 30-Day Statute of Limitations or Under an Exception to This Statute of Limitations

The Court of Appeal extended the reasoning of the California Supreme Court in *Stockton Citizens for Sensible Planning v. City of Stockton* to conclude that substantive arguments that an NOD did not comply with CEQA may be raised if the suit is brought within 30 days of the filing of the NOD. Here, since Petitioner failed to file suit within 30 days of the City's filing of the NOD, Petitioner was barred from raising substantive arguments.



Substantive CEQA challenges in connection with an NOD may be raised if one of two exceptions to the 30-day statute of limitations applies: the NOD is facially invalid, or the NOD is filed before the project is approved. After finding that Petitioner had failed to file within the 30-day period, the Court of Appeal considered whether one of the exceptions applied. The Court concluded that neither exception applied because (i) the NOD was facially valid, and (ii) the NOD was adopted after the City approved the MND and Tract Map for the Project.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's ruling sustaining the demurrer of the City and Real Parties without leave to amend and ordered Petitioner to pay costs on appeal.

- Opinion by Justice Moor, with Presiding Justice Rubin and Justice Baker concurring.
- Trial Court: Los Angeles County Superior Court, Case No. BS172664, Judge Joseph Kalin and Judge Yvette M. Palazuelos.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
5 <i>Golden Door Properties, LLC v. Superior Court</i>		4 th	

[*Golden Door Properties, LLC v. Superior Court*](#) (2020) 53 Cal.App.5th 733, California Court of Appeal, Fourth Appellate District, Case Nos. D076605, D076924, D076993 (July 30, 2020).

- *A writ petition is not moot if some project approvals remain or a developer indicates an intent to proceed with a project.*
- *CEQA requires that all written evidence, correspondence, or other written materials relevant to a lead agency's compliance with CEQA or evaluation of a project be maintained and included in the record of proceedings.*
- *Discovery is allowed to obtain CEQA records.*

Background for Appeal

In 2017, the County of San Diego (County) released a draft environmental impact report (EIR) for the Newland Sierra Project (Project), a proposed development of 2,135 residential units and 81,000 square feet of commercial space in unincorporated San Diego County.

A collection of neighbors and environmental groups (collectively, Petitioners) submitted California Public Records Act (CPRA) requests for County documents pertaining to the Project, including "Project-related" communications. In response, the County stated that its document retention policy provides that, unless the user designates an email as an "official record," emails are automatically deleted after 60 days.

Golden Door filed a complaint and writ petition, alleging, among other things, that the County improperly withheld public records under the CPRA and improperly destroyed documents that should be included in the CEQA record. In early 2019, this action was consolidated with two subsequent writ petitions challenging the Project's EIR, and a discovery referee was appointed by the trial court.

Petitioners filed a series of motions to compel discovery pursuant to several requests for production served on the County, the Project developer, and various third-party consultants. The discovery referee denied the Petitioners' motions, and the trial court adopted the referee ruling without substantive change. This ruling included the finding that the County's automatic email deletion policy was lawful under Public Resources Code Section 21167.6 because this provision "is not a document retention statute but describes documents [to be] included in all CEQA proceedings."

In October 2019, Petitioners sought writ of mandate from the Court of Appeal directing the trial court to grant the motions to compel or to enter judgment in Petitioners' favor on the grounds that the County violated Section 21167.6. The Court denied the petition, and Petitioners filed for review in the California Supreme Court.

In December 2019, Petitioners filed a second petition with the Court seeking writ of mandate with respect to the second round of motions to compel on CEQA and CPRA grounds. A week later, the Supreme Court granted Petitioners' petition for review of the Court's denial of the first writ petition and transferred the matter back to the Court, which then consolidated the two writ proceedings. Below is a summary of the Court's decision on the CEQA issues only.

A Writ Petition Is Not Moot if Some Project Approvals Remain or a Developer Indicates an Intent to Proceed With a Project

Before getting to the merits of Petitioners' writ petitions, the Court of Appeal asked the parties to brief whether a referendum disapproving the General Plan Amendment for the Project and the subsequent rescission of many, but not all, Project approvals rendered the writ petitions moot. The Court concluded that the writ petitions were not moot for two independently sufficient reasons: (i) some Project approvals remained, and (ii) the Project developer had indicated its intent to continue with the Project. Further, the Court decided to exercise its discretion to hear the cases given that the Supreme Court "implicitly determined the e-mail destruction issue is an important one with statewide significance" and that the parties' controversy was likely to recur.

The Lead Agency Must Maintain and Include in the Record All Written Materials, Including Correspondence, Relevant to Its CEQA Compliance and Project Evaluation

The core CEQA issue on appeal was the meaning of Public Resources Code Section 21167.6, subdivision (e), which states that "[t]he record of proceedings shall include ... [a]ll written evidence or correspondence submitted to, or transferred from, the respondent public agency with respect to compliance with this division or with respect to the project" and "[a]ny other written materials relevant to the respondent public agency's compliance with this division or to its decision on the merits of the project." Petitioners argued that this section necessarily requires that such materials not be destroyed before a project's record is prepared. The County argued that Section 21167.6 does not require document retention and instead only lists documents to be included in the CEQA record, and that the CEQA Guidelines establish which types of documents must be maintained for specific periods of time.

As a matter of first impression, the Court of Appeal began with the statute's plain language. Section 21167.6 provides that it applies "[n]otwithstanding other law," which controls over the County's email retention policy. Section 21167.6(e) states that the record "shall" include "all" and "any" of the enumerated materials. The Court explained that this language establishes a broadly inclusive, mandatory requirement that an agency preserve the materials identified by Section 21167.6. Nevertheless, the Court declined to specify the time period for retention and stated that such records are not required to be "retained in perpetuity." As such, Section 21167.6 "cannot reasonably be interpreted to mean all written materials, internal agency communications, and staff notes except those e-mails the lead agency has already destroyed" because such an interpretation "would enable the agency to prune the record by deleting unfavorable 'internal agency communications, including staff notes and memoranda related to the project.'" The Court determined that "[i]t is undisputed that the County destroyed e-mails" under its policy, and the record showed that some of those emails fell into categories enumerated by Section 21167.6. Thus, the Court determined that the County's email destruction policy was unlawful when applied to a CEQA case.

The Lead Agency Bears Responsibility for Maintaining Documents as Required by CEQA

The referee recommended, and the County argued on appeal, that Petitioners' motions to compel the production of emails from the County should be denied because Petitioners failed to request at the beginning of the Project's permitting and environmental review process that the County comply with its Section 21167.6 obligations. The Court of Appeal described this argument as "troubling," noting that "neither the County nor the referee's recommended rulings cite any authority for the remarkable proposition that an agency may destroy documents section 21167.6 mandates for judicial review, so long as a project opponent does not give advance notice that he or she expects the agency to comply with the law." The Court thus rejected this argument, finding that "[a]ny such argument would be anathema to CEQA, which is centered around government accountability."

Discovery Is Allowed to Obtain CEQA Records

The County argued that the rulings denying Petitioners' motions to compel were proper, in part because "discovery is generally not permitted" in a CEQA action." The Court flatly rejected this argument, explaining that both the Civil Discovery Act and CEQA authorize the use of discovery in CEQA

proceedings, at least “to establish the record of proceedings,” but noting that “discovery to obtain components of the record should ordinarily be unnecessary.”

Disposition

Accordingly, the Court of Appeal reversed in part and affirmed in part the trial court’s orders and remanded the case for further proceedings.

- Opinion by Presiding Justice McConnell, with Justice Haller and Justice O’Rourke concurring.
- Trial Court: San Diego County Superior Court, Case Nos. 37-2018-00030460-CUTT-CTL, 37-2018-00054312-CU-TTCTL, 37-2018-00054559-CU-TT-CTL, Judge Gregory W. Pollack.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
6 <i>Golden State Environmental Justice Alliance v. City of LA</i>		2 nd	

[Golden State Environmental Justice Alliance v. City of Los Angeles](#), California Court of Appeal, Second Appellate District, Division Three, Case No. B294231 (January 28, 2020).

The Court of Appeal affirmed the trial court's judgment, holding that Golden State Environmental Justice Alliance (Petitioner) failed to exhaust its administrative remedies when challenging the approval of proposed 34-story residential building in West Los Angeles (Project). Here, the City of Los Angeles (City) approved the Project despite allegations made in Petitioner's comment letter to the Project's draft environmental impact report (EIR) that the City did not adequately analyze the effect of the Project's greenhouse gas (GHG) emissions on climate change. After the petition was filed, the trial court rejected the same argument. It was not until Petitioner appealed the trial court's decision that it specifically claimed the City did not properly apply California's 2030 and 2050 GHG emissions goals, as set forth in Executive Orders S-3-05 and B-30-15, when analyzing the Project. On appeal, the Court reiterated the exhaustion of administrative remedies doctrine, recognizing that "generalized environmental comments at public hearings," "relatively ... bland and general references to environmental matters," and "isolated and unelaborated comment[s]" are insufficient to preserve a claim on appeal and that the "exact issue, not merely generalized statements, must be raised."

Although Petitioner referenced Executive Orders S-3-05 and B-30-15 in its comment letter, these references did not specifically address the Project's compliance with the 2030 and 2050 emissions targets, but involved unrelated issues like "near term" goals, amortization of construction emissions, and the utilization of Energy Star appliances. Because Petitioner did not raise the "exact issue" it now argued on appeal, the Court concluded that Petitioner failed to exhaust its administrative remedies and affirmed the trial court's decision, denying the mandate petition with regard to GHG emissions.

Disposition

The Court of Appeal affirmed the trial court's decision, denying the mandate petition with regard to GHG emissions.

- Opinion by Presiding Justice Edmon, with Justice Lavin and Justice Egerton concurring.
- Trial Court: Los Angeles County Superior Court, Case No. BS168429, Judge John Torribio.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
7 <i>Golden State Environmental Justice Alliance v. City of LA</i>		2 nd	

[Golden State Environmental Justice Alliance v. City of Los Angeles](#), California Court of Appeal, Second Appellate District, Division Three, Case No. B295988 (July 10, 2020).

The Court of Appeal affirmed the trial court's order denying attorney's fees, holding that the trial court did not abuse its discretion when it concluded that the statutory requirements under Code of Civil Procedure section 1021.5 (Section 1021.5) for awarding attorney's fees were not met. The City of Los Angeles (City) approved an application to build a 34-story residential building in West Los Angeles (Project). Golden State Environmental Justice Alliance (Petitioner) challenged the City's certification of the Project's environmental impact report (EIR), claiming that the City had erroneously calculated the Project's energy use. The trial court agreed that the Project's energy impact analysis was incorrect and needed to be fixed. After correcting the analysis, the City reached the same conclusion as before, i.e., that the Project's energy impacts would be less than significant. Pursuant to Code of Civil Procedure Section 1021.5, Petitioner filed a motion for attorney's fees and sought an award of \$545,850.



Under Section 1021.5, a court may award attorney's fees to a successful party if a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons. The trial court denied Petitioner's motion for attorney's fees because the case did not result in a significant benefit to the public. The Court of Appeal agreed, finding that a mere change in process without any substantive alterations to the actual a project is not a significant benefit that requires the award of attorney's fees. Petitioner's lawsuit resulted in a correction of a calculation error in an EIR, but the correction did not change the City's conclusion that the Project's energy impacts were less than significant. Additionally, the correction did not have any practical effect on the Project, nor did Petitioner change the City's conduct or obtain any other relief. Accordingly, the trial court acted within its discretion when it denied a fee award because the City's error in assessing the Project's energy impacts was only a minor calculation error, the correction of which did not ultimately confer significant benefits on anyone.

Disposition

The Court of Appeal affirmed the trial court's order denying attorney's fees.

- Opinion by Presiding Justice Edmon, with Justice Lavin and Justice Egerton concurring.
- Trial Court: Los Angeles County Superior Court, Case No. BS168429, Judge John Torribio.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
8 <i>Mary Jack v. City of Los Angeles</i>		2 nd	

[Mary Jack v. City of Los Angeles](#), California Court of Appeal, Second Appellate District, Division Two, Case No. B297021 (February 20, 2020).

The Court of Appeal affirmed the trial court's judgment denying a petition for writ of mandate challenging the City of Los Angeles (City) and the California Coastal Commission's (Commission's) approvals for a residential development project (Project). Mary Jack and Sue Kaplan (Petitioners) raised three claims: one against the City for violation of CEQA; a second against the City and the Commission for violation of the California Coastal Act; and a third against the City for violation of due process. In February 2019, the City filed a motion to dismiss the first and third causes of action on the grounds that Petitioners had not complied with Public Resources Code Section 21167.4(a), which requires that a CEQA petitioner "shall request a hearing within 90 days from the date of filing the petition or shall be subject to dismissal." The trial court granted the City's motion to dismiss, holding that Petitioners had not complied with Section 21167.4(a) and that discretionary relief under Code of Civil Procedure Section 437(b) was unwarranted.

On appeal, the Court of Appeal affirmed the trial court's ruling. First, the Court found that Petitioners had not substantially complied with the procedural requirements of Section 21167.4(a). The Court rejected Petitioners' argument that they had substantially complied by serving notice of a trial-setting conference that had been set by the trial court. The Court noted that the trial court set the matter for a trial-setting conference, not Petitioners. Because a trial-setting conference is not the functional equivalent of the request for a hearing under Section 21167.4(a), which triggers important deadlines under other provisions of the Public Resources Code, the Court concluded that Petitioners had not demonstrated substantial compliance.



Second, the Court of Appeal rejected Petitioners' argument that the trial court abused its discretion in denying relief from dismissal under Code of Civil Procedure Section 473(b). The Court explained that a threshold requirement for relief under CCP Section 473(b) is the moving party's diligence. The party seeking affirmative relief from default or dismissal under CCP Section 473(b) is required to file and serve a noticed motion. Petitioners failed to satisfy this requirement because they never included a copy of the request for a hearing that they proposed to file outside the 90-day time limitation. The Court added that even if Petitioners had properly filed a CCP Section 473(b) motion, the trial court did not abuse its discretion because its conclusion that Petitioners had not acted diligently was supported by the record.

Disposition

The Court of Appeal affirmed the trial court's judgment dismissing the petition for writ of mandate because Petitioner failed to comply with the procedural requirements under Section 21167.4(a) and did not diligently seek relief from dismissal.

- Opinion by Justice Kim, with Presiding Justice Moor and Justice Baker concurring.
- Trial Court: County of Los Angeles Superior Court, Case No. BS175256, Judge James Chalfant.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
9 <i>Parkford Owners for a Better Community v. County of Placer</i>		3 rd	

[*Parkford Owners for a Better Community v. County of Placer*](#), California Court of Appeal, Third Appellate District, Case No. C087824 (August 26, 2020).

- *Completed project construction can render challenges to the project's approval moot if the project developer has complied with all applicable laws and court orders and the project challenger fails to take adequate steps to maintain the status quo pending resolution of its claims.*
- *The key in determining if a case is moot is whether the court can grant the petitioner effectual relief.*

Background for Appeal

In August 2016, Placer County (County) approved a building permit for the expansion of an existing commercial self-storage facility (Project). Project construction began two months later. In February 2017, a community organization (Petitioner) petitioned the court to (i) set aside the County's building permit approval under CEQA and the Planning and Zoning Law, (ii) require the County to prepare and certify an environmental impact report (EIR) for the Project, and (iii) enjoin all Project construction activity. Specifically, Petitioner claimed that Project approval was a discretionary act subject to CEQA and that the original conditional use permit for the area's development did not authorize the Project. Petitioner also requested a temporary restraining order (TRO) and a preliminary injunction to halt Project construction — both of which the trial court denied. On the merits, the trial court found that the County did not violate CEQA because the County's approval of the building permit was ministerial, and dismissed Petitioner's Planning and Zoning Law claim as time-barred. Petitioner appealed.

Petitioner's Claims Were Moot

On appeal, the County and the Project developer argued that Petitioner's claims were moot because the Project was fully constructed and operational, and Petitioner's requested relief — to set aside the building permit and suspend construction until an EIR was prepared — could no longer be granted and effective. The Court of Appeal agreed, concluding that Project completion rendered Petitioner's challenges moot because the Court could not grant Petitioner any effectual relief. The Court explained that nothing in the record indicated that the Project developer completed the Project's construction in bad faith, in violation of a court order, or in an attempt to evade the requirements of CEQA or the Planning and Zoning Law. Although Petitioner requested a TRO and preliminary injunction, these requests were not made until construction was nearly complete. Thus, Petitioner failed to take steps to maintain the status quo pending the resolution of its claims.



Further, the Court noted that Petitioner did not address the mootness issue in its briefing. Although the burden of persuasion with respect to mootness is on the respondent (here, the County), the ultimate burden of showing reversible error is always on the appellant (here, Petitioner). Petitioner failed to meet its burden.

Disposition

The Court of Appeal affirmed the trial court's judgment in favor of the County and the Project developer, dismissing Petitioner's claims as moot.

- Opinion by Justice Hoch, with Acting Presiding Justice Hull and Justice Butz concurring.
- Trial Court: Placer County Superior Court, Case No. SCV0039094, Judge Charles Wachob.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
10 <i>Paulek v. HF City of Moreno Valley</i>		4 th	

[Paulek v. City of Moreno Valley](#), California Court of Appeal, Fourth Appellate District, Division Two, Case No. E071184 (November 24, 2020).

The Court of Appeal dismissed Petitioners' appeal and the City's cross-appeal of the trial court's judgement, finding that petitioners' appeal was moot. Individuals and environmental organizations (Petitioners) opposed the proposed development of a large-scale logistics center (Project) in the City of Moreno Valley (City). In 2015, the Moreno Valley City Council certified a final environmental impact report (EIR) for the Project and approved its construction. Petitioners filed for writ of mandate under CEQA and alleged that the EIR was inadequate.

The trial court found that the EIR was deficient because: (i) the EIR failed to conduct a good-faith analysis of potential sources of renewable energy for the Project, (ii) the EIR improperly described an area near the Project as a "buffer zone," (iii) the EIR improperly analyzed the Project's noise impacts, (iv) the EIR failed to determine whether the Project would have significant effects on farmland and how to mitigate those effects, and (v) the EIR's cumulative impacts analysis relied on outdated and incomplete information and failed to determine whether the Project's individually insignificant impacts were cumulatively significant.

Petitioners appealed, claiming that the trial court should not have upheld the EIR's greenhouse gas (GHG) analysis. Petitioners' appeal primarily related to whether the EIR conducted the appropriate GHG emissions analysis when it reasoned that emissions subject to cap-and-trade requirements did not "count" against the applicable significance threshold. In 2020, while the appeal was still pending, the City adopted a resolution vacating the original EIR and certifying a revised final EIR for the Project. The revised final EIR addressed the Project's GHG emissions with a new mitigation measure without consideration of the analysis based on the state cap-and-trade program.


The Court of Appeal found that Petitioners' appeal was moot. An appeal is moot if events occur while the appeal is pending that render it impossible for the appellate court to grant effective relief. There are three discretionary exceptions to the rule of mootness: (i) when the case presents an issue of broad public interest that is likely to recur, (ii) when there may be a recurrence of the controversy between the parties, and (iii) when a material question remains for the court's determination. Because Petitioners' only issue on appeal concerned the EIR's reliance on the cap-and-trade program in its GHG analysis, and the final revised EIR did not use the cap-and-trade program in its analysis, the Court could not grant Petitioners relief. Regarding the exceptions to the mootness doctrine, the Court held that there was no evidence in the record to suggest that the EIR's allegedly faulty GHG analysis would be employed in the future, and, therefore, the "continuing public interest" and "recurrence of the controversy" exceptions did not apply. Accordingly, there was no remaining material question for the Court to decide.

Disposition

The Court of Appeal dismissed Petitioners' appeal and the City's cross-appeal.

- Opinion by Justice Codrington, with Acting Presiding Justice McKinster and Justice Miller concurring.
- Trial Court: Riverside County Superior Court, Case Nos. RIC510957, RIC1511195, 1511279, RIC1511327, RIC1511421 Los Angeles County Superior Court, Case No. BS166732, Judge Sharon J. Waters.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
11 <i>Save Historic Roseville v. City of Roseville</i>		3 rd	

[Save Historic Roseville v. City of Roseville](#), California Court of Appeal, Third Appellate District, Case No. C090754 (November 18, 2020).

The Court of Appeal affirmed the trial court's judgment holding that a petition challenging a residential building's construction was untimely. The City of Roseville (City) adopted a downtown-specific plan and certified an environmental impact report (EIR) for a downtown area, which outlined the construction of a parking structure. Subsequently, the City's Planning Commission approved a minor design review permit and a tentative subdivision map (Permit) to allow construction of a residential building (Project) where the City's specific plan and EIR had previously designated the parking structure to be built. The City filed a notice of exemption from CEQA. Almost a year later, the City Council passed a resolution approving the development agreement between the City and the Project's developer, and the City filed a second notice of exemption. *Save Historic Roseville* (Petitioner) then filed a petition arguing that the City Council's approval of the development agreement, without adopting a negative declaration or a new EIR, violated CEQA. The trial court denied the petition as untimely. The court stated that Petitioner was required to challenge the City's earliest approval of the Project, which was the Permit and not the subsequent approval of the development agreement.

On appeal, the Court of Appeal affirmed the trial court's ruling. The Court noted that once an agency files a notice of exemption for a project, a 35-day statute of limitations period begins. If no notice of exemption is filed, or if the notice is invalid, a 180-day statute of limitations period applies. Approval of a project is "the decision by a public agency which commits the agency to a definite course of action." The Court rejected Petitioner's argument that the Permit was not an approval of the Project because it was not a discretionary act and did not commit the City to the Project. Because the use of personal judgment and the simultaneous weighing of several interests and facts were required, the Court reasoned, the City's approval of the Permit was a discretionary act.

Additionally, the Court stated that the City's approval of the Permit "effectively precludes consideration of any alternatives or mitigating measures CEQA would otherwise require," which meant the City's approval of the Permit committed itself to the Project. Thus, the Court held that the first notice of exemption filed after the City's approval of the Permit triggered CEQA's statute of limitations.


Finally, the Court rejected Petitioner's claim that the City's first notice of exemption was defective. Even if the first notice was defective, the Court stated, the petition was still untimely because it fell outside the 180-day statute of limitations period after the City's approval of the Permit.

Disposition

The Court of Appeal affirmed the trial court's decision denying the Petitioner's challenge to the building of a residential structure because the challenge was untimely.

- Opinion by Justice Robie, with Presiding Justice Raye and Justice Blease concurring.
- Trial Court: Placer County Superior Court, Case No. SCV0042495, Judge Charles Wachob.

Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
12 <i>SPM Fairfield LLC v. City of San Juan Capistrano</i>		4 th	

[SPM-Fairfield, LLC v. City of San Juan Capistrano](#), California Court of Appeal, Fourth Appellate District, Division Three, Case No. G057482 (June 2, 2020).

The Court of Appeal affirmed the trial court's denial of SPM-Fairfield, LLC's (Petitioner's) motion for attorney's fees because the Petitioner had a significant financial stake in the litigation, which was sufficient to warrant its decision to incur substantial attorney's fees and costs in pursuing the case without the incentive of a fee award under the private attorney general statute, or Code of Civil Procedure section 1021.5 (Section 1021.5) After Petitioner brought a successful challenge to the City of San Juan Capistrano's (City's) approval of a hotel development under CEQA and the City's general plan, historic master plan, and municipal code, Petitioner moved for attorney's fees under Code of Civil Procedure Section 1021.5. The trial court denied the motion, reasoning that Petitioner, which was pursuing its own hotel project in the City, had financial stake in the litigation such that its decision to incur substantial attorneys' fees and costs in the prosecution of its lawsuit was sufficient to disqualify Petitioner from receiving a fee award under Section 1021.5.



On appeal, the Court of Appeal only considered the third element required for an attorneys' fees award under Section 1021.5: whether the necessity and financial burden of private enforcement make an award of attorneys' fees appropriate. In determining whether this element is met, reasonably expected financial benefits of the litigation are measured as of the time essential litigation decisions were made, including decisions made after the initial decision to file the litigation. The Court held that the financial benefit from potentially delaying or increasing the costs of a competitor's development through litigation was sufficient to preclude an attorney's fee award under Section 1021.5. In reaching this decision, the Court also rejected Petitioner's argument that whatever financial benefit it may have obtained from the litigation was not sufficiently direct or immediate because the litigation did not prevent the competitor's hotel development, but only forced it to comply with CEQA and other laws. But because the parties were or potentially were competitors, the Court determined that Petitioner was granted an advantage through its litigation by potentially delaying the potentially competing hotel development and making it more costly.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's judgment denying Petitioner's motion for attorney's fees.

- Opinion by Justice Fybel, with Acting Presiding Justice Bedsworth and Justice Aronson concurring.
- Trial Court: Superior Court of Orange County, Case No. 30-2016-00878881, Judge Peter J. Wilson.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
13 CBE v. SCAQMD		2 nd	

[Communities for a Better Environment v. South Coast Air Quality Management District](#), Court of Appeal, Second Appellate District, Division Eight, Case No. B294732 (April 7, 2020).

- *An agency's choice of methodology to determine baseline environmental conditions must be based on substantial evidence.*
- *An agency need not obtain information that does not contribute to the overarching goal of an EIR.*
- *An issue that is not raised during the public comment period is forfeited on appeal.*
- *An agency can withhold information immaterial to the purpose of an EIR.*

Background for Appeal

Tesoro Refining and Marketing Company, LLC's Refinery Integration and Compliance Project (Project) sought to improve air quality regulation compliance and better integrate two of the company's adjacent oil refining facilities. The Project entailed shutting down a high emissions unit, installing new storage tanks to reduce the frequency of oil tanker trips, and altering a thermal operating limit of a facility heater.

On June 22, 2017, following an extended 94-day public comment period and federal Environmental Protection Agency (EPA) approval of refinery permits, the South Coast Air Quality Management District (SCAQMD) approved the Project and certified a final environmental impact report (EIR). Communities for a Better Environment (Petitioner) immediately challenged the certification, alleging that the EIR was inadequate under CEQA. Petitioner argued that: (i) SCAQMD used the wrong baseline to measure air pollution impacts, (ii) in preparing the EIR, SCAQMD did not obtain necessary information regarding crude oil composition, (iii) the EIR did not explain how SCAQMD calculated its 6,000 barrel figure, and (iv) the EIR did not disclose the total volume of crude oil processed or the refinery's unused processing capacity. The trial court ruled in favor of the SCAQMD on each of the four arguments, and Petitioner appealed.

SCAQMD's Baseline for Measuring Air Pollution Impacts Was Proper

Petitioner challenged the baseline for measuring the Project's impact on air pollution. SCAQMD used a 98th percentile near-peak value based on the refinery's worst emissions during the prior two years, excluding the worst 2% of data as outliers. Petitioner argued that an average-value baseline would better represent the refinery's normal emissions levels. The Court of Appeal pointed out that an agency may choose its method of determining a baseline provided its decision is supported by substantial evidence. The Court rejected Petitioner's argument and determined that the federal EPA's 98th percentile baseline method to regulate air pollution nationally aligns with California's air quality goals and served as substantial evidence supporting SCAQMD's baseline choice.

An Agency Need Not Obtain Nor Disclose Information Immaterial to an EIR's Evaluation and Purpose

Petitioner challenged SCAQMD's failure to obtain information about the pre-project composition of the crude oil refinery processes. SCAQMD instead determined that the crude oil's composition fell within the refinery's "operating envelope." Petitioner argued that, without obtaining baseline crude composition data, SCAQMD could not assess whether changes to crude oil properties would cause significant environmental effects.

Rejecting this challenge, the Court of Appeal determined that the composition of the crude oil was not material to determining the Project's environmental impact. The EIR explained that, absent additional machinery modifications beyond the scope of the Project, the refinery could process only a specific range of crude oil blends that fell within its operating envelope. For this reason, the Project would not change the composition of crude oil processed by the refinery. Thus, the Court concluded that additional information about crude oil composition was immaterial to the EIR's purpose of assessing environmental impacts.

Petitioner also argued that the EIR violated CEQA by not disclosing the existing volume of crude oil the refinery processes as a whole or the refinery's unused capacity. The Court rejected this argument as well, holding that the two numbers were not material to the EIR's goal of evaluating air pollution impacts. The EIR explained that the existing refining equipment could process only a certain amount of oil. Because the Project would not modify the refining equipment, it would not alter the amount of oil that could be processed. The Court also held that the refinery's unused capacity was not material to the EIR's goal of evaluating pollution impact because it was merely a "variant" of the existing volume argument.

Arguments Not Raised During Public Comment Are Forfeited



The EIR stated that the Project increased the capacity of one of the facility's production units by 6,000 barrels of oil per day, but did not explain how it reached this conclusion. Petitioner argued that the EIR's failure to explain how it calculated that figure undermined the informational purpose of CEQA, as it prevented the public from understanding and challenging the calculation. The Court of Appeal held that Petitioner failed to raise this issue during the public comment period for the EIR, thereby forfeiting the argument on appeal.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's judgment.

- Opinion by Justice Wiley Jr., with Justice Bigelow concurring and Justice Stratton dissenting.
- Trial Court: Los Angeles County Superior Court, Case No. BS169841, Judge Richard Fruin, Jr.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
14 <i>Coalition to Save San Marin v. Novato Unified School Dist.</i>		1 st	

[*Coalition to Save San Marin v. Novato Unified School District*](#), California Court of Appeal, First Appellate District, Division One, Case No. A156877 (April 23, 2020).

The Court of Appeal affirmed the trial court's decision to enjoin a lighting project until its proponent complied with CEQA. Novato Unified School District (District) proposed to install 26 athletic-field lights at the San Marin High School Stadium (Project). Coalition to Save San Marin (Petitioner) claimed that the District's environmental impact report (EIR) was insufficient and violated CEQA.

The Court of Appeal found that the administrative record did not support the lighting baseline used in the EIR because evidence of the dimly lit nearby streets and the darkness of the extensive open spaces and unlit hillsides surrounding the school refuted the District's conclusion that the Project area was characterized by medium ambient brightness. The Court also held that a detailed lighting study was essential to the EIR and that the District committed prejudicial error when it deferred such a study until after the Project's approval. Although the District included preliminary studies, these were insufficient because they were not open for public comment and lacked substantial evidence to support the District's conclusions regarding lighting impacts.



The Court found that the EIR's analysis of biological resources and cumulative aesthetic impacts was inadequate. During the approval process, the District learned new information about the Project's effects on bat habitats and behavior, which should have resulted in the recirculation of that section before certifying the final EIR. In addition, the Court held that the EIR was required to discuss the Project's cumulative effect on the environment, accounting for other closely related past, present, and reasonably likely future projects. Specifically, the District was required to evaluate the Project together with other approved plans for a lighted soccer and lacrosse field.

Disposition

The Court of Appeal affirmed and modified the trial court's judgment to direct the District to prepare a new draft EIR to address the deficiencies found by the Court.

- Opinion by Justice Petrou, with Presiding Justice Siggins and Justice Jackson concurring.
- Trial Court: Marin County Superior Court, Case No. CIV1702295, Judge Roy Chernus.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
15 <i>Environmental Council of Sacramento v. County of Sacramento</i>		3 rd	

[*Environmental Council of Sacramento v. County of Sacramento*](#), California Court of Appeal, Third Appellate District, Case No. C076888 (January 30, 2020).

- *CEQA requires that an EIR assume all phases of a project will be completed and does not require the consideration of future unspecified or uncertain developments.*
- *Arguments unsupported with evidence in the record are forfeited.*

Background for Appeal

Cordova Hills, LLC, Conwy, LLC, Cielo, LLC, and Grantline, LLC applied to develop Cordova Hills, a 2,669-acre property in southeastern Sacramento County (County), as a master planned community (Project). The Project's proposed uses included residential sites, a commercial area, offices, schools, parks, and a university campus.

After the County approved the Project's final environmental impact report (EIR), the Environmental Council of Sacramento (Petitioner) petitioned for a writ of mandate, challenging the County's certification of the final EIR and Project approval. Petitioner argued that (i) the EIR's project description and impact analysis were inadequate under CEQA; (ii) the EIR failed to address consistency with the local metropolitan transportation plan/sustainable communities strategy (MTP/SCS); and (iii) the County failed to adopt a feasible mitigation measure of project phasing. The trial court denied the petition, and Petitioner appealed.

Project Completion Is Assumed and Uncertain Developments Need Not Be Considered

Petitioner argued that the EIR's project description was inadequate because it did not consider the possibility that the university campus component would not be constructed. The Court of Appeal concluded that the project description did not need to address a speculative event. CEQA required the EIR to assume that all Project phases would be built. Although a future decision to use the land for a different purpose could require a new EIR, the existing EIR need not address this possibility. Additionally, record evidence established the strong likelihood that the university would be constructed, including statements from educational and civic leaders about the need for a university and the suitability of the location, along with a description of the funding commitments to the university.

Next, Petitioner argued that the EIR understated the significance of the Project's impacts on air quality, climate change, and traffic because it assumed that the university would be constructed right away. However, the EIR found that these impacts to the environment would be significant and unavoidable regardless, and thus, the County appropriately adopted findings and a statement of overriding considerations. The Court determined that the EIR discussed each impact fully and identified all feasible mitigation measures.

Finally, Petitioner argued that the EIR misrepresented air quality impacts by not discussing the increase in emissions that would result if the university were not built. However, the EIR included a mitigation measure requiring a 35% reduction in emissions, regardless of any Project amendments. Similarly, Petitioner argued that the EIR failed to address all possible climate change impacts. The Court held that, as with air quality impacts, the EIR adequately addressed climate change impacts by including a mitigation measure ensuring that any future Project changes would not increase impacts. The Court

rejected Petitioner's argument regarding traffic impacts, finding that Petitioner did not meet its burden of demonstrating that the EIR underestimated traffic impacts. Evidence in the record demonstrated that the university would not greatly impact traffic in the first place.

Therefore, Petitioner failed to meet its burden of showing that the EIR underestimated each impact.

The EIR Did Not Require Recirculation

In response to the County's claim that a revised mitigation measure would require a 35% reduction in emissions, Petitioner argued that the EIR should be recirculated due to this allegedly significant new information. Petitioner also maintained that if the university were not built, the Project's emissions would be reduced by only 20% (rather than 35%), resulting in air quality impacts that would be more significant than those discussed in the EIR. In response, the County argued that Petitioner failed to exhaust its administrative remedies by not raising this argument during the administrative process. Assuming that Petitioner did properly raise a recirculation argument, the Court found that Petitioner nevertheless overlooked the fact that the new mitigation measure required a 35% emission reduction, regardless of whether the university were built. Even accepting Petitioner's argument as true, the Court stated that it was debatable whether a 15% reduction in mitigation constituted a "substantial increase" in the severity of the Project's air quality impacts. Ultimately, because the revised mitigation measures did not increase environmental impacts, let alone substantially increase them, the EIR did not require recirculation.

Issues Not Raised During the Administrative Process Are Waived

Petitioner argued that the EIR failed to address whether the Project was consistent with the Sacramento Area Council of Government's MTP/SCS. The Court determined that Petitioner's failure to raise this issue during the administrative process amounted to waiver. Moreover, the Court found that Petitioner did not establish that CEQA requires consistency with an MTP/SCS.

Arguments Not Supported by the Record Are Forfeited



Petitioner argued that the County failed to adopt a feasible mitigation measure requiring phased development. The Court disagreed, finding that Petitioner failed to support the argument with evidence in the record. Because "it is not the court's duty to independently review the administrative record," Petitioner forfeited the argument.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's judgment.

- Opinion by Justice Raye, with Justice Robie and Justice Blease concurring.
- Trial Court: Superior Court of Sacramento County, Case No. 34201380001424CUWMGDS, Judge Shelleyanne Chang.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
16 <i>Friends of the Santa Clara River v. County of LA</i>		2 nd	

[*Friends of the Santa Clara River et al. v. County of Los Angeles et al.*](#), California Court of Appeal, Second Appellate District, Case No. B296547 (April 3, 2020) (unpublished).

The Court of Appeal affirmed the trial court's denial of a petition for writ of mandate challenging the County of Los Angeles' (County's) decision not to prepare supplemental environmental impact reports (EIRs) or request preparation of new water supply assessments (WSAs) for two mixed-use development projects. In 2017, the County recirculated portions of two previously certified EIRs in response to earlier litigation. Specifically, the County recirculated portions of the EIRs to provide additional analysis regarding the project's potential impact on climate change and the unarmored three-spined stickleback, an endangered fish species. The County subsequently recertified the EIRs. Several environmental groups (Petitioners) filed a petition for writ of mandate, asserting that the County: (i) violated CEQA by failing to issue supplemental EIRs that addressed the impact of climate change on water supplies, and (ii) failed to prepare updated WSAs for the projects. The trial court denied the petition, and Petitioners appealed.

On appeal, Petitioners asserted that the County was required to prepare supplemental EIRs re-analyzing the projects' water supply impacts in light of new climate change reports, California's recent drought, and data issued since the EIRs' original certifications in 2011. The Court of Appeal rejected these arguments and concluded the County was not required to prepare supplemental EIRs under Public Resources Code Section 21166 because the information cited by Petitioners did not raise novel concerns or suggest that the projects' water supply impacts would be more severe than anticipated in 2011.



Petitioners also argued that new WSAs for the two projects were required. The Court declined to reach the merits of Petitioners' arguments because Petitioners did not present such arguments to the County during the public comment period on the recirculated greenhouse gas emissions analyses.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's judgment.

- Opinion by Justice Baker, with Presiding Justice Rubin and Justice Kim concurring.
- Trial Court: Superior Court for the County of Los Angeles, Case No. BS170568, Judge Richard L. Fruin, Jr.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
17 <i>Golden Door Properties, et al. v. County of San Diego</i>		4 th	

[*Golden Door Properties, et al. v. County of San Diego*](#) (2020) 50 Cal.App.5th 467, California Court of Appeal, Fourth Appellate District, Division One, Case Nos. D075478, D075328, D075504 (June 12, 2020).

- *A project need not conform perfectly to every general plan policy to be consistent with the general plan, as courts give great deference to a local agency’s determination of a project’s consistency with its own general plan.*
- *Mitigation is improperly deferred if the agency defers decision-making on mitigation measures to an individual without providing specific, objective, and measurable performance standards to ensure that the mitigation goal will be achieved.*
- *An EIR’s cumulative impacts analysis is inadequate if it fails to address reasonably known cumulative impacts from closely related, probable future projects.*

Background for Appeal

In early 2018, the County of San Diego (County) adopted a Climate Action Plan (CAP) to reduce greenhouse gas (GHG) emissions resulting from the build-out of the County’s general plan in order to meet state-mandated GHG reduction goals. The CAP did not include GHGs from or plan for development projects that were not originally contemplated in the general plan and would require a general plan amendment (GPA). In preparing the CAP supplemental environmental impact report (SEIR), the County acknowledged that these GPA projects could frustrate the CAP’s GHG reduction goals by increasing emissions above projected levels.

To mitigate emissions from the GPA projects, the County included a mitigation measure in the SEIR called M-GHG-1, which required GPA projects to achieve either “no net increase” (i.e., no increase above the emissions planned for in the CAP) or “net zero” (i.e., reduce the project’s emissions to zero). Under M-GHG-1, GPA projects were directed to achieve these reductions first through on-site design features. However, if on-site design features were insufficient to fully mitigate the GHG emissions, off-site mitigation was permitted at the discretion of the County Director of Planning & Development Services (Planning Director) without performance standards using the following geographical hierarchy: (i) the unincorporated County, (ii) the County, (iii) California, (iv) the United States, and (v) off-site internationally. M-GHG-1 listed several offset registries approved by the California Air Resources Board (CARB) as possible sources for offset credits, but also allowed the Planning Director to discretionarily permit GPA projects to use other “reputable” registries without additional performance standards.

The SEIR also identified 21 GPAs, including projects that planned to add 14,000 additional dwelling units to the unincorporated County. The SEIR stated that these in-process GPAs were “reasonably foreseeable” and “probable future projects” that could result in a cumulatively considerable effect when combined with the CAP.

After the County certified the SEIR, environmental groups and others (Petitioners) challenged the County’s actions, arguing that M-GHG-1, and therefore the CAP, was inconsistent with the County’s general plan policies requiring the “reduction of community-wide (i.e., unincorporated County)” GHGs and violated CEQA on a number of grounds. The trial court agreed, holding that the CAP was inconsistent with the general plan and that M-GHG-1 violated CEQA by requiring the purchase of out-of-County

offsets without legally sufficient analysis and unlawfully delegating and deferring feasibility findings. The trial court also determined that the SEIR violated CEQA by inadequately analyzing cumulative GHG impacts, impacts to energy and environmental justice, and smart growth mitigation or alternatives for GPA projects. Finally, the trial court held that the County inadequately responded to comments on the draft SEIR. The County appealed.

The CAP Was Not Inconsistent With the General Plan

Petitioners argued that M-GHG-1's scheme allowing the purchase of out-of-County carbon offsets was inconsistent with the general plan's mandate to reduce emissions within the unincorporated County. Petitioners argued that because M-GHG-1 and the CAP were literally and functionally intertwined, the CAP was inconsistent with the general plan.

The Court of Appeal disagreed, adopting the County's position that M-GHG-1 was not a mitigation measure of the CAP, but a mitigation measure in the SEIR and only applied to "in-process and future" GPAs. As such, the Court reasoned that the CAP and M-GHG-1 were separable. Under a highly deferential standard of review, the Court then concluded that although the CAP was "not entirely consistent with the [general plan's] focus on reducing in-County GHG emissions," the CAP did include a variety of GHG-reducing measures to achieve state goals and therefore was consistent with the general plan. As such, the Court declined to determine whether M-GHG-1 was consistent because it was otherwise invalid under CEQA.

M-GHG-1 Violated CEQA Because Its Performance Standard Was Unenforceable

Although CEQA does not require GHG offsets to be compliant with the cap-and-trade program, the County argued that M-GHG-1 was compliant with CEQA because it was "substantially similar" to the Assembly Bill 32 offset program authorized under cap-and-trade. Likewise, the County contended that M-GHG-1 was enforceable because it required that offsets be purchased from registries approved by CARB or that met the requirements of Health & Safety Code Section 38562(d)(1).

The Court rejected the comparison and drew a sharp distinction between the cap-and-trade program and the "materially different" M-GHG-1. Significantly, M-GHG-1 lacked the stringent procedures set forth in the Assembly Bill 32 offset program that ensure offset effectiveness.

The Court indicated that there was not substantial evidence under M-GHG-1 to verify GHG reductions internationally. Further, although M-GHG-1 referenced subdivision (d)(1) of Section 38562, it did not require "additionality" under subdivision (d)(2). (Additionality is the principle that, for an offset to be effective, mitigation must not have occurred in the absence of a market for the offset credits.)

The Court also rejected the County's arguments that M-GHG-1 was effective and enforceable because it conformed to a discussion draft on carbon offsets prepared by the Governor's Office of Planning and Research and that M-GHG-1 was comparable to the Court-approved Newhall Ranch project. The Court determined that M-GHG-1 was less rigorous than the Newhall Ranch project's GHG mitigation requirements.

M-GHG-1 Violated CEQA Because It Improperly Deferred Mitigation

Under CEQA, mitigation can only be deferred if the agency (i) commits itself to the mitigation, (ii) adopts specific performance standards that the mitigation will achieve, and (iii) identifies the type(s) of potential action(s) that can feasibly achieve those performance standards. The County compared M-GHG-1 to previously upheld mitigation measures that required plans or purchasing of offsets subject to review and approval by an agency official, arguing that CEQA permits shifting the performance of a mitigation measure to agency staff's discretion. In addition, the County defended the standards set forth in M-GHG-1 by emphasizing that scientific knowledge with respect to emissions technology is constantly evolving.

The Court rejected these arguments and determined that M-GHG-1 lacked specific, objective, and measurable performance standards to guide County staff's exercise of discretion. The Court held that,

while flexible mitigation measures that can adapt with the availability of better technology is encouraged, an agency must still use its best efforts and make environmental decisions in an accountable arena. Because M-GHG-1 lacked objective standards, the Court found that it provided no reasonable assurance that any on-site GHG reduction would actually occur.

M-GHG-1's Invalidation Tainted the CAP

The Court next considered what effect M-GHG-1's invalidity would have on the CAP. The trial court held that the CAP was invalid because it incorporated M-GHG-1 by reference.

The Court disagreed with that reasoning, noting that M-GHG-1 was not a CAP GHG emission reduction measure for GPA-consistent projects. Nonetheless, the Court concluded that the CAP was tainted by M-GHG-1's invalidity. The CAP relied on the assumption that M-GHG-1 would mitigate GHG emissions above the CAP to zero for GPA projects that had yet to be adopted as of August 2017, and therefore did not include or calculate those emissions in its future in-County GHG projections. Without M-GHG-1, there was "no factual basis for that assumption." Accordingly, the Court determined that the CAP's finding that in-process and future GPAs would not result in significant GHG impacts was not supported by substantial evidence.

The SEIR Violated CEQA by Failing to Include an Adequate Cumulative Impacts Analysis

The Court addressed the issue of whether CEQA requires an analysis of cumulative impacts from in-process GPAs other than, and in addition to, their projected GHG emissions. An agency must include closely related, reasonably foreseeable projects in conducting its cumulative impacts analysis.

The County conceded that in-process GPAs were reasonably foreseeable, but contended that no additional cumulative impacts analysis was required because (i) the parameters of the projects remained highly speculative, (ii) the County did not know whether the projects would rely on carbon offsets that might result in other impacts, and (iii) the CAP would reduce GHG emissions and related air quality and energy impacts compared to conditions without the CAP. The County also argued that analyzing cumulative impacts in addition to GHG impacts from in-process GPAs would require an inappropriate level of detail for the SEIR.

The Court disagreed and concluded that the SEIR failed to include an adequate cumulative impacts analysis for the in-process and probable GPAs. The Court explained that the SEIR should have considered whether in-process GPAs would create cumulatively considerable impacts in addition to GHG impacts, such as those to air quality, energy, and vehicle miles traveled, in combination with the CAP. The Court emphasized that the County's problem was not insufficiency of detail as to the non-GHG impacts, but rather the total absence of analysis.

The SEIR Was Inconsistent With the RTP

Petitioners and *amicus curiae* argued that the SEIR was inconsistent with the Regional Transportation Plan (RTP) of the San Diego Association of Governments (SANDAG) because the SEIR did not acknowledge that M-GHG-1 would foreseeably result in increased vehicle miles traveled (VMT) — contrary to the RTP's goals of reducing GHGs through VMT reductions. CEQA requires that an EIR discuss any inconsistencies between the proposed project and regional transportation plans. The Court noted that the VMT associated with the in-process and future GPA projects, facilitated by M-GHG-1, were not included in the RTP. Nor did the SEIR evaluate whether or how much VMT would increase as a result of the in-process and future GPA projects facilitated by M-GHG-1. Because VMT from the in-process GPA projects could have prevented the RTP from achieving its GHG reduction goals, and because the County failed to provide any analysis of those VMT, the Court determined that the SEIR's finding of consistency with the RTP was not supported by substantial evidence.

Additionally, the Court concluded that the SEIR's failure to include a VMT analysis or properly evaluate consistency with the RTP rendered it inadequate as an informational document. The Court underscored the "seriousness of this deficiency," stating that "the County's failure to analyze and disclose VMT impacts

caused by GPAs threatens achieving state-mandated GHG emission reduction targets.” Notably, the County’s argument that it need not analyze VMT because it was “just coming into play” (i.e., a new metric) was soundly rejected.

Failure to Include Alternative to Reduce Vehicle Trips Given Significant Emissions From Vehicles Was Unreasonable

The Court determined that the SEIR failed to analyze a reasonable range of alternatives. An agency may not approve a project that will have significant environmental impacts if there are feasible alternatives that would substantially lessen those effects while still meeting project objectives. Citing widespread agreement that VMT reduction features must be prioritized to reduce GHG emissions and the fact that the CAP acknowledged that on-road transportation was the largest source of GHG emissions in the County, the Court determined that it was unreasonable to omit discussion of smart-growth alternatives.

In so deciding, the Court recalled its decision in *Cleveland National Forest Foundation v. San Diego Association of Governments* (2018) 17 Cal.App.5th 413, 437, stating that, “Given these recommendations, and their source, it is reasonable to expect at least one project alternative to have focused primarily on significantly reducing vehicle trips.” Thus, the Court concluded that by failing to include such an alternative that reduced trips, the County’s analysis was inadequate.

Petitioners Adequately Exhausted Administrative Remedies on All Issues but One

The County argued that Petitioners failed to exhaust administrative remedies on their challenges regarding the SEIR’s alternatives analysis and the geographic scope of the cumulative impacts analysis. The Court held that a February 2018 letter from Petitioners’ attorneys to the County Board of Supervisors properly exhausted Petitioners’ alternatives argument by stating that the County should study “a mitigation measure *or alternative* to limit General Plan Amendments to areas identified by SANDAG as ‘smart growth’ areas.” As to the geographic scope argument, the Court held that Petitioners failed to exhaust this issue because their letters regarding it in the administrative process were too general and did not specifically state that the SEIR violated CEQA by having an improper geographic scope.

Both Petitioners and the County Forfeited Issues on Appeal



In the trial court proceedings, Petitioners claimed that when the County amended GPU policy COS-20 and goal COS 20.1 in 2018, “a separate requirement” under Government Code Section 65302 to adopt an environmental justice element in the general plan was triggered. However, the trial court did not make any ruling on this claim. The Court of Appeal held that if the trial court neither rules nor reserves its ruling for later, the party pressing the point must make some effort to have the court actually rule. Because Petitioners did not do this, the Court held that Petitioners had waived the issue on appeal.

The County forfeited two issues on appeal. First, the trial court ruled that the County failed to analyze potential energy impacts that may result from GPAs. Because the County did not raise this issue in its opening brief, the Court held that the trial court’s ruling on the point must be affirmed. Second, for the first time in its reply brief, the County attempted to make an argument that M-GHG-1 could be severed from the CAP. The Court held that the County forfeited this argument by not making it in its opening brief.

Disposition

The Court of Appeal affirmed in part and reversed in part the trial court's opinion and directed the trial court to (i) amend its minute order; (ii) issue a new writ of mandate, injunction, and judgment; and (iii) conduct further proceedings consistent with the opinion of the Court of Appeal.

- Opinion by Justice Irion, with Presiding Justice McConnell and Justice Huffman concurring.
- Trial Court: Consolidated Superior Court of San Diego, Case Nos. 37-2018-0001-14081-CU-TT-CTL, No. 37-2018-0001-3324-CU-TT-CTL, & 37-2012-0010-1-54-CU-TT-CTL, Judge Timothy Taylor.

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
18 <i>Granville Homes v. City of Fresno</i>		5 th	

[Granville Homes v. City of Fresno](#), California Court of Appeal, Division Five, Case No. F077870 (June 1, 2020).

The Court of Appeal affirmed the trial court’s judgment, holding that a city’s approval of a new fee system did not violate CEQA. The City of Fresno (City) sought to update the fee structures for both its groundwater and surface water systems. The City conducted a fee study that recommended changing the prior fee scheme to a new citywide water capacity fee program. In 2017, the City implemented this change through a municipal ordinance (Ordinance). Granville Homes (Petitioner) claimed that the City effectively approved the expansion of a water treatment facility referenced in the fee study and that the City’s enactment of the Ordinance constituted approval of a project under CEQA. Petitioner maintained that the City violated CEQA by making these approvals before performing substantive environmental review.



The Court of Appeal found that the City’s enactment of water capacity fees were merely a government funding mechanism and did not constitute a project under CEQA. The Court pointed to various factors to conclude that the City did not approve a project, including provisions in the Ordinance that expressly disavowed commitment to any specific project, provisions that required applicable CEQA review before infrastructure improvements could occur, and the absence of a binding, unconditional agreement. Even though the City could only use funds to improve the water system for the benefit of new development, this limitation was not a “project” approval under CEQA. The Court recognized that the City had wide latitude to choose what type of water system improvements to fund in the future and the flexibility to consider alternatives that could be proposed in subsequent environmental review.

Disposition

The Court of Appeal affirmed the trial court’s judgment.

- Opinion by Justice Peña, with Acting Presiding Justice Detjen and Justice Meehan concurring.
- Trial Court: Fresno County Superior Court, Case No. 17CECG01669, Judge James Petrucelli.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
19 <i>Gulli v. San Joaquin Area Flood Control Agency</i>		3 rd	

[*Gulli v. San Joaquin Area Flood Control Agency*](#), California Court of Appeal, Third Appellate District, Case No. C088010 (March 5, 2020).

The Court of Appeal affirmed the trial court's denial of Dominick Gulli's (Petitioner's) petition to vacate the San Joaquin Area Flood Control Agency's (Agency's) EIR for a flood wall and gate structure at the mouth of a canal. Petitioner's company was one of two companies to submit proposals to address potential flooding from the Smith Canal in Stockton. The Agency rejected Petitioner's proposal, which claimed that a flood gate was unnecessary. Petitioner filed a petition for writ of mandate, arguing that the Agency did not conduct proper CEQA review and requesting the trial court to direct the Agency to contract with Petitioner instead. The trial court denied the petition and held that mere disagreements among experts are not enough to show that an EIR is clearly inadequate or unsupported. On appeal, Petitioner argued that (i) the administrative record did not conform to Public Resources Code Section 21167.6, (ii) the selected project was not needed for flood protection and would harm the environment more than project alternatives, and (iii) the EIR failed to inform the public of various environmental consequences.



Regarding the administrative record, the Court of Appeal determined that a petitioner must affirmatively demonstrate error, and if the record is silent, the Court will presume that the record supports the trial court's order. Because Petitioner failed to meet this burden, the Court found that the record complied with Section 21167.6. Furthermore, the Court found that many of Petitioner's contentions were grounded on his belief that his solution was superior and his disagreement with the Agency's determinations, and that such contentions did not ultimately amount to anything more than a disagreement among experts.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's judgment denying the petition for writ of mandate to vacate the Agency's EIR, suspend all activity, and require the Agency to contract with Petitioner.

- Opinion by Justice Murray, with Acting Presiding Justice Blease and Justice Robie concurring.
- Trial Court: Superior Court of San Joaquin County, Case No. STKCVUWM20150011880, Judge Humphreys.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
20 <i>King & Gardiner Farms, LLC v. County of Kern</i>		5 th	

[King & Gardiner Farms, LLC v. County of Kern](#), California Court of Appeal, Fifth Appellate District, Case No. F077656 (February 25, 2020).

- *If an agency adopts mitigation measures of uncertain effectiveness in response to significant and unavoidable impacts, the agency must make findings that: (i) the measures are at least partially effective, (ii) all feasible mitigation measures have been adopted, and (iii) the environmental impact will not be mitigated to less than significant levels.*
- *Agricultural conservation easements do not mitigate significant impacts to agricultural land conversion because the easements do not create new agricultural land to replace the land lost.*
- *An agency's exclusive use of a single absolute noise level as the threshold for significance in analyzing noise impacts violates CEQA because it does not account for changes in noise levels in any given area.*
- *Even if a court finds that CEQA has been violated, that court has the authority to permit actions already taken pursuant to the challenged project to remain in place.*

Background for Appeal

Various petroleum associations (Real Parties) proposed amending Kern County's (County's) zoning ordinance to require permits for all new oil and gas activities, and to subject permit applications to a ministerial Oil and Gas Conformity Review. The primary purpose of the proposed amendment was to eliminate individual environmental review of well and field development activities by establishing a ministerial permit review process that incorporates mitigation measures identified in the environmental impact report (EIR) analyzing the proposed amendment.

After preparing an EIR analyzing the potential environmental impacts of the proposed amendment, the County ultimately adopted the proposed amendment as Ordinance No. G-8605 (Ordinance) and certified the EIR.

King & Gardiner Farms, LLC (KG Farms) and various environmental groups (collectively, Petitioners) filed two petitions for writ of mandate and complaints for declaratory and injunctive relief against the County, alleging violations of CEQA and state planning and zoning law. The trial court held that the EIR violated CEQA by failing to analyze (i) the Ordinance's impacts to rangeland, and (ii) the environmental impacts of the Ordinance's road-paving mitigation measure intended to reduce dust and the Ordinance's impacts to air quality. The trial court denied all other CEQA claims. Petitioners appealed.

The EIR Was Not Required to Analyze Impacts to Local Water Supply

KG Farms argued that the EIR failed to analyze water supply impacts to the extent reasonably possible because it only addressed regional level impacts based on three subareas, and that it was possible for the County to analyze water supply impacts at a local level. The Court of Appeal concluded that the EIR's use of regional subareas was sufficient because the information in the EIR about the uncertainty created by the Sustainable Groundwater Management Act and the implementation of groundwater sustainability plans for groundwater extraction, the area's largest water source, provided substantial evidence supporting the determination that a more localized water source analysis would be speculative.

The EIR Sufficiently Addressed Recent Drought

KG Farms argued that the EIR failed to address meaningfully a recent drought that had affected water supplies in the County by failing to use the most recent data, thus causing the EIR to underestimate the effect on water shortages. The Court concluded that the EIR provided sufficient information about the drought to facilitate informed agency decision-making and public discussion because the EIR described the drought's impact on the demand for groundwater and how that demand contributed to the over-drafted condition of the County's sub-basin. The EIR also informed readers on the projections used for future water supply and demand, and how the drought increased uncertainty in the projections.

Further, the Court rejected KG Farms' argument that the County was required to use updated projections of imported water published before the County released the final EIR. The Court reasoned that the EIR properly used the information that was available at the time the notice of preparation was filed to describe water supply conditions, including the drought and its consequences. Similarly, the Court found that KG Farms failed to show that the updated data constituted significant new information requiring recirculation of the EIR.

Water Supply Mitigation Measures Violated CEQA

Petitioners argued that the County unlawfully deferred mitigation for significant impacts to municipal and industrial (M&I) water by adopting measures that lacked specific, mandatory performance criteria, and by failing to implement mitigation measures before oil and gas activities would begin impacting the environment. The mitigation measures included in the EIR and Ordinance required (i) permit applicants to increase the use of produced water and decrease use of M&I water to the extent feasible, (ii) the five biggest M&I water users to develop a water use plan by 2016 to be implemented by 2020, (iii) the oil and gas industry to use best practices for water use with a goal of reusing 30,000 acre-feet of produced water, and (iv) permit applicants to work with the County to integrate into the Groundwater Sustainability Plan for the Tulare Lake-Kern Basin, which must be adopted by January 31, 2020. The Court held that these measures improperly deferred mitigation, delayed implementation, and lacked sufficient specific performance measures. Specifically, the Court noted that terms like "increase," "reduce," "feasible," "best practices," and "goal" were impermissibly vague.

Real Parties argued that the measures' defects did not constitute reversible error because the County concluded that water supply impacts were significant and unavoidable, and, thus, adopted a statement of overriding considerations. However, the court held that the County's CEQA violation was a prejudicial abuse of discretion because the County's findings were ambiguous as to whether the mitigation measures would be at least partially effective. The Court also determined that the EIR failed to provide any information about what permit applicants might do to minimize the use of M&I water and maximize reuse of produced water, and the statement of overriding considerations did not cure these defects.

Agricultural Land Conversion Impact Mitigation Measures Violated CEQA

KG Farms challenged the County's mitigation measures for the significant conversion of agricultural land. The Project site contained approximately 2.1 acres that were zoned for agricultural use, and the EIR estimated that future oil and gas exploration and production activities would result in the conversion of 298 acres of agricultural land annually. As mitigation for this significant impact, permit applicants would be required to demonstrate a "1:1 mitigation ratio" for oil and gas exploration and extraction activities on agricultural land that had been actively farmed five or more of the last 10 years. The Court held that this mitigation measure, which authorized the 1:1 mitigation ratio to be accomplished through agricultural conservation easements on unaffected agricultural land, did not reduce the Project's impact on agricultural land because such easements did not create new agricultural land to replace any land lost when converted to oil and gas uses. In addition, the EIR's mitigation measures providing for the purchase of credits for land conservation and participation in any agricultural land mitigation program were not effective because the record identified no such program or avenue to purchase credits. Accordingly, the Court held that the County violated CEQA when it found that the impacts would be less than significant with mitigation.

KG Farms further argued that the County failed to respond to comments proposing the most promising mitigation measure — clustering future oil infrastructure sited on farmland. The Court agreed, explaining that the comments raised a “major environmental issue” that the County must address, and that the County failed to provide a “reasoned analysis” of the clustering proposal.

The EIR’s Discussion of Noise Impacts Was Insufficient

KG Farms challenged the EIR’s analysis of noise impacts based on the County’s selection of a single standard relating to the absolute noise level as a threshold for significance. The Court found that the EIR’s use of a single threshold was not a complete and reasonable method of evaluating the significance of noise impacts because it did not account for the change in noise level in any given area. The County was unable to provide any reasonable explanation to support its position that all increases in the magnitude of noise were insignificant until the cumulative noise level of the threshold was exceeded.

Additional Claims Addressed in Unpublished Portions of Opinion

In the unpublished portions of the opinion, the Court held that the mitigation measure for particulate matter (PM) 2.5 emissions impacting air quality was insufficient, and if a revised EIR were circulated, it would need to include a Multi-Well Health Risk Assessment that was subject to public review and comment. The Court also agreed with the trial court that: (i) the County’s rejection of an alternative requiring conditional use permits for oil and gas activities was supported by the record, (ii) the County did not abuse its discretion in choosing not to provide Spanish translation, and (iii) the environmental groups were not entitled to declaratory relief about the discretionary nature of the Ordinance.

Appellate Relief

In light of the CEQA violations, the Court determined that the appropriate remedy was to set aside the County’s certification of the EIR and approval of the Ordinance. Although the Court invalidated the Ordinance, it allowed permits already issued under the Ordinance to remain in effect. The Court also determined that this was not an extraordinary case that would allow the Court to exercise its inherent equitable authority to allow the Ordinance to remain operative.



The Court further explained that if the County were to revise the EIR, then the EIR must bring the water supply baseline up to date, but that the County had the discretion to resolve whether the noise and agricultural land baselines should also be brought up to date.

Disposition

Accordingly, the Court of Appeal reversed in part and affirmed in part the trial court’s judgment.

- Opinion by Acting Presiding Justice Franson, with Justice Peña and Justice Snauffer concurring.
- Trial Court: Kern County Superior Court, Case Nos. BCV-15-101666 and BCV-15-101679, Judge Eric Bradshaw.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
21 <i>Novaresi v. County of Placer</i>		3 rd	

[Novaresi v. County of Placer](#), California Court of Appeal, Third Appellate District, Case No. C086209 (October 29, 2020).

The Court of Appeal affirmed the trial court's judgment denying a petition for writ of mandate challenging the County of Placer and the County of Placer Board of Supervisors' (the County's) approval of a residential development project in the community of Granite Bay in Placer County, California (the Project). Petitioners asserted, among other claims, that the County violated CEQA when it certified the environmental impact report (EIR) for the Project. The petition contained the following claims: (i) the EIR's conclusions regarding the water pollution and runoff quantity generated by the Project were unsupported, (ii) the EIR's conclusions related to the impact of the Project on traffic flows around the Project were not supported by substantial evidence and were based on an incomplete analysis, and (iii) the EIR failed to address inconsistencies between the Project and the Placer Countywide General Plan. The trial court ultimately rejected these claims and denied the petition.

Petitioners appealed, and the Court of Appeal affirmed the trial court's ruling. First, the Court rejected Petitioners' argument that the EIR's conclusions regarding water pollution and runoff quantity generated by the Project were unsupported. The Court explained that the County acted reasonably by relying on a preliminary study and a Storm Water Quality Plan in making its hydrology conclusions. The Court also found Petitioners' argument that the Project's proposed water pollution control measure was not compliant with local water treatment standards to be moot because the Project switched its pollution control measure to achieve compliance with the local standards. Further, the Court found that the record did not support Petitioners' argument that the Project would lead to significant increases in the volume of surface water runoff.

Second, the Court concluded that the County did not abuse its discretion in making its traffic significance findings. Although the traffic study relied on in the EIR concluded that the Project's impact in certain scenarios would be significant, the EIR stated that the Project would have a less than significant impact on traffic. Despite this apparent inconsistency, the Court concluded that "CEQA grants agencies discretion to develop their own thresholds of significance," and substantial evidence supported the EIR's conclusion that the overall traffic impacts by the Project would be less than significant.



Third, the Court rejected Petitioners' argument that the Project was inconsistent with the Granite Bay Community Plan, which requires the County to distinguish between urban/suburban and rural areas and prohibits the use of underground storm drain systems in rural areas. Because the County rezoned the Project site's land from "rural low density residential" to "medium density residential," the Court stated, the Project did not conflict with the Granite Bay Community Plan policies.

Disposition

The Court of Appeal affirmed the trial court's dismissal of the petition for writ of mandate, because the County's approval of the EIR was reasonable and supported by substantial evidence.

- Opinion by Presiding Justice Hull, with Justice Robie and Justice Murray concurring.
- Trial Court: Placer County Superior Court, Case No. S-CV-0038667, Judge Charles Wachob.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
22 Save Our Rural Town v. County of Los Angeles		5 th	

[Save Our Rural Town v. County of L.A.](#), California Court of Appeal, Second Appellate District, Division Five, Case No. B294182 (September 10, 2020).

The Court of Appeal affirmed the trial court’s ruling, holding that the County of Los Angeles (County) violated CEQA when it approved a fast-food development (Project). Real Parties in Interest’s proposed Project included, among other buildings, a 3,300-square-foot restaurant providing both dine-in and drive-through service. The Project required a conditional use permit (CUP) and subdivision approval from the County of Los Angeles (County). In 2016, the Los Angeles County Board of Supervisors (Board) certified a negative declaration for the Project and upheld the Planning Commission’s 2014 approval of the CUP, finding that the Project, including the drive-through portion, would not draw substantial traffic from the freeway. In 2017, the Planning Commission approved subdividing the property and certified an addendum to the negative declaration for the 2014 CUP. On an administrative appeal of the Planning Commission’s 2017 approval, the Board determined that the subdivision approval did not change the nature or scope of the 2014 CUP or result in significant environmental effects not earlier discussed. Save Our Rural Town (Petitioner) claimed that the Project violated CEQA.



The trial court found that the County violated CEQA because it did not make a traffic study available to the public before approving the 2014 CUP. The trial court also held that Petitioner had identified substantial evidence supporting a fair argument that the Project could cause significant transportation impacts. The Court of Appeal affirmed the trial court’s ruling and determined that there was sufficient evidence in the record to support a fair argument that the Project could have a significant impact on the environment. While the record included traffic studies using two different standard methodologies, the Board relied on only one of those studies to determine that the Project would have no significant traffic impacts. The Court found that the County violated CEQA by ignoring substantial evidence of traffic delays shown by the other study, which was sufficient to raise a fair argument on the question of vehicle delays. The Court also held that the proper standard of review for an agency’s decision regarding a project’s consistency with an area plan is the deferential “substantial evidence” standard. Based on this standard, the Court rejected Petitioner’s claim that the Board’s approvals were inconsistent with local zoning requirements.

Disposition

The Court of Appeal remanded to the trial court with instructions to amend the judgment in favor of Petitioner and to direct the County to comply with CEQA.

- Opinion by Justice Moor, with Presiding Justice Rubin and Justice Kim concurring.
- Trial Court: Los Angeles County Superior Court, Case No. BS166732, Judge Mary H. Strobel.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
23 <i>Sierra Club v. County of Fresno</i>		5 th	

[Sierra Club v. County of Fresno](#), California Court of Appeal, Fifth Appellate District, Case No. F079904 (November 24, 2020).

- *A writ of mandate properly directed the lead agency to vacate its approvals of the project because, for purposes of Section 21168.9, the approvals were not severable.*
- *CEQA does not authorize partial decertification of an EIR. Thus, a writ of mandate directing an agency to vacate its project approval and to not approve the project before preparing a revised EIR does not violate CEQA even if much of the EIR complies with CEQA.*
- *Even if CEQA did allow for partial EIR decertification, severance findings would be required to allow some of the project approvals to remain in place.*

Background for Appeal

Friant Ranch (Developer) proposed a master planned community for persons age 55 or older (Project) on a 942-acre site in north-central area of the County of Fresno (County). The County issued a final environmental impact report (EIR) in August 2010. On February 1, 2011, the County Board of Supervisors approved the Project.

In March 2011, three nonprofit organizations (Petitioners) challenged the Project approval and the EIR certification, alleging CEQA and Planning and Zoning Law violations. In December 2012, the trial court denied Petitioners' claims and entered judgment in favor of the Developer and the County. Petitioners appealed.

The Fifth District Court of Appeal rejected Petitioners' Planning and Zoning Law claims and CEQA claims regarding wastewater, but concluded that the EIR's discussion of issues relating to air quality was inadequate. The Court directed the trial court to issue a writ of mandate compelling the County to vacate its approval of the Project and to not approve the Project before preparing a revised EIR that cured the CEQA defects.

In an opinion issued on December 24, 2018, the California Supreme Court addressed a significant question on the standard of judicial review for CEQA claims, and on the merits, affirmed in part and reversed in part the Court of Appeal's opinion (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502).

On remand, the trial court (i) vacated its prior judgment, (ii) granted Petitioners' petition for writ of mandate, and (iii) awarded Petitioners costs. The writ of mandate ordered the County to vacate or set aside its approval of the Project and to not approve the Project before preparing a revised EIR that adequately discussed air quality issues.

On May 31, 2019, the Developer and the County moved to vacate and reconsider the judgment and writ, arguing that (i) public policy militates against vacating all of the project approvals, (ii) trial courts must issue narrowly tailored remedies in CEQA cases, and (iii) the facts support findings of severability and, thus, the issuance of a limited writ. The trial court denied the motion. The Developer and the County appealed.

Interpreting the Combined Opinions

In an unpublished portion of the decision, the Court of Appeal first determined how to interpret its 2014 opinion and the Supreme Court's opinion. It followed the principle that if a judgment is affirmed in part and reversed in part, the affirmed portion still governs the dispute between the parties, while the reversed portion remains a nullity with no force or effect.

The Court then concluded that the Supreme Court affirmed two of its corrective actions: (i) the EIR did not adequately discuss health and safety problems that would be caused by the rise in pollutants resulting from the Project, and (ii) the EIR's bare conclusion that mitigation measures would substantially reduce air quality impacts must be either explained or deleted. The Court of Appeal determined that the Supreme Court's intent did not extend beyond requiring the subsequent proceedings on remand (i) to not contradict its opinion, and (ii) to comply with CEQA. Further, the Court determined that its 2014 opinion intended for the trial court to issue a peremptory writ of mandate compelling the County to vacate or set aside its Project approval. The Court concluded that the trial court's writ of mandate complied with the Court's intent. As such, the critical remaining question was whether the Court's intended outcome complied with CEQA.

Compliance With CEQA: Vacating Approval of the Project

In an unpublished portion of the decision, the Court of Appeal next addressed the Developer's argument that the writ should not have ordered the County to vacate all of the Project's approvals because such a broad order did not comply with CEQA Section 21168.9. The Developer argued that the trial court should have issued a limited writ leaving all or most of the Project's approvals in place.

Under CEQA Section 21168.9, an agency may be directed to (i) void, in whole or in part, a determination, finding, or decision made in violation of CEQA, (ii) suspend any or all specific project activity or activities if certain conditions exist, or (iii) take specific action necessary to bring the determination, finding, or decision tainted by the CEQA violation into compliance with CEQA. Section 21168.9 limits a court's authority in fashioning a CEQA remedy: a court's order must be limited to that portion of a determination, finding, or decision or the specific project activity or activities found noncompliant. However, this limitation applies only if that portion of the project or certain project activities are severable, and severance will not prejudice full CEQA compliance.

Under this legal framework, the Court rejected the Developer's contention that the trial court should have left the Project approvals in place. It further held that the decision to approve the Project was not severable. Because of the EIR's defects, the Board of Supervisors' balancing was not fully informed as to the Project's "unavoidable environmental risks" in its statement of overriding considerations. The outcome of that balancing was tainted by the EIR's incomplete information. Additionally, the Developer did not demonstrate that the County's approval of those planning documents was not affected by the tainted weighing process that resulted in the adoption of a statement of overriding considerations. Therefore, the trial court's writ of mandate requiring the vacatur of the approvals did not violate CEQA Section 21168.9.

Compliance with CEQA: Certification of EIR and Partial Decertification



In a published portion of the decision, the Court of Appeal addressed Developer's argument that the trial court should have issued a limited writ of mandate partially decertifying the EIR. Relying on the reasoning in *LandValue 77, LLC v. Board of Trustees of California State University* (2011) 193 Cal.App.4th 675, a decision also issued by the Fifth District Court of Appeal, the Court reiterated that CEQA and the Guidelines provide for EIR certification when it is complete, and the concept of "completeness" is not compatible with partial certification. The Court noted that *LandValue 77* has been criticized and that other districts of the California Courts of Appeal have since held that partial EIR decertification is permissible. Nevertheless, because the Court found its prior decision in *LandValue 77* persuasive, the Court rejected the Developer's argument of partial decertification, holding that it ignores the statutory text and contradicts the Court's prior interpretation of CEQA Sections 21100, 21151, and 21168.9.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's judgment granting the petition for writ of mandate and issuance of a writ compelling the County to (i) vacate its approval of the Project, (ii) void its decision to certify the final EIR, and (iii) not approve the Project before preparing a revised EIR.

- Opinion by Justice Donald R. Franson, Jr., with Acting Presiding Justice Brad R. Hill and Justice Herbert I. Levy concurring.
- Trial Court: Superior Court of Fresno County, Case No. 11CECG00706, Judge Kristi Culver Kapetan.

Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
24 <i>Villas at Santana Park Homeowners Assn. v. City of San Jose</i>		6 th	

[*Villas at Santana Park Homeowners Ass'n v. City of San Jose*](#), California Court of Appeal, Sixth Appellate District, Case No. H045644 (April 30, 2020).

The Court of Appeal affirmed the trial court's judgment denying a petition for writ of mandate challenging the City of San Jose's (City's) issuance of a development permit for a residential housing project. The City issued a permit for the construction of a residential building (Project) within a residential and community redevelopment area (Santana Row). The City did not prepare a new environmental impact report (EIR) for the Project, determining that the Project fell within the scope of two earlier EIRs analyzing Santana Row and its subsequent expansion. An association representing neighboring homes (Petitioner) challenged the City's issuance of the permit. Petitioner claimed that the City violated CEQA by failing to prepare a new EIR for the Project and that the Project was inconsistent with the City's general plan. The trial court found that many of Petitioner's claims constituted time-barred attacks on earlier CEQA documents and that substantial evidence supported the City's conclusion that no additional environmental review was required for the Project.

On appeal, the Court of Appeal found that Petitioner's claims were not time-barred by CEQA's statute of limitations because Petitioner's contention that the City violated CEQA in issuing a permit for the Project was "inextricably intertwined" with Petitioner's claims regarding the earlier EIR. The Court also rejected the City's argument that Petitioner failed to adequately exhaust its administrative remedies, because Petitioner raised the Project's insufficient environmental review during earlier administrative proceedings. However, the Court found that substantial evidence supported the City's determination regarding subsequent environmental review of the Project under Public Resources Code Section 21166, which governs changes to a project for which an EIR has already been prepared, rather than PRC Section 21151, which governs review of new projects. The Court explained that an agency's decision whether to consider a project under CEQA's subsequent review provisions or under CEQA's new project provisions is a factual question for the agency, and courts are limited in determining whether substantial evidence supports the agency's conclusion. Because an earlier EIR retained "some informational value" for the Project, the Court concluded that the City properly proceeded under PRC Section 21166.



The Court rejected Petitioner's argument that the Project's increased height constituted a substantial change that would require a supplemental EIR. Because an earlier EIR evaluated the expansion of Santana Row and zoning changes that allowed for increased building heights, the Court found that the Project did not constitute a substantial change and, accordingly, that the City was not required to prepare a subsequent or supplemental EIR.

Disposition

The Court of Appeal affirmed the trial court's decision denying the Petitioner's challenge to the Project's planned development permit.

- Opinion by Justice Danner, with Acting Presiding Justice Elia and Justice Bamattre-Manoukian concurring.
- Trial Court: Santa Clara County Superior Court, Case No. CV299964, Judge Helen Williams.

Exemptions and Exceptions

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
25 <i>Assn. of Irrigated Residents v. Cal. Dept. of Conservation</i>		5 th	

[Association of Irrigated Residents v. California Department of Conservation](#), California Court of Appeal, Fifth Appellate District, Case No. F078460 (April 8, 2020).

The Court of Appeal affirmed the trial court's judgment, denying a petition for writ of mandate challenging the decision by the California Department of Conservation, Division of Oil, Gas, and Geothermal Resources (DOGGR) to issue 213 permits for new oil well drilling. DOGGR issued these permits to Aera Energy, LLC (Aera) to drill new oil wells within the South Belridge oil field in western Kern County. After DOGGR granted approval to Aera's notices of intention to commence drilling new wells, the Association of Irrigated Residents (Petitioners) petitioned for writ of mandate, alleging that: (i) DOGGR's issuance of each of the permits constituted a discretionary approval of a project subject to CEQA, and (ii) no exemption applied, including the statutory exemption for an ongoing pre-CEQA project or the categorical exception for the negligible expansion of existing facilities. The trial court denied the petition, and Petitioners appealed.



On appeal, Petitioners argued that DOGGR's permit approvals were not exempt from CEQA because they were discretionary and not ministerial in nature. Petitioners pointed to PRC Section 3106(a), which gives a supervisor the duty to "supervise the drilling, operation, maintenance, and abandonment of wells ... so as to prevent, as far as possible, damage to life, health, property, and natural resources." The Court of Appeal found that this section, standing alone, did not answer the question of whether DOGGR's action was discretionary or ministerial in this case. Petitioners also argued that provisions relating to well casing and blowout prevention equipment required DOGGR to exercise its discretion to determine if such equipment was of "sufficient" strength to effectively prevent blowouts and fires. However, because these statutes may be met by compliance with "methods approved by the supervisor," the Court explained, any decisions in the issuance of these permits did not reflect the existence of discretionary decision-making by DOGGR. The Court concluded that DOGGR's issuance of the permits were exempted from CEQA as ministerial decision. Next, the Court rejected DOGGR and Aera's argument that the issuance of the permits was exempt from CEQA as a pre-CEQA project, explaining that the permits were neither contemplated by nor within the scope of any pre-CEQA project approval. Additionally, the Court rejected DOGGR and Aera's argument that the issuance of the permits was exempt from CEQA as minor alterations to existing facilities or grounds (CEQA Guideline Section 15300). The drilling of more than 200 new wells on separate sites within a large oil field, the Court found, could not reasonably be classified as a minor alteration. Further, the Court decided that the CEQA exemption for minor alterations to the condition of land (CEQA Guideline Section 15304) was not supported by the record.

Disposition

The Court of Appeal affirmed the trial court's judgment, noting that CEQA review was unnecessary because the project approvals were ministerial in nature under the limited facts of the case.

- Opinion by Presiding Justice Levy, with Justice Franson and Justice Smith concurring.
- Trial Court: Superior Court of Kern County, Case No. S1500CV283418, Judge Eric Bradshaw.

Exemptions and Exceptions

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
26 <i>Protecting Our Water & Environmental Resources v. County of Stanislaus</i>		Supreme Court	

[Protecting Our Water and Environmental Resources v. County of Stanislaus](#), California Supreme Court, Case No. S251709 (August 27, 2020).

- *The blanket classification of well construction permit issuances as ministerial is unlawful and violates CEQA if the well construction standards give the county, in some instances, enough authority to render those issuances discretionary.*
- *The blanket classification of well construction permit issuances as discretionary is also unlawful and violates CEQA if an ordinance permits an agency to exercise independent judgment only in some instances.*
- *Whether the issuance of a well construction permit is ministerial or discretionary is evaluated on a case-by-case basis and depends on circumstances relevant to the particular permit.*

Background for Appeal

Stanislaus County Code Chapters 9.36 and 9.37 govern permits related to the construction of wells. Chapter 9.36 regulates the construction of wells that might affect the quality and potability of groundwater, incorporating certain state standards. Under this section, an agency may increase or decrease suggested distances between a well and potential contamination sources depending on attendant circumstances. Chapter 9.36 also allows for variance permits: the County health officer can issue an exception to any provision of the chapter if they believe the application of the provision is unnecessary.

Chapter 9.37 regulates the extraction and export of groundwater. This chapter was amended to prohibit the unsustainable extraction and export of groundwater and requires that future permit applications satisfy both Chapters 9.36 and 9.37, unless they are exempt from Chapter 9.37.

In 1983, the County adopted its own CEQA regulations, which categorically classified the issuance of all well construction permits as ministerial projects unless the County health officer granted a variance. Although variance permits were considered discretionary projects, the County's practice was to treat all nonvariance permit issuances as ministerial. The County evaluated permit applications through a three-step process. First, the County determined whether an application was exempt from Chapter 9.37. (If the application was not exempt, the County classified approval or denial as discretionary.) Second, if the application was exempt, the County determined whether the application sought a variance under Chapter 9.36. Third, if the application was exempt from Chapter 9.37 and did not seek a variance, the County classified its approval or denial as a ministerial project.

In 2014, Protecting Our Water and Environmental Resources and the California Sportfishing Protection Alliance (together, Plaintiffs) filed a complaint for declaratory relief alleging a pattern and practice of approving well construction permits without CEQA review in Stanislaus County. Plaintiffs challenged the third step in the County's evaluation process, arguing that even if an application was exempt from Chapter 9.37 and sought no variance under Chapter 9.36, its approval was still a discretionary project. Plaintiffs argued that all permit issuance decisions were discretionary because the County could deny a permit or require changes in the project as a condition of permit approval.

The case was submitted on stipulated facts. The trial court ruled that the County's approval of all non-variance permits was ministerial. The Court of Appeal reversed, concluding that issuance of well construction permits was instead a discretionary decision. The Supreme Court granted the County's petition for review, utilizing the *de novo* standard of review because no specific permit was challenged in the case, and the issue was based on a legal interpretation of Chapter 9.36.

The Issuance of Well Construction Permits Was Not Categorically Ministerial

Under CEQA, government actions are either discretionary (requiring some level of CEQA environmental review) or ministerial (requiring no environmental review under CEQA). Providing a lengthy background on the distinction between discretionary and ministerial projects, the Supreme Court recognized that typically, courts apply a functional test that focuses on the scope of an agency's discretion to make such a determination. However, because this case focused not on the characterization of a particular approval, but rather on the characterization of an entire class of permits, the functional test did not directly apply.

The Court observed that the plain text of Section 8.A authorizes the County to exercise judgment or deliberation if it decides to approve or disapprove a permit. Although the standard sets out distances between wells and potential contamination sources that are generally considered adequate, it also makes clear that individualized judgment may be required. Thus, the County health officer had significant discretion to deviate from the general standards, given the circumstances. The Court therefore concluded that a permit issuance in which the County is required to exercise independent judgment under Section 8.A cannot be classified as ministerial.

The County argued that issuance of these permits was categorically ministerial because: (i) the standard's minimum distances constrained its discretion, (ii) the well-separation standard was only a small part of a much larger regulatory scheme, and (iii) it had limited options under Chapter 9.36 to mitigate environmental damage. The Court rejected each argument in turn. First, it observed that the standard's minimum distances were not the only criteria the agency was authorized to consider in making the decision. Second, the Court explained that under the CEQA Guidelines, when a project involves an approval with both ministerial and discretionary elements, the project should be deemed discretionary, and any doubt should be resolved in favor of a discretionary characterization. While, under the CEQA Guidelines, an agency may categorically classify approvals as ministerial, an agency may only do so when the conferred authority is *solely* ministerial. Third, the Court held that the County's limitations under Chapter 9.36 to minimize environmental damage was irrelevant to determine whether a decision to issue the permits was discretionary or ministerial, recognizing that "[j]ust because the agency is not empowered to do everything does not mean it lacks discretion to do anything."

Next, the Court considered the amount of deference owed to the County's interpretation of Chapter 9.36. The Court noted that the County was not interpreting its own ordinances; rather it was interpreting incorporated state standards. Additionally, although factual determinations in particular issuance decisions are deferentially reviewed for substantial evidence, here the County claimed an entire category of permits was ministerial as a matter of law. Nevertheless, the Court concluded that it could not simply ignore the County's interpretation, and that the County's interpretation instead served as one of several tools available to aid the Court in its interpretation of the text.

The Court therefore held that because Section 8.A gave the County sufficient authority to render certain issuances discretionary, the County's blanket classification violated CEQA.

The Issuance of Well Construction Permits Was Not Categorically Discretionary

The Supreme Court next turned to whether, as the Court of Appeal held, the issuance of a permit under Chapter 9.36 is *always* a discretionary project. Relying on *Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11, 23, the Court concluded that just because an ordinance contains provisions that allow the permitting agency to exercise independent judgment in some instances does not mean that *all* permits issued under that ordinance are discretionary. Additionally, the CEQA Guidelines provide that a

discretionary project is one that *requires* the exercise of judgment or deliberation. If the circumstances of a particular project do not require the exercise of independent judgment, it is not discretionary.


Lastly, the Court rejected the County's argument that such a decision would result in increased costs and delays, noting that these burdens did not justify the categorical misclassification of well construction permits.

Disposition

Accordingly, the Supreme Court reversed the Court of Appeal's holding that all permit issuances under Chapter 9.36 were discretionary. However, the County's blanket categorization of these permits as ministerial was also unlawful, and Plaintiffs were entitled to a judicial declaration stating as much.

- Opinion by Justice Corrigan, with Chief Justice Cantil-Sakauye and Justices Chin, Liu, Cuéllar, Kruger, and Groban concurring.
- Court of Appeal: Fifth Appellate District, Case No. F073634, Acting Presiding Justice Poochigan, with Justice Franson and Justice Peña concurring.
- Trial Court: Stanislaus County Superior Court, Case No. 2006153, Judge Roger M. Beauchesne.

Exemptions and Exceptions

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
27 <i>San Francisco Taxi Coalition v. City & County of San Francisco</i>		9 th Circuit	Federal

[*San Francisco Taxi Coalition v. City and County of San Francisco*](#), United States Court of Appeals, Ninth Circuit, Case No. 19-16439 (November, 9, 2020).

The Ninth Circuit Court of Appeals affirmed the district court's judgment on the pleadings in favor of defendants, but remanded for the district court to consider whether plaintiffs should be given leave to amend their CEQA and state-law age discrimination claims in an action challenging regulations adopted in 2018 by the San Francisco Municipal Transportation Agency (2018 Regulations). The 2018 Regulations favored taxi drivers who had recently obtained a medallion from the City of San Francisco (City) over those who had obtained their medallion years ago by giving new medallion holders priority for lucrative airport pick-up rides, in order to help alleviate the consequences of ridership decreasing due to the rise in ride-sharing. A coalition of taxi drivers (Plaintiffs) challenged the 2018 Regulations as violating equal protection, substantive due process, CEQA, and state laws against age discrimination. The City filed a motion for judgment on the pleadings, which the district court granted in its entirety and entered judgment dismissing the case, holding, among other things, that the 2018 Regulations were not a "project" under CEQA.

Regarding the district court's CEQA holding, the Court of Appeals stated that to determine if a proposed activity is a project, an agency looks to the general nature of a proposed action and whether the activity could cause a direct or reasonably foreseeable indirect physical change in the environment. Plaintiffs argued that the 2018 Regulations would potentially increase the number of passenger-less trips that taxi drivers take to and from the airport based on their priority, as well as the general demand for rides, thus encouraging and promoting additional driving. The Court rejected this argument, holding that the complaint did not plausibly allege that the 2018 Regulations would increase the number of taxis in circulation or authorize more fares. Instead, the 2018 Regulations merely allocated existing fares among classes of medallion holders. Simply put, taxis would continue to produce the same emissions and traffic regardless of where they were driving within the City. Because the assertion of significant environmental change rested on speculation, the 2018 Regulations were held to not be a "project" and therefore not within the scope of CEQA. The Court also upheld the 2018 Regulations against Plaintiffs' equal protection, substantive due process, and age discrimination claims.

Disposition

Accordingly, the Court of Appeals affirmed the district court's judgment on the pleadings in favor of the City but remanded for the district court to consider whether Plaintiffs should be given leave to amend their CEQA claim and state law age-discrimination claim.

- Opinion by Circuit Judge Lee, with Circuit Judge Bumatay and District Judge Silver concurring.
- Trial Court: United States District Court for the Northern District of California, Case No. 3:19-cv-01972-WHA, Presiding District Judge William Alsup.

Exemptions and Exceptions

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
28 <i>Save Berkeley's Neighborhoods v. Regents of Univ. of Cal.</i>		1 st	

[Save Berkeley's Neighborhoods v. Regents of the University of California](#), California Court of Appeal, First Appellate District, Case No. A157551 (June 25, 2020).

- *A university's enrollment increase may be considered as a "project" or a project change, requiring a tiered, subsequent, or supplemental EIR when that increase is inconsistent with a prior long-range development plan previously analyzed under CEQA.*

Background for Appeal

The University of California (University) is required periodically to develop a comprehensive, long-range development plan, which guides campus development based on the academic goals and expected enrollment. In 2005, the University certified a program environmental impact report (EIR) for its adopted development plan for the UC Berkeley campus through 2020 (2005 EIR). The development plan and 2005 EIR projected that student enrollment at the UC Berkeley campus would increase by 1,650 students, with the addition of 2,500 beds for students. Starting in 2007, the University increased enrollment beyond the projection analyzed in the 2005 EIR, without preparing further environmental review. By 2018, UC Berkeley's actual student enrollment had grown by a total of approximately 8,300 students.

Save Berkeley's Neighborhoods (Save Berkeley) petitioned for writ of mandate, alleging that the University violated CEQA when it increased enrollment well beyond the growth projected in the 2005 EIR without conducting further environmental review. The University demurred to the Petition. The trial court sustained the University's demurrer without leave to amend, holding that the University's "informal discretionary decisions" to increase student enrollment beyond the enrollment projected in the development plan and 2005 EIR did not constitute "project changes" necessitating CEQA review. Save Berkeley appealed.

CEQA Does Not Exempt Universities From Analyzing Enrollment Increases

Public Resources Code section 21080.09 requires universities to prepare EIRs alongside their adopted long-range development plans. The University argued that it was not required to analyze changed increases in enrollment not contemplated in the 2005 EIR because section 21080.09 omits the word "enrollment" from its definition of "long-range development plan" and, thus, exempts universities from analyzing such enrollment increases unless or until a physical development project is approved. Further, the University argued that, because the language in section 21080.09 was more specific than the broad definition of "project" under section 21065, section 21080.09 controlled.



The Court of Appeal rejected the University's arguments, holding that section 21080.09 does not exclude enrollment increases from the broad definition of a "project" under section 21065. Instead, the broad definition of a project was harmonious with section 21080.09 because enrollment levels and physical development are related features that must be mitigated under CEQA. Thus, the University's analysis of enrollment changes is not limited only to situations in which the University is adopting a development plan or physical development, but that those enrollment changes can independently be considered a project subject to CEQA's EIR requirements.

Disposition

Accordingly, the Court of Appeal reversed the trial court's judgment, remanding the action with directions for the trial court to vacate its order sustaining demurrer and issue a new order overruling the demurrer.

- Opinion by Justice Burns, with Acting Presiding Justice Simons and Justice Needham concurring.
- Trial Court: Alameda County Superior Court, Case No. RG18-902751, Judge Frank Roesch and Judge Noël Wise.

Mitigated Negative Declarations

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
29 <i>Citizens for Smart Development in Amador County v. County of Amador</i>		3 rd	

[*Citizens for Smart Development in Amador County v. City of Amador*](#), California Court of Appeal, Third Appellate District, Case No. C082915 (December 11, 2020).

The Court of Appeal affirmed the trial court's judgment, finding that petitioners failed to raise a fair argument that the expansion of a county jail would generate significant environmental impacts. The County of Amador (County) sought to expand its jail by proposing to build an 8,000 to 10,000-square-foot space adjacent to the existing jail, a development that would include new walkways and a new parking lot (Project). In 2014, the County started a CEQA review for the Project, which included a ground-penetrating radar survey, a biological resources assessment, and a geotechnical investigation. The County determined that the Project would not have a significant adverse effect on the environment because of required mitigation measures, and prepared a mitigated negative declaration (MND). Citizens for Smart Development in Amador County (Petitioners) sued, claiming that the County violated CEQA because: (i) the Project would infringe on their privacy, block their light, and have a negative impact on the environment, (ii) the County did not adequately consider the Project's runoff, and (iii) the County improperly deferred specific mitigation measures until after the Project was approved. The trial court rejected Petitioners' arguments, finding that the County did not violate CEQA.



The Court of Appeal affirmed the trial court's rejection of Petitioners' arguments. First, the Court found that Petitioners did not provide enough evidence of blocked light and privacy invasion to raise a fair argument that the Project may have a significant impact on the environment, and did not consider the County's proposed mitigation measures. Second, even though the County's report on the runoff was brief, it was supported by an expert report from an engineering firm, which the Court found was enough to satisfy CEQA. Finally, the Court held that the County did not violate CEQA by improperly deferring the specifics of certain mitigation measures.

Disposition

The Court of Appeal affirmed the trial court's judgment, finding that Petitioners failed to raise a fair argument that the Project would generate significant environmental impacts.

- Opinion by Acting Presiding Justice Blease, with Justice Hull and Justice Murray concurring.
- Trial Court: Superior Court of Amador County, Case No. 15CV0374, Judge Day.

Mitigated Negative Declarations

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
30 <i>Save the Agoura Cornell Knoll v. City of Agoura Hills</i>		2 nd	

[Save the Agoura Cornell Knoll v. City of Agoura Hills](#), California Court of Appeal, Second Appellate District, Division Seven, Case No. B292246 (February 24, 2020).

- *A party does not forfeit the issue of exhaustion of remedies by alleging it in the petition and addressing it for the first time in a reply brief.*
- *Failure to plead statute of limitations as an affirmative defense in a general demurrer or answer forfeits the defense.*
- *Substantial evidence that a project may have a significant environmental impact supports a fair argument that an EIR must be prepared, even if the record contains contrary evidence that the project may not have significant environmental impacts.*
- *Mitigation is improperly deferred if a mitigation measure fails to provide specific performance criteria to evaluate the efficacy of the measures to be implemented in the future.*

Background for Appeal

Doron Gelfand and Agoura and Cornell Roads, LP (ACR) proposed a mixed-use project on an 8.2-acre site in the City of Agoura Hills (City), with development of 35 residential apartment units and retail, restaurant, and office space (Project). The undeveloped site contained oak trees and scrub oak habitat, including three plant species that were considered rare, threatened, or endangered. Gelfand submitted applications to the City for the required entitlements to pursue the development, and the City issued a final initial study-mitigated negative declaration (MND) for the Project in November 2016. The Agoura Hills Planning Commission adopted the MND and approved the Project in January 2017. The California Native Plant Society (CNPS) appealed the Planning Commission's approval. In March 2017, the City Council held a public hearing at which it denied the appeal, adopted the MND, and approved the Project.

Save the Agoura Cornell Knoll, or STACK (collectively with CNPS, Petitioners) subsequently filed a petition for writ of mandate challenging the City's adoption of the MND and approval of the Project. Specifically, Petitioners argued that under the fair argument standard, there was substantial evidence that the Project may have significant environmental impacts and that accordingly, an environmental impact report (EIR) was required to be prepared. The trial court granted the petition, and Gelfand and ACR (Appellants) timely appealed.

A Party Does Not Waive a Claim of Exhaustion by Failing to Discuss the Claim in Its Opening Brief

It is well settled that parties must exhaust administrative remedies before resorting to the courts. Appellants argued that Petitioners waived any claim that they had exhausted administrative remedies by failing to raise the issue in their opening brief. The Court of Appeal found that Petitioners: (i) had alleged that they exhausted all administrative remedies in their first amended petition; (ii) cited to evidence that they had exhausted administrative remedies by participating in the administrative proceedings, even though they did not directly address exhaustion in their opening brief; and (iii) addressed exhaustion squarely in their reply brief. The trial court found, and the Court of Appeal affirmed, that failure to argue satisfaction of the exhaustion requirement in their opening brief did not result in Petitioners' forfeiting the

issue, where Petitioners had already provided the Court with, and addressed, the evidence of exhaustion, and did not rely on any new evidence of exhaustion in their reply brief.

Failure to Raise the Statute of Limitations in a General Demurrer or Answer Forfeits the Affirmative Defense

Appellants asserted for the first time in their appellate brief that the action should be dismissed because STACK lacked standing, and CNPS was barred by the statute of limitations. Appellants argued that STACK failed to prove that the organization or any of its members had objected to the approval of the Project prior to the close of the public hearing, as required by CEQA to establish standing. Further, because CNPS was not named as a petitioner until the first amended petition, which was filed after the statute of limitations had expired, Appellants argued that CNPS was not a proper plaintiff. Because the statute of limitations may only be used as an affirmative defense if asserted in a general demurrer or pleaded in an answer, and is forfeited if not so raised, the Court of Appeal held that Appellants did forfeit this claim, and the statute of limitations did not bar CNPS. While a claim that a party lacks standing may be raised at any time and cannot be waived, the Court did not reach the question of whether STACK had standing in this suit. No party disputed that CNPS had standing and, since at least one petitioner had standing under CEQA, the Court held that it had jurisdiction over the appeal.

Substantial Evidence Supports a Fair Argument That a Project May Have Significant Environmental Impacts

The City's adoption of an MND was reviewed for abuse of discretion under the "fair argument" standard. The fair argument standard creates a low threshold requirement for initial preparation of an EIR. If there is substantial evidence that a proposed project may have a significant environmental impact, contrary evidence that a project will *not* have a significant environmental impact is not sufficient to overcome the fair argument. In other words, if an agency has determined an EIR is not required, and a reviewing court finds there was substantial evidence that a project may have a significant environmental impact, the court must overturn the agency's decision. Here, the trial court found that substantial evidence supported a fair argument that the Project may have a significant impact on cultural resources, sensitive plant species, native oak trees, and aesthetic resources, and that the MND's proposed mitigation measures were insufficient to reduce those impacts to less than significant. The Court of Appeal affirmed this judgment.

Cultural Resources

The Project site included an identified prehistoric archaeological site with surface artifacts and subsurface deposits of cultural resources. Studies in 1988, 2004, and 2011, and a peer review report in 2014, determined that the site represented a significant heritage resource under CEQA and that it met the requirements for inclusion in the California Register of Historical Resources. The City reviewed these studies in adopting the MND, determining that the Project would have a significant impact on cultural resources but finding that three mitigation measures would reduce the impacts to less than significant. The mitigation measures provided for monitoring the excavation work, stopping work to take "appropriate actions" if resources were discovered, and providing for a data recovery excavation program if the resource area could not be avoided. However, the trial court found that the MND did not actually analyze whether the resource area could be avoided or establish criteria for determining the feasibility of avoidance. Further, the trial court found that the MND improperly deferred mitigation by delaying formulation of the data recovery plan without any indication it was then impractical or infeasible to do so. Appellants challenged evidence submitted by the Petitioners' expert and argued that the City was entitled to rely on its own experts. The trial court held that there was a fair argument that the Project would have a significant impact on cultural resources and that an EIR was required. The Court of Appeal confirmed, concluding that a disagreement between experts on whether a project will have significant environmental impacts is to be resolved in an EIR, not an MND.

Sensitive Plant Species

The Project site contained three plant species considered rare, threatened, or endangered. All three occur in areas of the Project planned for mowing, pruning, and clearing of brush. The City concluded that

the impacts of the Project to these sensitive plant species would be significant, but that the impacts could be reduced to less than significant with the adoption of three mitigation measures. However, the trial court noted that there was evidence in the record that (i) the surveys used to develop the mitigation measures were outdated and inadequate; (ii) restoration, on-site or off-site, was not effective mitigation for these plant species; (iii) the mitigation measures deferred determination of whether avoidance of the plant species was feasible and failed to specify performance standards for restoration; and (iv) impacts to plant species could occur for the life of the Project, even after monitoring required by the mitigation measures ended. Thus, the trial court concluded, and the Court of Appeal affirmed, that substantial evidence supported a fair argument that the mitigation measures were infeasible or inadequate to mitigate the Project's impacts to a less than significant level and that an EIR was required.

Native Oak Trees

The Project site contained native oak trees, which are protected by the City's Oak Tree Ordinance. In adopting the MND, the City concluded, the impacts of the Project to these native oak trees would be significant, but the impacts could be reduced to less than significant with the adoption of two mitigation measures, one providing for replacement of oak trees removed during project development and one requiring payment of an in-lieu fee to acquire off-site land if the trees could not be replaced on-site. The trial court held that the mitigation measures were inadequate to mitigate the significant impacts on oak trees because (i) there was substantial evidence in the record that the mass grading of the site would disrupt the natural flow of water on the site and may cause a loss of water to both retained and replacement trees; (ii) there was substantial evidence that prior efforts to restore oak trees had failed, and the MND did not analyze whether this mitigation measure would be likely to succeed; and (iii) development of the in-lieu fee program was improperly deferred. Because substantial evidence supported a fair argument that the Project may have significant impacts on native oak trees, the trial court held that an EIR was required. The Court of Appeal affirmed.

Aesthetic Resources



Appellants did not challenge the trial court's finding that the Project may have significant impacts to aesthetic resources. Appellants only contended that Petitioners failed to exhaust their administrative remedies as to the aesthetic resources claims. As discussed above, the Court of Appeal found that Petitioners adequately exhausted their administrative remedies because the concerns about Project impacts were included in the public record and the City was fairly apprised of Petitioners' concerns about significant impacts to aesthetic resources as a result of removal of native oak trees and the development of three-story buildings on the knoll.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's judgment overturning the City's adoption of the MND and requiring an EIR to be prepared.

- Opinion by Justice Zelon, with Presiding Justice Perluss and Justice Feuer concurring.
- Trial Court: Los Angeles County Superior Court, Case No. BS169207, Judge Mary H. Strobel.

Supplemental Review

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
31 <i>Community Venture Partners v. Marin County Open Space District</i>		1 st	

[Community Venture Partners v. Marin County Open Space District](#), California Court of Appeal, First Appellate District, Case No. A154867 (January 24, 2020).

The Marin County Open Space District (District) approved proposed improvements to and bicycle use on the Bob Middagh Trail in Mill Valley (Project). Before approving the Project, the District created a Road and Train Management Plan and approved a corresponding Tiered Program environmental impact report (EIR). With respect to the Project, the District first issued a memorandum stating that the Project was approved with design modifications, though environmental compliance and permitting would be required prior to the implementation of those modifications. The District later prepared a consistency assessment, which found that the potential impacts associated with the Project were consistent with those identified in the Tiered Program EIR. Community Venture Partners (Petitioners) sought to set aside the District’s approval. The trial court ruled for the Petitioners, holding that the District violated CEQA by (i) failing to evaluate the Project’s environmental impacts in a new EIR before approving it, and (ii) failing to perform sufficient environmental review on the Project’s “reasonably foreseeable social and safety risks.”

The Court of Appeal disagreed. It found that the District did not wrongly approve the Project before evaluating its environmental effects. The Court held that agency approval occurs when an agency commits to a definite course of action through its statements, behavior, or commitment of financial resources. The District expressly conditioned the Project’s approval upon subsequent CEQA review and called the Project a “recommendation” and a “pending proposed project.” The District did not pledge or expend any financial resources before environmental review occurred.

Further, the Court found that the District did not need to consider potential trail “user conflicts” under CEQA, where such conflicts included potentially adverse effects from allowing mountain bikes on the trail, such as a decrease in user enjoyment of the trail due to an increase in accidents and noise. The Court concluded that, as alleged by Petitioner, these potential effects were purely social and not tied to the physical environment and, therefore, were not required to be considered under CEQA.



Finally, the Court concluded that the Tiered Program EIR adequately discussed the environmental impacts of the Project and that the District properly conducted environmental review under CEQA Guidelines Section 15162 and Public Resources Code Section 21166.

Disposition

The Court of Appeal reversed the portion of the trial court’s judgment finding that the District violated CEQA.

- Opinion by Justice Brown, with Presiding Justice Pollack and Justice Streeter concurring.
- Trial Court: Marin County Superior Court, Case No. CIV1701913, Judge Paul Haakenson.

Supplemental Review

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
32 <i>Martis Camp Community Association v. County of Placer</i>		3 rd	

[Martis Camp Community Association v. County of Placer](#), California Court of Appeal, Third Appellate District, Case Nos. C087759, C087778 (August 17, 2020).

- *Agency review of a project modification must be based on the original EIR for the same project.*
- *Substantial environmental impacts not considered in an EIR necessitate a supplemental or subsequent EIR.*

Background for Appeal

Mill Site Road (Road) runs through a residential community called the Retreat. The Road is also connected to another residential community called Martis Camp via an emergency access road. When the Retreat and Martis Camp developments were approved, the environmental impact reports (EIRs) for both communities assumed there would be no private vehicle trips between the developments. However, over time, Martis Camp residents began using the Road with increasing frequency.

In 2011 and 2012, Retreat homeowners asked the County of Placer (County) to stop Martis Camp residents' use of the Road. The County declined to take action. In 2013, an association of Retreat property owners filed a petition for writ of mandate and a complaint seeking to require the County to prohibit Martis Camp residents from using the Road. The petition alleged CEQA violations, among other causes of action. The trial court determined that the petition failed to state facts sufficient for relief and sustained the County's demurrer on all causes of action. The Court of Appeals reversed and remanded, determining that the petitioners sufficiently pleaded a CEQA violation related to the County's failure to prepare a supplemental or subsequent EIR (SEIR) to analyze environmental impacts resulting from a substantial change in circumstances in which Martis Camp residents use the Road.

In 2014, the Retreat homeowners formally requested that the County abandon public road easement rights to the Road and sought to preclude Martis Camp residents from using the Road. The County Board of Supervisors denied the request. Upon rehearing the request and receiving additional public comment, the Board voted in favor of abandonment, conditioning its approval on the subsequent approval of an addendum to the Martis Camp EIR.

The Martis Camp Homeowners and Martis Camp Community Association (collectively, Petitioners) filed separate petitions challenging the County's approval, alleging multiple causes of action, including CEQA violations. Petitioners argued that the County violated CEQA by (i) relying on an addendum to the Martis Camp EIR, as opposed to the Retreat EIR; (ii) using an improper baseline to evaluate the impacts of abandoning the Road; and (iii) failing to prepare an SEIR. The trial court consolidated the petitions and denied both writ petitions. Petitioners appealed.

The County Improperly Based Its Decision on the EIR for a Different Project

Petitioners challenged the County's use of an addendum to the Martis Camp EIR (Martis Camp Addendum) that analyzed whether abandoning the Road would impact Martis Camp, because the Road was not part of the Martis Camp project. Petitioners argued that the County should have considered the abandonment as a modification to the Retreat project and evaluated impacts in relation to the Retreat EIR. The County argued that the Martis Camp Addendum was appropriate because the abandonment would alter traffic patterns in Martis Camp.

The Court of Appeal agreed with Petitioners, determining that abandoning the Road modified the Retreat project. The Road was built as part of the Retreat project — not as part of the Martis Camp project. Even though the effect of the abandonment was to restore traffic patterns to those envisioned by the Martis Camp project and analyzed in its EIR, the Court explained that it was not aware of any authority that allows an agency to conduct subsequent environmental review of a change to a project by relying on analysis from a prior EIR prepared for a different project. The County therefore needed to evaluate the Retreat EIR to determine whether the proposed abandonment necessitated an addendum or some other environmental document for the Retreat project. Thus, the County's use of the Martis Camp Addendum was prejudicial, because it prevented meaningful public participation and informed decision-making.

A Determination of Whether the County Used the Proper Baseline Was Premature

Petitioners argued that the proposed Road abandonment's environmental impacts were evaluated using an improper baseline because the baseline should have reflected the fact that, on the date of the environmental analysis, Martis Camp residents were using the Road. Because the County should have compared the effects of abandoning the Road against the environmental impacts analyzed in the Retreat EIR, and not the Martis Camp EIR, the Court determined that it was premature to consider whether the County used an appropriate baseline.

The Impacts of a Substantial Project Change Not Considered in an EIR Require a Supplemental or Subsequent EIR



Petitioners also argued that the County's decision to prepare the Martis Camp Addendum instead of an SEIR for the Retreat project violated CEQA, which requires an SEIR when the environmental impacts of a substantial project change are not considered in an original EIR. An SEIR is not required when a project change does not result in impacts that are significantly different from those described in the original EIR. The County argued that an SEIR was unnecessary because the traffic impacts at issue were fully analyzed in the Martis Camp EIR. However, because the Court already determined that an analysis of the Project's impacts must be based on the Retreat EIR — not the Martis Camp EIR — the Court found the County's determination that no SEIR was required to be a prejudicial abuse of discretion.

Disposition

Accordingly, the Court of Appeal reversed the trial court's judgment and remanded with directions to enter a new judgment granting the petitions.

- Opinion by Justice Krause, with Justice Duarte and Justice Blease concurring.
- Trial Court: Placer County Superior Court, Case Nos. SCV0038483, SCV0038045, Judge Charles Wachob.

Supplemental Review

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
33 <i>Santa Clara Valley Water District v. San Francisco Water Quality Control Board</i>		1 st	

[*Santa Clara Valley Water District v. San Francisco Bay Regional Water Quality Control Board*](#), California Court of Appeal, First Appellate District, Case No. A157127 (December 29, 2020).

- *If a responsible agency has independent authority to enforce or administer an environmental law, the agency may undertake independent environmental review and impose mitigation measures beyond what the lead agency imposed.*
- *An agency’s CEQA proceedings must possess a judicial character for the agency’s decision to have a preclusive effect in a subsequent proceeding.*
- *The challenger of an agency’s decision must support its argument with evidence in the record; the court is not obligated to scour the record for evidence supporting the challenger’s position.*

Background for Appeal

To combat periodic regional flooding, the US Army Corps of Engineers (Corps), with the Santa Clara Valley Water District (District) as CEQA lead agency, developed a flood-control project (Project). After the Corps completed its environmental review, the Regional Water Quality Control Board (Regional Board) suggested that the Project proposal include mitigation of the Project’s impacts on wetlands. The Corps declined to make this change on the grounds that it exceeded the scope of the Project’s authorization from Congress and of the Corps’ environmental review.

Next, the District undertook a CEQA review and prepared an environmental impact report (EIR) for the Project. The Regional Board submitted comments on the EIR, again raising concerns regarding mitigation for wetland impacts. The final EIR concluded that the Project would have certain significant impacts on water resources, including wetlands, but that such impacts could be reduced to less-than-significant levels with mitigation.

In the meantime, the Corps applied to the Regional Board under Clean Water Act Section 401, seeking certification that the Project complied with state law. The Regional Board notified the Corps that the application was incomplete because it lacked, among other things, mitigation measures for impacts on waters and wetlands. However, the Regional Board faced pressure to approve the Project from the state’s congressional delegation and Governor’s office, because the Project could lose federal funding. As a compromise, the Regional Board, the Corps, and the District agreed that the Regional Board would move quickly to issue Section 401 certification so that Project construction could begin, and that the Regional Board would subsequently issue waste discharge requirements (WDRs) and additional mitigation measures under the Porter-Cologne Act to address Project design issues and impacts not handled in the Section 401 certification. The Regional Board issued the Section 401 certification, which stated that the environmental impacts from construction within the Regional Board’s purview would be mitigated to less-than-significant levels, and declared that it would later consider WDRs to address the need to compensate for wetland impacts from Project operation.

After holding two hearings and taking public comment — and after Project construction was nearly complete — the Regional Board issued WDRs that required off-site mitigation through the enhancement of roughly 15 acres of state waters. The WDRs addressed CEQA by stating that the Regional Board had

considered the District's EIR and found that the EIR's mitigation measures, in combination with those in the WDRs, would mitigate the Project's impacts to less-than-significant levels.

The District sought the State Water Resources Control Board's (State Board's) review of the WDRs, which was denied by operation of law. The District then petitioned for writ of mandate, challenging the order under CEQA, the Clean Water Act, the Porter-Cologne Act, and other laws. The trial court denied the petition on all causes of action, and the District timely appealed.

The Regional Board Had Independent Authority to Undertake Environmental Review and Impose Additional Mitigation Measures

First, the Court of Appeal addressed the District's argument that the Regional Board violated CEQA procedure by taking an inconsistent approach to CEQA findings. The Regional Board stated in its Section 401 certification that it was approving the Project under CEQA even though the EIR lacked sufficient detail and that it intended to address mitigation at a later date. Yet when issuing the WDRs, the Regional Board purported to make CEQA findings again. The Court recognized that the Regional Board's approach did not appear to comply with the rule that "an agency cannot formally approve a project, or commit itself to approve it, without complying with CEQA before doing so." But the Court ultimately rejected the District's argument because the District's interpretation of CEQA would make binding on an agency its explicitly unfinished CEQA findings.

Next, the District argued that the Regional Board's failure to impose mitigation as part of the Regional Board's CEQA review barred it from later imposing mitigation in the WDRs under the Porter-Cologne Act. For support, the District cited CEQA Guidelines Section 15096, which provides that if a responsible agency believes that the final EIR is not adequate, the responsible agency must seek judicial review, prepare a subsequent EIR, or assume the lead agency role. Otherwise, the responsible agency waives any challenge. As the Regional Board did not take any action on the final EIR, the District argued that the Regional Board had waived its mitigation concerns and was barred from imposing additional mitigation through the WDRs.

The Court rejected the District's Section 15096 argument, notwithstanding "the flaws in [the Regional Board's] CEQA procedure," because the Regional Board had independent authority — "and indeed the obligation" — to enforce the Porter-Cologne Act. Under the CEQA savings clause — Public Resources Code Section 21174 — CEQA did not prevent the Regional Board from discharging its responsibilities under the Porter-Cologne Act. The Court noted that its holding was further supported by other CEQA provisions that require the integration of other required planning and environmental review procedures with the EIR process "to the maximum extent feasible."

Further, the District argued that "the CEQA process will become a meaningless exercise if responsible agencies with authority to enforce environmental laws are permitted to impose additional environmental mitigation requirements on projects after CEQA review is complete." The Court rejected this argument, concluding that the District's argument rested on "an unwarranted assumption that government agencies will not discharge their CEQA responsibilities in good faith" and was "insufficient to overcome the plain language of section 21174."

The District's CEQA Proceedings Did Not Possess the Judicial Character Necessary for Collateral Estoppel

The District argued that the Regional Board — a party to the District's CEQA proceedings — was barred from using its subsequent environmental review and WDRs — a second administrative process — to collaterally attack the District's CEQA findings. The Court of Appeal disagreed, holding that the District's CEQA proceedings "did not possess [the] judicial character" necessary for collateral estoppel. The District's administrative process did not involve a hearing before an impartial decision maker, testimony under oath, or the opportunity to call, examine, and cross-examine witnesses. As such, applying collateral estoppel would make CEQA's savings clause meaningless.

The District Failed to Satisfy Its Burden of Supporting Its Arguments With Record Evidence

The District argued that the Regional Board committed a prejudicial abuse of discretion because its mitigation requirements were not supported by substantial evidence. However, the Court of Appeal rejected this argument, noting that the District failed to cite to the studies in the record relied on by the Regional Board or even the evidence relied on by the trial court. According to the Court, the District cited “only a few documents in the record that tenuously support[ed] its arguments, rather than engaging in the extensive analysis of the evidence” necessary for substantial evidence review. The Court concluded by stating that it was “not obligated to conduct an independent scouring of the record pertinent to the District’s arguments.”

Disposition

Accordingly, the Court of Appeal affirmed the trial court’s judgment.

- Opinion by Justice Brown, with Presiding Justice Pollak and Justice Streeter concurring.
- Trial Court: Contra Costa County Superior Court, Case No. MSN17-1822, Judge Edward G. Weil.

Supplemental Review

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
34 <i>Stein v. Alameda County Waste Management Auth.</i>		1 st	

[Stein v. Alameda County Waste Management Authority](#), California Court of Appeal, First Appellate District, Division Two, Case No. A154804, (August 17, 2020).

The Court of Appeal affirmed the trial court’s denial of Antoinette W. Stein and Arthur R. Boone, III’s (Petitioners’) petition for writ of mandate seeking to set aside Alameda County Waste Management Authority’s (the County Waste Authority’s) approval of a waste composting and recycling process inside an existing facility for alleged noncompliance with CEQA. Petitioners argued that the new process triggered the requirement for new CEQA review pursuant to Public Resources Code Section 21166 and CEQA Guidelines Section 15162. The trial court denied the petition, holding that Petitioners did not point to substantial evidence in the record raising a fair argument that there would be new significant environmental impacts that were not addressed in the facility’s mitigated negative declaration (MND) from 2011. On appeal, Petitioners argued that: (i) per CEQA Guidelines Section 15164, the County Waste Authority was required to prepare an addendum to the 2011 MND, (ii) the County Waste Authority did not consider alternatives to the action approving the new process, and (iii) the new process proposed by the facility was sufficiently different than what was approved in 2011, warranting a new environmental analysis and investigation as to whether new impacts would occur, under *Sundstrom v. County of Mendocino*.



The Court of Appeal found that all of Petitioners’ arguments were not supported by substantial evidence in the record. The Court rejected the addendum argument, finding that: (i) Petitioners did not raise this issue in the administrative proceedings and thus failed to exhaust administrative remedies, (ii) Petitioners did not make the argument at the trial court and thus waived the argument on appeal, and (iii) the County Waste Authority ordinance included the substantive requirements for an addendum and therefore could serve as the CEQA addendum itself. The Court further rejected the Petitioners’ “failure to consider alternatives” argument since the obligation to consider alternatives applied to the original 2011 MND, not an action relying on the MND later in time. Using a reasonableness standard for whether a discussion of alternatives is warranted, the Court concluded that modifying a process inside an already approved facility did not warrant the discussion of alternatives. Lastly, the Court rejected Petitioners’ *Sundstrom* “new analysis and investigation” argument. The Court held that because the 2011 MND retained informational value, the *Sundstrom* analysis was not pertinent. Unlike in *Sundstrom*, there was no argument that the County Waste Authority’s 2011 initial study was inadequate, and, therefore, Petitioners’ arguments regarding the merits of the agency’s decision not to prepare new environmental documentation were unfounded.

Disposition

The Court of Appeal affirmed the trial court’s judgment denying the petition for writ of mandate.

- Opinion by Acting Presiding Justice Richman, with Justice Stewart and Justice Miller concurring.
- Trial Court: Alameda County Superior Court, Case No. RG17858423, Judge Ronni B. MacLaren.

Supplemental Review

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
35 <i>Tahoe Residents United for Safe Transit v. County of Placer</i>		3 rd	

[*Tahoe Residents United for Safe Transit v. County of Placer*](#), California Court of Appeal, Third Appellate District, Case No. C075933 (February 28, 2020).



The Court of Appeal reversed the trial court's decision and held that the County of Placer (County) had abused its discretion under CEQA by approving a substantial change to a project without considering whether the original EIR adequately covered the change. After full CEQA review, DMB/Highland Group LLC and Trimont Land Company received approvals from the County to develop two communities on abutting parcels. An emergency vehicle access (EVA) road connected the two developments. According to evidence in the administrative record for both projects, the EVA road was approved for emergency and transit uses only. After observing the EVA road being used as a shortcut by community residents, Tahoe Residents United for Safe Transit (Petitioner) sent the County letters inquiring about the status of the EVA road. In a letter to Petitioner, the County asserted that the conditions for approval for the developments did not preclude the use of the EVA road for uses other than emergency or transit use. Petitioner filed a petition for writ of mandate and complaint to set aside the County's decision in its response letter to Petitioner and alleged that the County abused its discretion under various authorities, including CEQA. The trial court granted Defendants' demurrer, holding that Petitioner's CEQA claims were time-barred by the statute of limitations and that Petitioner's remaining claims failed to state sufficient facts to constitute a cause of action.

On appeal, Petitioner argued that the County's letter approved a "project" under CEQA. Petitioner also argued that the County's letter approved of or resulted in a substantial change to the original projects such that additional environmental review was required under CEQA. The Court of Appeal rejected Petitioner's first argument, holding that a letter interpreting preexisting authorities is a ministerial act and not a "project" as defined by CEQA. However, the Court found that because the environmental impacts of non-emergency/transit use of the EVA road were not contemplated in the original CEQA documents, the later approval of such use resulted in a substantial change to the original projects. Thus, further CEQA review was required and the County's failure to conduct such review constituted a prejudicial abuse of discretion. Finally, the Court reversed the trial court's holding that Petitioner's CEQA claim was time-barred by the statute of limitations, concluding that the record did not support the certainty required to decide the statute of limitations issue on demurrer.

The Court of Appeal reversed and remanded the trial court's judgment on the CEQA claim and affirmed the trial court's judgment in all other respects.

- Opinion by Justice Murray, with Justice Raye and Justice Blease concurring.
- Trial Court: Placer County Superior Court, Case No. SCV0032463, Judge Charles Wachob.

Supplemental Review

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
36 <i>Willow Glen Trestle Conservancy v. City of San Jose</i>		6 th	

[*Willow Glen Trestle Conservancy v. City of San Jose*](#), California Court of Appeal, Sixth Appellate District, Case No. H047068 (May 18, 2020).

- *A public agency's application for and acceptance of a new SAA after a project has already been approved does not constitute further discretionary approval requiring supplemental environmental review under CEQA.*

Background for Appeal

The Willow Glen Railroad Trestle (Trestle) is a wooden railroad bridge built in 1922, which the City of San Jose (City) took ownership of in 2011. In 2013, the City proposed to demolish the Trestle and replace it with a new steel truss pedestrian bridge (Project). The City approved the Project and adopted a mitigated negative declaration (MND).

Litigation ensued over whether the Trestle was a historical resource. The City ultimately prevailed, but afterward, the California State Historical Resources Commission approved the listing of the Trestle in the California Register of Historical Resources.

At the end of 2017, the streambed alteration agreement (SAA) that the City had obtained from the California Department of Fish and Wildlife (CDFW) expired. Consequently, in March 2018, the City submitted to CDFW a new notification of lake or streambed alteration for the Project. The City and CDFW signed the final SAA in October 2018. CDFW found that the Project would not have any significant impacts on fish or wildlife with the measures specified in the MND and SAA.

The Willow Glen Trestle Conservancy and Friends of the Willow Glen Trestle (Petitioners) filed a petition for writ of mandate challenging the City's decision under CEQA. The trial court temporarily enjoined the City from proceeding with Trestle demolition, but ultimately denied the petition. The court found that the City's actions in connection with obtaining the new SAA were not a discretionary approval for the Project requiring supplemental environmental review.

Petitioners appealed and sought a writ of supersedeas to prevent destruction of the Trestle pending appeal, which the Court of Appeal granted to prevent the case from being mooted.

Application and Acceptance of New SAA Was Not a "Discretionary Approval"

Public Resources Code section 21166 and CEQA Guidelines section 15162 dictate when supplemental review is required after an initial project approval. Public Resources Code section 21166 and CEQA Guidelines section 15162 generally prohibit further review unless "substantial changes" have occurred or "new information" not known at the time of the initial environmental impact report (EIR) or MND becomes available. CEQA Guidelines section 15162(c) further explains that "a subsequent EIR or negative declaration shall only be prepared by the public agency which grants the next discretionary approval for the project, if any."

Petitioners argued that the City's request for a new SAA and acceptance of CDFW's new SAA constituted a discretionary approval by the City requiring additional CEQA review. Although the Court of Appeal held that issuance of the final SAA was an "approval," that approval was not *by the City*. Rather, it was by

CDFW, whose environmental review was limited to fish and wildlife resources and whose decision was not challenged in this litigation.

The Court further held that Petitioners' argument did not withstand scrutiny because it equates *any action* in connection with a project with an "approval on" or an "approval for" the project for CEQA purposes. Essentially, any step an agency takes toward implementing an approved project would constitute a discretionary approval, endlessly subjecting a project to additional review. That is not what CEQA requires.

The Court dismissed Petitioners argument that different rules should apply to "a city's own project" than a "private project." The Court noted that this characterization does not exist in CEQA or the CEQA Guidelines, and declined to read in such a distinction.

Disposition

Accordingly, the Court of Appeal affirmed the trial court's judgment denying the petition for writ of mandate.

- Opinion by Justice Mihara, with Acting Presiding Justice Premo and Justice Elia concurring.
- Trial Court: Santa Clara County Superior Court, Case No. CV335801, Judge Thomas E. Kuhnle.

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