

BPC EXPERT BRIEFING**CEQA Update 2017: Climate Change & Hot Topics Review**

Tuesday, October 17, 2017

11:00 a.m. – 2:00 p.m.

Wendel Rosen Black & Dean LLP

1111 Broadway, 19th Floor, Oakland, CA

2.75 General MCLE Credit Hours Pending Approval*

Panelists:

- **Arthur F. Coon**, *Attorney and Shareholder, Miller Starr Regalia*
- **Shari Libicki**, *Principal, Ramboll Environ*
- **Kathryn L. Oehlschlager**, *Partner, Downey Brand LLP*
- **Todd A. Williams**, *Partner, Wendel Rosen Black & Dean LLP*

11:00 am – 11:05 am:

Welcome and Introductions

William H. Butler, *Lind Marine*

11:05 am – 12:15 pm:

Year in Review – Significant CEQA Developments in 2016/2017

Moderated by: **Christian Marsh**, *Partner, Downey Brand LLP*

New Battle Lines Over Ministerial v. Discretionary Actions

- 1) *Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11 – Scope of ministerial exemption for local land use decisions

Dissecting EIRs and Discerning Trends

- 1) *East Sacramento Partnership for a Livable City v. City of Sacramento* (2016) 5 Cal.App.5th 281 – Traffic analysis
- 2) *Mission Bay Alliance v. Office of Community Investment and Infrastructure* (2016) 6 Cal.App.5th 160 – Fast track CEQA and the Warriors stadium
- 3) *Residents Against Specific Plan 380 v. County of Riverside* (2017) 9 Cal.App.5th 941 – Master planned community
- 4) *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918 – Integrating CEQA and parallel regulatory requirements under other state environmental laws

The EIR is Done, Now What? – Wrestling with Future Changes and Subsequent Environmental Review

- 1) *Committee for Re-Evaluation of the T-Line Loop v. San Francisco Municipal Transportation Agency* (2016) 6 Cal.App.5th 1237
- 2) *San Diegans for Open Government v. City of San Diego* (2016) 6 Cal.App.5th 995
- 3) *Friends of the College of San Mateo Gardens v. San Mateo County Community College District* (2017) 11 Cal.App.5th 596

12:15 – 12:30 pm:

Break for Lunch

12:30 – 1:50 pm:

Climate Change

Moderated by: **Christian Marsh**, *Partner, Downey Brand LLP*

CEQA, Guidelines, and Regulatory Responses to Climate Change

- 1) AB 32, etc.
- 2) Statute and Guidelines
- 3) Executive Orders
- 4) Scoping plan

Climate Change Case Law

- 1) *Center for Biological Diversity v. Dept. of Fish & Wildlife*
- 2) *Cleveland National Forest Found. v. San Diego Assoc. of Governments*

Approaches to Climate Analysis

- 1) Thresholds and analysis
- 2) Business as usual
- 3) Service population
- 4) Bright line thresholds
- 5) Mitigation strategies

1:50 – 2:00 pm:

Discussion and Q&A

*An application requesting MCLE credit for this activity is pending for approval by the State Bar of California. Certificates of Attendance will be sent upon request once approval is received. To ensure MCLE Credit verification, please also sign-in on the Record of Attendance form available at check-in.

Thank you for joining us today and to Wendel Rosen Black & Dean LLP for generously contributing such a beautiful event space for the program.

Please let Bay Planning Coalition staff know if there is anything we can do to improve your experience at CEQA Update. We hope to see you at another BPC event soon.

UPCOMING BPC EVENTS

BPC Strategic Planning Retreat

Sunday, November 5, 2:00 pm – Tuesday, November 7, 12:00 pm
Monterey Plaza Hotel, Monterey

BPC Workshop: Dredging & Beneficial Reuse

Monday, November 13, 9:00 am – 1:00 pm
Port of Oakland

BPC Annual Luncheon

Friday, December 8, 11:00 am – 2:00 pm
The City Club of San Francisco

Visit our website for more information and to register.
bayplanningcoalition.org

SPEAKER BIOGRAPHIES



William H. Butler – Vice President – Regulatory Affairs, Lind Marine, Inc. and Vice President, Bay Planning Coalition

William (Bill) Butler is an experienced building materials executive and resource developer with over 30 years of general and project management, permitting and entitlement experience. Bill is currently Vice President of Regulatory Affairs for Lind Marine Incorporated, a local family- and employee-owned marine services and materials company engaged in dredging, bulk materials barging and placement, sand and oyster shell mining, and other related marine services in San Francisco Bay. Prior to joining Lind Marine in 2012, Bill served as Vice President and General Manager of the San Francisco Bay Area region for Hanson Aggregates, part of the Lehigh Hanson and Heidelberg Cement Group, for over 12 years. In this role, Bill managed multiple aggregate, readymix concrete, hot mix asphalt, dredging and distribution terminal operations with key market positions in the Bay Area.

Bill earned his Bachelor of Science degree in Mining Engineering from the Colorado School of Mines. He completed the Stanford Executive Leadership Course in 2000. Bill currently serves as Vice President of the Bay Planning Coalition, and is active on the Executive Committee, the Dredging and Beneficial Reuse Committee, and the Marinas and Boatyards Committee. Bill received Bay Planning Coalition's Member of the Year award in 2004. Bill is a past Chairman of the Construction Materials Association of California, and he also sits on the Port of San Francisco's Maritime Commerce Advisory Council.

Bill currently resides in Petaluma, CA with his wife Gail, where he enjoys music (listening and performing), hiking and wine tasting.



Arthur F. Coon – Shareholder, Miller Starr Regalia

As the Co-Chair of Miller Starr Regalia's Land Use Practice Group and Chair of its Appellate Practice Group, Art Coon guides clients through a broad range of real property, land use and environmental matters.

Art has distinguished himself as a litigator at the trial and appellate levels of both federal and state courts, including an appearance as counsel of record before the U.S. Supreme Court. His areas of expertise include land use, environmental law, the law of public agencies, extraordinary writs, and the California Environmental Quality Act (CEQA). Art also counsels and advocates for clients who have matters in front of administrative bodies.

In receiving a J.D. from the University of California, Davis School of Law in 1986, Art was awarded the Order of the Coif, served as a Law Review editor, was a member of the Trial Practice Honors Board, and received American Jurisprudence Awards in Conflict of Laws and Commercial Paper. He earned his bachelor's degree from the University of Southern California in 1982.

He has written dozens of articles for law reviews, legal periodicals, and other publications, as well as authoring the "CEQA" Chapter and co-authoring the "Subdivisions, Land Use Planning, and Approvals" Chapter in Miller & Starr, California Real Estate, Fourth Edition. Since September 2011, he has been principal author of the blog ceqadevelopments.com.

Art Coon has received the following recognitions: Martindale-Hubbell – AV Preeminent Rated (2002 – 2017), Super Lawyers Northern California (2006 – 2017), Best Lawyers – Land Use & Zoning Law (2012 – 2018), Best Lawyers – Oakland Land Use and Zoning Law "Lawyer of the Year" (2014).



Shari Beth Libicki – Principal, Ramboll Environ

Shari Beth Libicki, PhD, is Ramboll Environ's global Air Quality Service Line Leader. She has over 25 years of chemical fate and transport experience, as applied to managing greenhouse gas (GHG) emissions and estimating air emissions and dispersion from chemical processes, landfills and new developments. Her experience includes providing technical expertise to entitlement and litigation teams, negotiating complex technical agreements and permits with agencies and assisting facilities with compliance programs. She is an expert on GHG evaluations for California Environmental Quality Act (CEQA) documents, and is at the forefront of developing regulations in California, having served on the Regional Targets Advisory Council. She has conducted extensive air quality regulatory assessments for New Source Review/Prevention of Significant Deterioration (NSR/PRD) permitting and compliance auditing. She has lectured widely on evaluating climate change impacts for new developments and estimating chemical exposure for risk assessments. She currently serves as a Lecturer in the Department of Chemical Engineering at Stanford University. She has a PhD and MS in Chemical Engineering from Stanford University, and a BSE in Chemical Engineering from the University of Michigan.



Christian Marsh – Partner, Downey Brand LLP

Christian Marsh is a partner in the San Francisco office of Downey Brand LLP. He advises public and private clients on natural resource, energy, and land use matters involving water rights, the public trust doctrine, endangered species, wetlands, California planning and zoning law, and NEPA and CEQA review. Among a variety of projects, he has entitled and permitted large-scale residential, commercial, and mixed-use real estate developments, ground and surface water supply projects, renewable energy and oil production and transmission facilities, port and waterfront developments, and public infrastructure and mining projects. Christian also conducts trial and appellate-level litigation in each of these areas. He successfully defended the county as its lead counsel in the six appeals challenging the Cadiz Valley Water Conservation, Storage, and Recovery Project and previously represented the prevailing parties in two successive CEQA cases before the California Supreme Court, *Save the Plastic Bag Coalition v. City of Manhattan Beach* and *Stockton Citizens for Sensible Planning v. City of Stockton*. Before practicing law, Christian served as special assistant in the U.S. Department of the Interior, where he advised the Deputy Secretary and the Assistant Secretary for Water & Science on endangered species and water policies.



Kathryn L. Oehlschlager – Partner, Downey Brand LLP

Kathryn Oehlschlager is a partner in the San Francisco office of Downey Brand, LLP, with a robust practice spanning environmental and land use compliance counselling, state and federal enforcement defense, and major litigation.

Kathryn advises public and private clients on compliance with all facets of environmental and land use law, including CEQA, NEPA, federal and state endangered species laws, contaminated site remediation, water quality and supply issues, and laws regulating solid and hazardous waste. She routinely represents clients in all aspects of the CEQA project review process, including preparation, review, and analysis of negative declarations, draft environmental impact reports, from investigation and remediation through the entitlement process and redevelopment. Kathryn routinely represents her clients in administrative proceedings and has tried numerous traditional civil and mandamus cases in state and federal courts across the state.

Kathryn received her J.D., cum laude, from the University of California, Hastings College of the Law and her bachelor's degree from the University of California, Los Angeles.



Todd A. Williams – Partner, Wendel, Rosen, Black & Dean LLP

Todd Williams is a partner at Wendel Rosen and Chair of its Land Use Practice Group. Todd represents clients in a broad spectrum of land use, real estate and environmental matters concerning both administrative entitlement proceedings and land use litigation. Todd works with public and private clients, including landowners and developers of residential, infill, commercial, mixed use and industrial projects, as well as local agencies, on matters concerning development entitlement processing and local government approvals; CEQA litigation and compliance; planning and zoning law advice; and real property litigation.

Todd has appeared before trial and appellate courts on matters regarding CEQA, the State Planning and Zoning Law, the Subdivision Map Act, local zoning laws, historic preservation, the Coastal Act, and the Williamson Act among others. Todd is a frequent speaker and writer on land use issues, with a particular emphasis on CEQA. He has been selected for inclusion in Northern California's Super Lawyers magazine since 2010.

Todd received his J.D. from the University of California, Hastings College of the Law where he was an editor for the Hastings Law Journal. During law school, he served as an extern for the Hon. Marilyn Hall Patel in the U.S. District Court for the Northern District of California. He earned his bachelor's degree from UCLA. Prior to becoming a lawyer, Todd worked as a sports writer covering college football and basketball, and the 1994 World Cup.

CASE SUMMARIES

Banning Ranch Conservancy v. City of Newport Beach (2017) 2 Cal.5th 918

On March 30, 2017 the California Supreme Court issued a unanimous opinion, authored by Justice Carol Corrigan, invalidating an EIR for the coastal development at Banning Ranch that had been approved by the City of Newport Beach. Despite the fact that the EIR addressed in detail the project's physical impacts on wetlands and sensitive habitats, the Court nevertheless held that it failed to adequately disclose and consider the controversy surrounding the potential presence of Environmentally Sensitive Habitat Areas (ESHA) under the Coastal Act. This decision falls within a growing line of cases mandating inclusion of non-CEQA regulatory requirements within the confines of the CEQA environmental review process, and doing so in a manner that places ever greater burdens on lead agencies and EIR preparers.

Banning Ranch is a 400-acre tract of largely undeveloped property within both the City's sphere of influence and California's coastal zone, and thus requires a coastal development permit under the Coastal Act. Because the Banning Ranch area had been excluded from the City's local coastal program, however, the Coastal Commission remained the sole permitting authority under the Coastal Act. Under the Coastal Act and the City's own coastal plan, areas qualifying as ESHA receive special protection and "shall be protected against any significant disruption of habitat values" except for those uses "dependent on those resources." Further, the City's General Plan included a provision requiring the City to "[w]ork with appropriate state and federal agencies to identify wetlands and habitats to be preserved and/or restored and those on which development will be permitted."

In 2008, the project applicant submitted a proposal for development of a residential and commercial village, which included a survey report identifying potential ESHA. The notice of EIR preparation stated that the project included areas that "may be" defined as ESHA and would require a coastal development permit. There was other evidence in the record regarding the possibility of ESHA onsite, including previous reports on ESHA within a key access roadway and extensive comments submitted by the public and Coastal Commission on the need to identify and evaluate ESHA. Instead of attempting to delineate or otherwise evaluate those sensitive and habitat areas that might be treated as ESHA, the City in its Final EIR

acknowledged the identification of two possible ESHA onsite, but stated that “no conclusions of ESHA can and will be made by the City at this time as part of the EIR process that would in any way bind the Coastal Commission or elucidate on the Coastal Commission’s ultimate conclusions [sic].”

Banning Ranch Conservancy filed suit, urging that the EIR did not adequately disclose or analyze impacts and mitigation measures with respect to ESHA and that the City violated its obligation under the General Plan to work with the Coastal Commission to identify areas to be protected from development. The trial court disagreed with petitioner regarding the EIR’s treatment of ESHA, but granted the writ petition regarding the City’s failure to meet its obligations under the General Plan. The Fourth Appellate District reversed in part, ruling for the City on all grounds. The Fourth District affirmed that the General Plan did not require the City to work with the Coastal Commission before project approval and that CEQA did not compel the City to “prognosticate as to the likelihood of ESHA determinations and coastal development permit approval.” The Fourth District then denied petitioner’s claim regarding inconsistency with the City’s General Plan, concluding that post-CEQA consultation with the Coastal Commission would have satisfied the General Plan policy requiring consultation in the coastal development permitting process. The California Supreme Court granted review.

Treating this as a procedural issue reviewed as a matter of law, the Supreme Court found the City’s decision to forgo consideration of ESHA in the EIR was “untenable.” CEQA, the Court stated, “sets out a fundamental policy requiring local agencies to ‘integrate the requirements of this division with planning and environmental review procedures otherwise required by law or by local practice so that all those procedures, to the maximum feasible extent, run concurrently, rather than consecutively.’” (Citing Pub. Resources Code, § 21003(a) and Guidelines, § 15080.) The Court further stated that an EIR must also: (1) “propose and evaluate mitigation and alternatives that ‘avoid or substantially lessen’ significant effects”; (2) “lay out any competing views put forward by the lead agency and other interested agencies”; and (3) address “in detail” any “major environmental issues raised” in public comments.

The Court found that by “openly declar[ing] that it was omitting any consideration of potential ESHA from the EIR,” the City “ignored its obligation to integrate CEQA review with the requirements of the Coastal Act, and gave little consideration to the Coastal Commission’s needs.” The Court emphasized that, “[b]y definition, projects with substantial impacts in the coastal zone are regionally significant.” (Citing Guidelines, § 15206(b)(4)(C).) The Court acknowledged that while a lead agency is not required to make a “legal” ESHA determination in an EIR, “it must discuss potential ESHA and their ramifications for mitigation measures and alternatives when there is credible evidence that ESHA might be present on a project site.” The Court determined that the City’s failure to discuss ESHA requirements and associated impacts “resulted in inadequate evaluation of project alternatives and mitigation measures [and] [t]he public was deprived of a full understanding of the environmental issues raised by the Banning Ranch project proposal.” As such, the Court held that the City had prejudicially abused its discretion.

The Court, however, noted that invalidation of an EIR would not always be required where regulatory information is omitted. Failure to include specific information is only prejudicial where its absence substantially impairs the EIR’s informational function, and the determination regarding prejudice is subject to the “rule of reason”: “Other regulations may be complex. Their application may be uncertain. Practical difficulties with interagency coordination may arise at the EIR stage. Courts must be careful not to second-guess good faith efforts to coordinate environmental review.”

***Center for Biological Diversity v. California Department of Fish and Wildlife* (2015) 62 Cal.4th 204**

In a 5-2 decision, the California Supreme Court reversed the judgment of the Court of Appeal, which had upheld the EIS/EIR for two natural resources plans for the controversial Newhall Ranch development project – which, at 20,885 dwellings and extensive commercial and other uses on 12,000 acres is one of the largest land use development projects ever proposed in California. The Supreme Court approved the EIS/EIR’s methodology analyzing the significance of the project’s greenhouse gas

(GHG) emissions in terms of reductions from “business as usual” (BAU) emissions consistent with AB 32’s statewide reductions mandate, rather than against some absolute numeric limit above the project site’s “baseline” emissions; however, it held the GHG analysis lacked supporting substantial evidence and a cogent explanation correlating the project-specific reductions to AB 32’s mandated state-wide reductions so as to demonstrate consistency with the latter’s goals under the approved methodology.

The Court also held the EIS/EIR violated Fish & Game Code § 5515’s prohibition on the taking of “fully protected” fish species by including mitigation measures providing for the collection and relocation by USFWS of the unarmored three spine stickleback.

Finally, the Court held on the particular facts presented that certain issues raised by plaintiffs during an optional public comment period on the Final EIS/EIR were timely raised so as to sufficiently exhaust administrative remedies under Pub. Resources Code § 21177(a).

***Cleveland National Forest Foundation v. San Diego Association of Governments* (2017) 3 Cal.5th 497**

In a 6-1 decision, the California Supreme Court held that the San Diego Association of Governments’ (SANDAG) 2011 EIR for its Regional Transportation Plan/Sustainable Communities Strategy (RTP/SCS) issued pursuant to SB 375 did not violate CEQA by not explicitly analyzing the consistency of projected 2050 GHG emissions under the plan with the goals of a 2005 Executive Order (No. S-3-05) issued by then-Governor Arnold Schwarzenegger.

The EIR analyzed the significance of the RTP’s regional GHG emissions over the 40-year plan horizon using three “thresholds” or “measures” of significance – GHG-1, GHG-2, and GHG-3 – which it applied to years 2020, 2035 and 2050. GHG-1 compared projected total regional emissions in those years to 2010 baseline emissions and found decreased omissions for 2020 but increased emissions constituting significant impacts for 2035 and 2050. GHG-2 compared projected regional emissions from cars and light trucks for same years to projected regional emissions meeting SB 375’s mandated reduction targets for that narrower category, finding CARB targets would be met in 2020 and 2035, while making no 2050 determination because CARB had not set a target for that year. GHG-3 made a qualitative comparison of consistency of projected regional emissions with CARB’s Scoping Plan and SANDAG’s own Climate Action Strategy (CAS) and found consistency.

The parties did not dispute that SANDAG’s long-range RTP was required to analyze 2050 GHG emissions impacts; that the 2005 EO lacked the force of a binding legal mandate on SANDAG; and that the 2011 RTP’s project GHG emission increases from 2020 through 2050 constituted significant (and, in SANDAG’s analysis, unavoidable) impacts. The majority held the EIR did not obscure the existence or conceptual significance of the 2005 EO’s 2050 statewide emissions reduction target – 80% below 1990 levels – and also made clear that target is part of the regulatory setting and repeatedly mentioned it in explaining why it did not use it as a measure of significance. In upholding this aspect of the 2011 RTP EIR, which had been superseded by an updated 2015 RTP/SCS and related unchallenged EIR that did contain a 2005 EO consistency analysis, the Court repeatedly emphasized the narrowness of its holding on the discrete issue under review, the evolving nature of the science and regulatory scheme addressing GHG emissions and analysis, and that it expressed no opinion on other deficiencies the Court of Appeal found in the EIR, such as failures to adequately consider VMT-reducing alternatives and mitigation measures. (Justice Cuellar dissented and would have held the EIR inadequate as an informational document with respect to the issue under review.)

***East Sacramento Partnerships for a Livable City v. City of Sacramento* (2016) 5 Cal.App.5th 281**

Cities charged with preparing EIRs for proposed projects often look to their general plans and other adopted policies to set thresholds of significance for assessing environmental impacts. A lead agency’s discretion to select a particular significance threshold has long been afforded deference under CEQA’s

“substantial evidence” standard of review. Potential impacts assessed under a general plan-based significance threshold have similarly enjoyed deferential review under the substantial evidence standard. However, in *East Sacramento Partnerships for a Livable City v. City of Sacramento* (2016) 5 Cal.App.5th 281, as modified on denial of rehearing, the Third Appellate District appears to have relied on the less deferential “fair argument” standard in holding that compliance with a general plan policy does not conclusively establish there is no significant environmental impact. In so holding, the court found that the City of Sacramento (“the City”) failed to adequately address the traffic impacts related to a development project.

Following publication of the *East Sacramento* decision, requests for depublication were filed with the California Supreme Court. Although the Supreme Court denied those requests, the weight of appellate authority still strongly favors application of the substantial evidence standard of review in this context. For this reason, the *East Sacramento* description of the governing legal standards is an outlier of little precedential value to the extent it is cited for the proposition that fair argument review may be applied to an EIR.

The underlying project involved a 328-unit residential development (“Project”) on an approximately 49-acre infill site located in the City of Sacramento. The City certified an EIR which found that all project-specific and cumulative impacts could be mitigated to a less than significant level. A neighborhood group, East Sacramento Partnership for a Livable City (“ESPLC”), filed a petition for writ of mandate challenging the development and alleging a number of CEQA violations. The trial court denied the petition in its entirety. On appeal, ESPLC raised five alleged CEQA violations, of which the Court of Appeal found merit in only one: that the City’s use of a general plan policy as a threshold of significance resulted in an inadequate analysis of the Project’s traffic impacts.

The general plan policy at issue—Mobility Element Policy M 1.2.2—allows for flexible Level of Service (“LOS”) standards depending on geographic area. It allows LOS F conditions (i.e., congested, “stop and go” traffic) in the “core area” during peak hours, but generally requires that LOS E (roadway at traffic capacity) be maintained in multi-modal districts and LOS D (roadway approaching capacity) be maintained in all other areas. Using this policy as a significance threshold, the EIR found no significant traffic impacts in the core area, even though several intersections in that area would operate at LOS F (under cumulative plus project conditions), and similar changes to LOS conditions outside the downtown-midtown area were deemed to be significant impacts that required mitigation.

The Third District found fault in the City’s reliance on this significance threshold and held the EIR’s traffic impacts analysis to be deficient on that basis. Specifically, the court held that compliance with a general plan policy does not, by itself, “insulate a project from the EIR requirement, where it may be *fairly argued* that the project will generate significant environmental effects.” In reaching this conclusion, the Third District’s analysis muddled the distinction between the ‘substantial evidence’ and ‘fair argument’ standards of review.

In the opinion, the court initially set forth the proper standard of review in the EIR context: whether the lead agency’s decision is supported by substantial evidence, with reasonable doubts resolved in favor of the agency. But the court then reviewed the City’s significance threshold for the traffic impact analysis under a line of appellate decisions that apply the “fair argument” standard to a lead agency’s initial determination regarding whether to prepare an EIR. Namely, under the fair argument standard, a project requires preparation of an EIR, rather than a mitigated negative declaration, whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impacts. However, a long line of CEQA cases articulates that the fair argument standard does not apply after the lead agency has elected to prepare an EIR.

Here, the Third District may actually have applied the substantial evidence standard of review, or determined that the standard of review did not make a difference to the result. Regardless, the opinion as drafted, even after the court modified it upon denial of rehearing, is difficult to parse and ultimately blurs

the distinction between substantial evidence review and fair argument review, which is otherwise very clear in the corpus of CEQA case law.

***Friends of the College of San Mateo Gardens v. San Mateo County Community College District* (2017) 11 Cal.App.5th 596**

On remand from the California Supreme Court, the Court of Appeal again held Appellant San Mateo Community College District's ("District") Addendum to an MND to be inadequate under CEQA for its modified project to demolish its Building 20 complex, which was formerly slated for renovation. Acknowledging its earlier error in applying the arbitrary "new project" test now rejected by the Supreme Court, the Court of Appeal held substantial evidence supported the District's factual determination that the prior MND retained informational value. However, the District erred in using an Addendum because "major revisions" to the prior MND were required. This was because Petitioner made a fair argument that the project modification may cause a previously unstudied significant *aesthetic* impact from removal of substantial portions of the gardens around Building 20.

***Mission Bay Alliance v. Office of Community Investment & Infrastructure* (2016) 6 Cal.App.5th 160.**

This case involves the approval of a new arena for the Golden State Warriors in Mission Bay. A citizens group challenged the City and County of San Francisco's certification of an EIR for construction of the arena and adjacent facilities (18,500 seat stadium, two 11-story office and retail buildings, parking and open space) in the Mission Bay South redevelopment plan area. In 2015, Governor Brown certified the project as an "environmental leadership development project" thereby qualifying it for expedited environmental review and litigation. The City prepared a supplemental EIR ("SEIR") for the project which was based on a program EIR adopted for Mission Bay in 1998.

The challengers ("MBA") raised numerous issues of claimed inadequacy: (1) certain environmental issues were improperly "scoped-out" of the SEIR and there was a fair argument of potentially significant impacts; (2) mitigation requiring the Warriors to "work with" transit agencies to address traffic impacts was legally inadequate; (3) inclusion of the Muni Transit Service Plan in the project description, rather than as mitigation, prevented the consideration of other potential mitigation measures (citing *Lotus v. Dept. of Transportation* (2014) 223 Cal.App.4th 645); (4) the City's use of an "ambient plus increment" noise threshold improperly disregarded noise impacts; and (5) the SEIR failed to quantify GHG emissions and rely on a qualitative standard of consistency with the City's GHG strategy was legally deficient.

The trial court denied the petition, and the First District Court of Appeal affirmed the decision on the following grounds:

(1) The substantial evidence standard of review was proper, because the City made a determination that the project was consistent with a prior program EIR, while identifying the specific issues that warranted more detailed environmental review, consistent with CEQA Guidelines section 15168. The court found these determinations were supported by substantial evidence and rejected MBA's claim that the City's determination of the scope of the supplemental review should be reviewed under the less deferential fair argument standard.

(2) The mitigation that required the Warriors to "work with" the transit agencies was adequate, since the adopted transportation management plan included specific performance standards and substantial evidence supported the conclusion that the mitigation will "actually be implemented as a condition of development." The SEIR's analysis of other impact areas was also found to be adequate.

(3) The *Lotus* case was inapplicable. The court found that, unlike the *Lotus* environmental document (which that court found included mitigation measures disguised as project feature), the SEIR

fully disclosed the traffic and transit impacts of the project, and analyzed both – with and without – the Muni Transit Service Plan under the same threshold to determine significance.

(4) The noise analysis was not deficient because the SEIR incorporated a smaller incremental threshold for high ambient noise levels. The court found that the cumulative analysis expressly addressed the issue that plaintiffs raised and fully described the noise impacts on human health.

(5) The SEIR's reliance on compliance with an adopted GHG reduction strategy was consistent with both CEQA Guidelines section 15064.4 (which grants agencies discretion in determining the proper significance threshold for a given project), and did not run afoul of the Supreme Court's holding in *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 219. The SEIR's significance standard for GHG emissions was based on compliance with the City's strategy for reducing greenhouse gas emissions. The City's strategy (adopted in 2010) is based on the CEQA Guidelines and the BAAQMD's interpretation of those Guidelines. The strategy contains emission reduction targets and 42 specific regulations for reducing emissions from new projects. (BAAQMD had determined the City's strategy measures met or exceeded BAAQMD's own recommendations.)

The SEIR assessed the project's compliance with the GHG strategy, but did not include a quantitative analysis of the project's projected GHG emissions. MBA argued that CEQA requires emissions be quantified, but the court disagreed, holding that the project's compliance with the City's GHG strategy was sufficient to support a finding of no significant impact. Though quantification of GHG emissions is one way to assess the impacts of GHG emissions, in *Center for Biological Diversity*, the Supreme Court identified other "potential pathways" for compliance, including following a regulatory program with a performance-based methodology for reducing GHG emissions. Moreover, CEQA Guidelines section 15183.5(b) states that an agency can determine a project's GHG emissions will not have a cumulatively considerable effect if it will comply with a preexisting mitigation program. Here, the project was found to meet the requirements of the City's strategy which supported the SEIR's finding that the project's GHG impacts would not be significant.

***Residents Against Specific Plan 380 v. County of Riverside* (2017) 9 Cal.App.5th 941**

The Court of Appeal affirmed the trial court's judgment denying a writ petition, and rejected numerous CEQA challenges to Riverside County's approval of an EIR for Specific Plan 380 (SP 380), a 200-acre master-planned, mixed-use community in the County's French Valley Region. Most of the Appellant group's unsuccessful arguments were procedural in nature, and failed with their erroneous position as to the timing of project approval.

The draft and final EIRs evaluated a version of SP 380 dividing the site into eight planning areas and describing the nature, density and intensity of likely allowed uses in each. Except for certain construction air emissions and noise impacts, the FEIR concluded all plan impacts would be less than significant with mitigation. The FEIR's responses to comments explained that the County did not require certain SCAQMD-recommended air quality mitigations because the applicant did not anticipate the reasonable availability during construction of the recommended Tier 3 and 4 equipment. They also explained why County rejected certain energy-related mitigations recommended by the City of Temecula as unnecessary in light of its adoption of other measures. County's Planning Commission suggested and real party proposed responsive revisions to four of the planning areas that would (according to the County's environmental consultant) not change the project footprint, but would somewhat reduce its scale, and to some extent a number of impacts while not changing others. The Commission accordingly concluded recirculation was unnecessary and recommended approval of the modified SP 380 to the Board of Supervisors.

The Board considered the revised SP 380 and recommended further revisions to staff, which revised several planning areas and merged two into one (for a new total of seven) to move denser

development away from the project's western and southern edges (and adjacent low density residential development). These revisions did not change the project footprint or alter the number of residential units or amount of allowable commercial square footage; County's environmental consultant therefore again concluded they would not cause new significant impacts, would reduce the severity of some impacts, were not amenable to feasible alternatives or mitigation measures, and did not trigger recirculation. The Board voted to tentatively approve the modified SP 380, and staff finalized the plan modifications and brought the matter back to the Board to certify the FEIR, finally approve the plan and related legislative approvals, and adopt a MMRP and statement of overriding considerations at a later date.

The Court of Appeal applied the deferential "substantial evidence" standard of review to County's factual findings and decision not to recirculate. The Board rejected Appellant's argument that the Board improperly approved the project before making substantial revisions to SP 380 and all required CEQA findings, because its tentative approval was not a final approval committing it to a definite course of action. Technical errors in the NOD's project description were not prejudicial because Appellant brought a timely challenge to the actually approved version of SP 380. County's decision not to recirculate was supported by substantial evidence as the new information added to the EIR was not "significant," i.e., did not deprive the public of a meaningful opportunity to comment on a substantial adverse effect or feasible mitigation measure. The project footprint did not change. The Court also rejected Appellant's "scope of analysis" arguments under a deferential substantial evidence standard of review, and held the County properly "limit[ed] analysis to the proposed and likely development while imposing restrictions that would limit the scope of potential changes to the development plan." While not required to respond to late comments at all, the County's responses to comments adequately explained its reasons not to require the rejected mitigation measures.

San Diegans for Open Government v. City of San Diego (2016) 6 Cal.App.5th 995.

The City of San Diego planning staff reviewed a developer's proposed design changes to a previously approved mixed-use project and determined that the project, as amended, was in substantial conformance with the conditions and requirements of the approved permit and, therefore, no further CEQA compliance was required. This staff-level review was known as a "substantial conformance review" or "SCR." The project was part of a master plan approved in 1997 pursuant to a program EIR that was intended to "provide a comprehensive single environmental document" that would allow the City to carry out the entire project. The development permit was amended in 2000 and the City adopted an addendum to the EIR. In 2002, the City increased density in the master plan area and adopted a mitigated negative declaration. In 2012, the City granted subsequent approvals for development in a portion of the master plan area, relying on the EIR, addendum and MND, and noting that future changes would require an SCR process. The developer applied for an SCR in 2013 to add a walkway, eliminate a level of parking, reduce some bicycle spaces, increase building height by five feet and change the residential unit mix (but not the unit count). Staff issued an SCR that the proposal substantially conformed to the previously-approved project and no further CEQA analysis was needed. Plaintiffs, two local public interest group, appealed the SCR to the City's Planning Commission which upheld staff's conclusion. The City rejected a request to appeal the matter to the City Council.

The sole issue on appeal was whether the Plaintiffs were entitled to an administrative appeal of the SCR to the City Council. Plaintiffs sued and made the following arguments: (1) they were entitled to an administrative appeal under Public Resources Code section 21151(c), requiring agencies to accept appeals of CEQA determinations made by non-elected decision making bodies; (2) the decision to approve the modified project was discretionary, thus entitling them to an appeal to the City Council; and/or (3) the local ordinance provides for an appeal of environmental determinations.

The trial court denied the petition and the appellate court affirmed. It held that the City was not obligated to allow plaintiffs to appeal the decision. First, it reasoned that nothing in the CEQA Guidelines supports the notion that section 21151(c) applies to review of a project that merely confirms a previous CEQA determination still applies. The court found that the SCR was not a determination that a project “is not subject to [CEQA]” that would have brought it within the ambit of 21151(c), and that such a determination occurs during preliminary review of a discretionary permit, prior to an EIR or initial study, citing CEQA Guidelines section 15060. The SCR confirmed that the project remained subject to mitigation measures contained in the approved CEQA documents. Second, it found that the discretionary nature of a decision is not sufficient on its own to establish a right to an administrative appeal. Finally, the court held that the SCR was not an “environmental determination” as defined in the City code (and which provided an appeal to the Council) because it did not certify an environmental impact report, adopt a mitigated negative declaration, or determine that a project was exempt from CEQA.

Sierra Club v. County of Sonoma (2017) 11 Cal.App.5th 11

Plaintiffs Sierra Club and others (Appellants) filed a writ petition challenging a vineyard development permit issued by the Sonoma County Agricultural Commissioner authorizing the Ohlson Ranch to develop a 54-acre vineyard in remote western Sonoma County. The Commissioner determined the permit, which was issued under the County’s Grading, Drainage, and Vineyard and Orchard Site Development Ordinance (VESCO) was a ministerial approval exempt from CEQA, and Appellants challenged this determination, arguing that VESCO contained vague, discretion-conferring provisions that rendered VESCO permits subject to CEQA.

The trial court denied the writ and the Court of Appeal affirmed. Under VESCO, the Commissioner’s consideration of the permit application was “confined by a series of finely detailed and very specific regulations.” Appellants failed to show the Commissioner erred in determining the approval was ministerial because most of VESCO’s provisions that potentially conferred discretion did not apply to the Ohlson Ranch project, and Appellants failed to show those that might apply conferred the ability to mitigate potential environmental impacts to any meaningful degree. The Court held that the determination of what is ministerial is most appropriately made by the public agency based on analysis of its own laws, and that “actions by a local agency are discretionary when they require the exercise of the administrator’s subjective judgment and are ministerial when they are taken under regulations that allow for little or no exercise of such judgment.” The case law applies a “functional test” that focuses on whether an agency has discretion to require project changes that would mitigate environmental consequences an EIR might reveal. Further, “[t]he relevant question in evaluating whether ... a particular project [approval] was discretionary is not whether the regulations granted the local agency some discretion in the abstract, but whether the regulations granted the agency discretion regarding the particular project.”

In holding that Appellants failed to show VESCO conferred such relevant discretion with respect to the Ohlson Ranch permit, the Court pointed out that some provisions invoked by Appellants were facially inapplicable to the project (e.g., those concerning watercourses, lakes and trees, which features were absent from the property), some were excluded by the Commissioner as inapplicable, and some applied only to post-approval operations and played no role in permit issuance. The three potentially applicable requirements (concerning wetlands setbacks, storm water diversion, and use of natural drainage features) were not shown to confer meaningful discretion sufficient to trigger CEQA review, nor did the applicant’s voluntary acceptance of conditions or the Commissioner’s requests for additional information and requests for corrections and clarifications in the application.

***The Committee for Re-Evaluation of the T-Line Loop v. San Francisco Municipal Transportation Agency* (2016) 6 Cal.App.5th 1237.**

In 1998, the San Francisco certified an EIR for the addition of a new light rail line to connect the southeastern portion of the City to the rest of San Francisco, included a portion of the project called the Initial Operating Segment (“IOS”). Over the next decade, portions of the IOS were constructed, but the “Loop” was not fully constructed due to budget constraints. In 2013, the San Francisco MTA (“Muni”) received approval of a federal grant to complete construction of the “Loop,” consisting of 900 feet of track. Muni consulted with the City planning staff who determined and concurred that the 1998 EIR provided sufficient CEQA review of the project. In 2014, the City determined that, despite developments in the area of the “Loop,” no additional CEQA review was required.

In 2014, Muni approved a contract to complete construction of the “Loop” and the plaintiffs filed suit arguing: (1) the 1998 EIR did not sufficiently cover construction of the “Loop,” and, thus, the court should apply the fair argument standard of review for CEQA compliance and review Muni’s decision under Public Resources Code section 21151; and (2) even if it did, supplemental review of the existing 2014 conditions should have been completed. The trial court denied the petition and plaintiffs appealed.

The First District Court of Appeal affirmed. Citing *Friends of College of San Mateo Gardens v. San Mateo Community College District* (2016) 1 Cal.5th 937, and Public Resources Code section 21166, the court of appeal found that the substantial evidence standard of review applies to judicial review of the City’s determination that the 1998 EIR was sufficient and no supplemental EIR was needed.¹ The court also found that substantial evidence supported the agency’s conclusion that the EIR retained informational value in that the “Loop” project was analyzed as part of the IOS in the 1998 EIR. The court also found that substantial evidence supported the conclusion that there had been no substantial changes in circumstances that would require a supplemental EIR. Thus, the court upheld the City’s decision to rely on the 1998 EIR.

In addition, it held that plaintiffs’ claim that the analysis of the “Loop” in the 1998 EIR was inadequate was time-barred pursuant to Public Resources Code section 21167.2. As to the question of whether supplemental review was required, the court also found the plaintiffs’ arguments were meritless. It reasoned that prior case law cited by plaintiffs that supported their position involved prior program or plan EIRs, while this matter involved a project-level EIR. As such, the court found that: (1) substantial evidence in the record supported the City’s decision not complete supplemental review; and (2) the delay between the 1998 EIR and the 2014 construction was not a substantial change to the project necessary to trigger supplemental analysis.

¹ In *Friends of the College of San Mateo Gardens*, the California Supreme Court held that a decision of whether or not a proposed activity was a new project or within the scope of a prior CEQA document was predominately a factual question to be made by the decision-making body, not a reviewing court, and that an agency’s decision in such an instance would be examined under the substantial evidence standard of review.

Bay Planning Coalition

THE 2017 CEQA UPDATE IS GENEROUSLY
SUPPORTED BY

PRESIDENT'S CLUB



EXPERT BRIEFING SERIES SPONSORS

