

**Summary of Published Appellate Opinions Involving CEQA
January 2013 – January 2014**

[current as of January 6, 2014; recent decisions may not be final]

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DEFINITION OF “PROJECT”

Neighbors for Fair Planning v. City and County of San Francisco (2013) 217 Cal.App.4th 540

The First District rejected a claim that a city violated CEQA by committing to a community center/affordable housing project prior to certifying an EIR.

San Francisco certified an EIR and approved a community center and affordable housing project. Neighbors opposed the project because they believed it was too large for the site. In the subsequent litigation, the neighbors argued the City’s CEQA process was a sham exercise because the city had already committed to the project. The trial court rejected this argument. The neighbors appealed.

The Court’s analysis focused on applying the test for “approval” of a project adopted by the California Supreme Court in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116. Under that test, the Court must determine whether, as a matter of law, the agency has taken actions such that, “as a practical matter, the agency has committed itself to the project as a whole or to any particular features, so as to effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered, including the alternative of not going forward with the project.” (45 Cal.4th at p. 139.)

The neighbors argued that, under the *Save Tara* test, the city “pre-approved” the project before completing the CEQA process. In particular:

- (1) The city loaned the project \$788K. The loan provided money for legal expenses, administrative overhead, design work, and environmental review. The Court concluded, however, that providing money for such pre-development work did not constitute “approval.” The money was for pre-development activities, not to construct the project itself. The loan stated the city was not committed to the project. The city’s ability to recoup the loan did not depend on approving the project; rather, the loan was secured by the property, and financial information showed the center had the wherewithal to pay the money back even if the project did not go forward.
- (2) As a condition of accepting the loan, the center agreed to be subject to a deed of trust requiring the site to be used for affordable housing. This commitment was not enough, by itself, to constitute “approval.”
- (3) The project relied on a density bonus under Government Code section 65915. To qualify for this bonus, the city had to approve a special use district increasing the maximum height of buildings on the site from 40 feet to 55 feet. A member of the Board of Supervisors introduced an ordinance to make this change. The Board ultimately approved the ordinance. The neighbors argued the Supervisor’s introduction of the ordinance for Board consideration was legislative action that itself constituted “approval.” The Court rejected this argument, noting that only a majority of the Board could approve an ordinance.
- (4) The record included notes from meetings, during which city staff stated the Supervisor supported the project. Internal e-mails suggested the Mayor’s office was involved in moving the proposal forward. Other documents consisted of flyers and e-mails seeking to rally support; these flyers and e-mails, however, were sent by the center, not by the

city. Under the *Save Tara* test, these isolated indications of support did not amount to approval.

City of Irvine v. County of Orange (2013) 221 Cal.App.4th 846

The Fourth District ruled that a county's approval of an application for state funding to expand a jail facility did not amount to "approval" of a "project" and, for this reason, the county did not need to complete the CEQA process prior to adopting a resolution directing county staff to apply for the money.

The county operates the "Musick Jail Facility." The jail is overcrowded. The county Board of Supervisors approved a resolution directing county staff to submit an application to the State for funding under Assembly Bill 900, which provides money to local jurisdictions to expand such facilities. The application stated the county would comply with CEQA prior to accepting any funding awarded by the State. The city sued, arguing the county should have completed the CEQA process before directing staff to submit the application. The trial court denied the petition. The city appealed.

The county argued the lawsuit was moot base on events that occurred after the city filed the lawsuit. While the lawsuit was wending its way through the courts, the State approved the county's application and conditionally awarded funds to the county; the county released a draft supplemental EIR covering, among other things, its plans to expand the jail; and the county certified the EIR and approved the expansion plan. The county argued the lawsuit was moot because the county had now completed the environmental review process. The Court of Appeal disagreed, concluding that it could still provide the city with effective relief by directing the county to vacate its approval of the application for funding.

There was no dispute that the jail expansion was a "project." The city argued, however, that the county should have completed the CEQA process before it approved submitting the application for AB 900 funding, citing *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116. According to the Court, under the *Save Tara* test, "[t]he critical question is whether the totality of the circumstances surrounding the public agency's action has effectively committed the agency to the project even though it has not provided all approvals or entitlements necessary to proceed." Advocating or having esteem for a proposal is not, by itself, determinative; the issue is instead whether, based on all the facts, the agency has committed itself as a practical matter.

The city argued that, in view of the public nature of the project, the test ought to be whether the agency's action has given "impetus" to a project. The Court rejected this test, concluding that the key issue was whether the agency's decision "effectively preclude[d]" the agency from considering alternatives or mitigation measures. Under this test, the board's decision did not amount to "approval" of a "project." Specifically:

- The AB 900 process made clear that, even if approved by the State, the award of funding would only be "conditional." There was no guaranteed that the State would actually receive the funds; rather, the conditional award only meant that the agency was qualified to move forward with the process.
- Under that process, the county was the "lead agency" for CEQA purposes. AB 900 did not limit the county's discretion regarding alternatives or mitigation measures, but instead affirmed the county's lead role.

- The State’s request for applications did not require the local agency to provide documentation of CEQA compliance until roughly a year *after* the agency received the conditional award. Indeed, the State’s application process established a prompt deadline that could not be met if the local agency had to complete the CEQA process before it even submitted an application.
- Nothing in the application, or in the AB 900 funding process, required the county to move forward with the jail expansion. “At most, [the application] permitted the [c]ounty to explore the possibility of using state funds to expand the Musick [f]acility.”

The Court noted that the county had previously applied for, and received a conditional grant of, an earlier phase of AB 900 money, but the county had decided not to move ahead with expanding the Musick facility at that time. These events showed that, in submitting an application, the county was not committed to expanding the jail.

The city argued the county had dedicated substantial resources to the expansion plan – so much so that the county had effectively committed to the project. The city also pointed to the high level of detail provided in the application. The Court rejected these arguments, holding that neither rose to the level of “commitment” required to constitute “approval” under the *Save Tara* test.

STATUTORY AND CATEGORICAL EXEMPTIONS

Concerned Dublin Citizens v. City of Dublin (2013) 214 Cal.App.4th 1301

The First District upheld a city’s reliance on a statutory exemption applicable to residential projects that are consistent with a specific plan for which the city certified an EIR.

In 2002, the City of Dublin certified a program EIR and approved the “Eastern Dublin Specific Plan.” The specific plan authorized a high-density, mixed-use, transit-oriented project adjacent to a Bay Area Rapid Transit station. The EIR analyzed impacts of full build-out of the specific plan, analyzed alternatives, and identified mitigation measures. The 2002 specific plan included land-use designations for the parcel at issue in the litigation. The parcel was designated for up to 405 high-density residential units and up to 25,000 square feet of retail space.

In 2011, AvalonBay submitted a proposal to develop the parcel. The project included 505 apartment units, a leasing center, a fitness center, two parking structures, and on-street parking spaces. The plan did not include retail uses. AvalonBay asked the city to amend the plan to reallocate 100 residential units from elsewhere in the specific plan area to this parcel. The city found the project exempt from CEQA under Government Code section 65457 and approved the proposal. The petitioners sued. The trial court denied the petition. The petitioners appealed.

Government Code section 65457, subdivision (a), provides a statutory exemption for residential projects consistent with a specific plan for which an EIR was certified. “... [T]o qualify for the section 65457 exemption, the project must be for residential development, it must implement and be consistent with a specific plan for which an environmental impact report previously has been certified, and the qualification contained in the final sentence must not apply, i.e., either a supplemental EIR must not be required by Public Resources Code section 21166 or such a supplemental EIR must already have been prepared and certified.” (*Id.* at p. 1311.) The court held the “substantial evidence” test applied to the city’s findings concerning the applicability of the exemption.

The petitioners argued the project did not qualify for the exemption because the underlying zoning authorized up to 25,000 square feet of retail uses; for this reason, the petitioner reasoned, the project was not exclusively “residential development” as required by section 65457. The Court of Appeal disagreed. AvalonBay’s project consisted entirely of residential units and ancillary uses. Even if AvalonBay could later seek to convert a portion of the project to retail uses, that would require a separate discretionary approval by the city. The fact that the zoning authorized mixed uses did not alter the purely residential character of AvalonBay’s project.

The petitioners argued the project was inconsistent with the 2002 specific plan; petitioners argued that the specific plan called for “mixed use,” so the project also had to be mixed use. The Court disagreed, noting that the specific plan did not *require* commercial uses on this particular parcel; moreover, the specific plan could retain its mixed-use character even if this particular site contained only residential uses.

The petitioners argued that, because the 2002 EIR was a “program EIR,” the city could not now shift gears and rely on Government Code section 65457. The Court disagreed, noting that CEQA Guidelines section 15168, which addresses the use of program EIRs in evaluating later activities, does not mandate a particular approach towards environmental review in evaluating later projects within the scope of a certified program EIR; that latter review could, therefore, consist of a determination that the project was statutorily exempt.

The petitioners argued that the city erred by failing to perform supplemental review pursuant to Public Resources Code section 21166. First, the petitioners argued the shift of 100 residential units to this site represented a significant change in the specific plan. The specific plan, however, authorized reallocating residential units within the plan area; thus, “[s]hifting 100 units to a different location within the transit center is not a significant change” because “the total number of residential units was not increased.”

Second, the petitioners argued significant new information regarding greenhouse gas (“GHG”) emissions had come to light since the city certified the EIR in 2002. The petitioners cited thresholds adopted by the Bay Area Air Quality Management District (“BAAQMD”) in 2010. The Court noted that BAAQMD’s 2010 thresholds had been suspended due to separate litigation. Even if the 2010 thresholds remained valid, they did not apply retroactively. Finally, GHG impacts were not “new”; the issue was known, and had been debated and regulated, since the early 1990s. The petitioners argued the 2010 thresholds were necessarily “new” because they did not exist in 2002, when the city certified the 2002 EIR. The Court was unmoved. The 2002 EIR analyzed the specific plan’s impact on air quality; the GHG issue was known at the time; and the issue could have been addressed. Under such circumstances, substantial evidence supported the city’s decision not to prepare a supplemental EIR.

Save the Plastic Bag Coalition v. County of Marin (2013) 218 Cal.App.4th 209

The First District upheld Marin County’s adoption of an ordinance banning plastic shopping bags based on categorical exemptions.

In 2011, Marin County adopted an ordinance banning certain retail businesses from dispensing plastic bags. The ordinance also required retailers to charge five cents per paper bag. The ordinance applied in unincorporated areas of the county and affected approximately 40 retailers. Among other things, the county relied on a master environmental assessment prepared by Green

Cities California, which reported that up to two-thirds of the District of Columbia’s consumers shifted to reusable bags after the district imposed a plastic bag ban combined with a five-cent charge for paper bags. In adopting the ordinance, Marin County determined the ordinance was exempt from CEQA review under the categorical exemptions set forth in CEQA Guidelines sections 15307 (class 7) and 15308 (class 8). Generally, classes 7 and 8 consist of actions taken by regulatory agencies as authorized by state law or local ordinance to assure the maintenance, restoration, or enhancement of a natural resource. Save the Plastic Bag Coalition sued, arguing the county should have prepared an EIR. The trial court denied the petition. The coalition appealed.

The Court of Appeal affirmed. In its view, the coalition’s challenge in this case was weaker than its unsuccessful challenge in *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155. The Court puzzled over the coalition’s unsupported contention that the county could not apply a categorical exemption to the ordinance as a legislative action. The Court also held that the ordinance withstood even the less deferential standard of review regarding whether the use of a categorical exemption was precluded by unusual circumstances.

The coalition argued the *Manhattan Beach* decision stands for the proposition that CEQA requires an EIR for any plastic bag ban in (1) a city or county larger than Manhattan Beach, and (2) smaller cities and counties based on cumulative impacts. The Court rejected the coalition’s argument based on its view that the Supreme Court “simply recognized there may be circumstances when more comprehensive environmental review will be required if . . . a plastic bag ban will result in a significant increase in paper bag use.”

The Court noted that Marin County’s ban would likely result in an even smaller increase in paper bag use than Manhattan Beach’s ban. First, the county’s ordinance only applied to about 40 stores, far fewer than over 200 affected stores in Manhattan Beach. Second, the county ordinance included a charge for paper bags, whereas the Manhattan Beach ban did not, thus increasing the incentive for consumers to switch to reusable bags. If anything, these differences reinforced the conclusion that the environmental impacts of the county’s ordinance would be insignificant.

The coalition argued the Class 7 and Class 8 exemptions are available only to regulatory agencies implementing regulations as authorized by preexisting state law or ordinance. The Court disagreed. The Court found that the county properly exercised its police powers under the California Constitution. Because the coalition failed to directly address whether substantial evidence supported the exemptions, the coalition waived that issue.

Save the Plastic Bag Coalition v. City and County of San Francisco (2013) – Cal.App.4th – [slip op. dated Dec. 10, 2013, ordered published Jan. 3, 2014]

The First District Court of Appeal ruled that San Francisco did not violate CEQA in relying on two categorical exemptions to adopt an ordinance regulating single-use shopping bags.

In February 2012, the City and County of San Francisco adopted an ordinance extending to all retail stores existing restrictions on providing check-out bags, imposing a new 10-cent charge for single-use check-out bags, prohibiting the use of non-compostable plastic bags, and establishing an outreach and education program. The city relied on the “Class 7” and “Class 8” categorical exemptions. The coalition sued. The trial court denied the petition. The coalition appealed.

The coalition did not dispute that there was substantial evidence supporting the city’s conclusion that the ordinance fell within the Class 7 and Class 8 exemptions. The coalition argued,

however, that the Supreme Court’s decision in *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155 precluded a city larger than Manhattan Beach from relying on a categorical exemption to adopt such an ordinance. The Court found that the coalition’s reliance on this case was “perplexing,” given that the Supreme Court had upheld Manhattan Beach’s adoption of a similar ordinance based on a negative declaration. Nothing in the Supreme Court’s decision held, or implied, that broader environmental review would be required in the event a larger city considered such a ban.

The coalition argued the city’s decision to adopt the ordinance was a “legislative” action, and thus not within the scope of the Class 7 and Class 8 categorical exemptions, which apply to “regulatory actions.” The court disagreed, noting that legislative bodies can, and often do, perform regulatory functions.

The coalition argued that, due to “unusual circumstances” (CEQA Guidelines, § 15300.2), the city could not rely on categorical exemptions. The coalition reasoned that, under *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, because the coalition submitted evidence of potential impacts from the ban, the burden shifted to the city to prove that no impacts would occur. The Court rejected the invocation of *Davidon Homes* because that case involved the so-called “common sense” exemption, rather than a categorical exemption. Thus, the party challenging an agency’s reliance on a categorical exemption had the burden to point to substantial evidence that a project fell within an exception to the categorical exemption. The Court noted a split in authority regarding whether the “fair argument” or “substantial evidence” standard applied, but did not take sides in the split because, even under the less deferential “fair argument” standard, the coalition failed to point to substantial evidence of a significant effect. That evidence consisted of global “life cycle” studies indicating that paper bags have greater impacts than plastic bags. Citing the Supreme Court’s decision in *Manhattan Beach*, however, the Court stated: “we are not convinced that global impact studies are a fair or accurate mechanism for measuring the impacts of a local ordinance which is clearly tailored to address the specific environmental goals of that specific locality.” Moreover, the ordinance did not target only plastic bags, but *all* single-use bags.

The coalition argued the 10-cent fee for providing a compostable paper bag served as “mitigation,” and thus precluded the use of a categorical exemption. The Court rejected this argument because the fee was an integral part of the project, rather than a mitigation measure designed to avoid a significant environmental effect of the ordinance.

Finally, the coalition argued that the ordinance was invalid because it was preempted by the Retail Food Code (Health & Saf. Code, § 113703 et seq.). The Court rejected this argument based on its determination that the Legislature did not intend to displace local authority to regulate single-use bags.

NEGATIVE DECLARATIONS

Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist. (2013) 215 Cal.App.4th 1013

The Fourth District Court struck down a negative declaration for a high school stadium lighting project, and ruled that the school district had to prepare an EIR to address parking impacts caused by nighttime football games.

In 2008, the voters approved a \$2.1 bond issue to build and rehabilitate schools in the San Diego area. In 2010, the district proposed to renovate the football field at an existing high school. The renovations included installing stadium lighting and a public address system. The district circulated an initial study and proposed mitigated negative declaration. In January 2011, the district adopted the negative declaration and approved the project. In May 2011, the district adopted a resolution exempting the project, and others, from the City of San Diego's zoning code under Government Code section 53094. The taxpayers sued. The trial court denied the petition. The taxpayers appealed.

The taxpayers argued the 2008 ballot measure did not list, and therefore did not authorize the use of bond proceeds for, new stadium lighting. Based on the language of the ballot measure, the Court agreed the ballot measure did not list stadium lighting in the projects to be funded. For this reason, bond proceeds could not be used for that purpose. The Court also held the taxpayers had standing to bring this claim.

The taxpayers argued the district violated CEQA by adopting a mitigated negative declaration. First, the taxpayers argued the initial study was too vague about the number of evening events that would occur. The initial study estimated that the installation of night lighting would result in up to 15 evening events per year. The initial study also stated "a few more events" – playoff games, practices and the like – were "possible." The Court held this description was not impermissibly vague. Nothing in CEQA required the district to place an express cap on nighttime events. If the district carried out substantially more events, it would have to perform supplemental review.

The taxpayers argued the record contained a "fair argument" the installation of field lighting would have a significant impact on the aesthetics of the neighborhood. The initial study included a technical report evaluating the glare that the lighting system would cause. That report estimated the luminescence caused by the lighting taking into account landscaping installed as part of the project, analyzed the extent to which the lighting would spill into adjacent neighborhoods, and applied a significance threshold in footcandles for measuring such glare. The technical report concluded the impact on neighborhoods would be insignificant due to the design of the system, the small number of events, and limits on the duration of events. The Court ruled the record did not contain a "fair argument," citing the report's conclusions regarding the de minimus nature of glare at nearby houses. In particular, the record did not contain substantial evidence that persons living nearby would be significantly deprived of sleep. The record contained general complaints from community members, but that was not enough to create a fair argument.

The taxpayers claimed the initial study did not provide an adequate description of the historic character of the surrounding neighborhood, or the extent to which the lighting system would negatively affect that character. The taxpayers cited draft maps and plans describing a proposed historic district adjacent to the high school. Nothing in the record indicated, however, that the city had ever designated the area as an historic district. Even if there were such a district, the record did not contain substantial evidence showing that installing the field lights would have a substantial adverse impact on its historic character.

The taxpayers argued the record contained a "fair argument" that the project would have an adverse impact on traffic and parking. The initial study included a traffic study; the study concluded the project's impacts on traffic and parking would be less than significant. The district received extensive comments from neighbors criticizing the study and expressing concern about the

neighborhood's inability to handle overflow parking in the evening. The Court ruled the district's approach to parking and traffic was inadequate. Specifically:

- The traffic study did not include any baseline information on attendance at the high school's existing, daytime games. That information was essential to support the district's estimate of attendance at evening games.
- Instead, the traffic study derived attendance estimates from five other high schools in the district. The methodology was defective, however, because it did not explain how those five schools were chosen, and why three other high schools in the area were excluded. The study also failed to correlate these estimates with actual game attendance data at the high school itself. The district also erred by estimating only average attendance, and by ignoring peak attendance.
- The study concluded that, although the project included increased parking at the school, there was still a shortfall of 174 parking spaces. The study concluded off-site, on-street parking would make up this shortfall. The study included no information on the reservoir of available off-street parking spaces in the neighborhood. Absent this information, the district erred by concluding that no significant parking impact would result.
- The district argued that the unavailability of parking is a social, not environmental, impact, citing *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656. The Court rejected this view, stating: "cars and other vehicles are physical objects that occupy space when driven and when parked. Therefore, whenever vehicles are driven or parked, they naturally must have some impact on the physical environment. The fact that a vehicle's impact may only be temporary (e.g., only so long as the vehicle remains parked) does not preclude it from having a physical impact on the environment around it. Therefore, as a general rule, we believe CEQA considers a project's impact on parking of vehicles to be a physical impact that could constitute a significant effect on the environment." In addition, the unavailability of adequate parking could lead to secondary effects, such as traffic congestion or air pollution.
- Observations from neighborhood residents constituted a "fair argument" that the project could have a significant impact on parking. Those comments included statements from residents that school parking was inadequate, that nighttime football games would exacerbate spillover into the neighborhood, and that residents would have to hunt for on-street parking as a result.
- The record contained a fair argument of significant traffic congestion. That evidence consisted of residents' letters pointing to significant traffic problems during past events at the stadium, particularly along narrow residential streets surrounding the stadium. The evidence indicated that attendance at night-time games would increase, suggesting that existing traffic problems would grow worse.

The Court ruled that, before moving forward with the project, the district had to prepare an EIR to examine parking and traffic issues.

The taxpayers argued the trial court erred by dismissing its claims under Government Code section 53094. That section provides that a school district may exempt itself from the local jurisdiction's zoning ordinance. The district adopted such a resolution for 12 proposed high school projects (including the project to install lights at the stadium). The Court held the taxpayers failed to

show the district provided inadequate notice of its intent to adopt this resolution. The district board's resolution was not overbroad in encompassing stadium lighting.

The taxpayers argued the district board's resolution under section 53094 was itself a "project" under CEQA. The Court disagreed, holding that the resolution was not a "project" because it did not commit the district to a definite course of action, or constitute "approval" of any of the 12 proposed high school projects listed in the resolution; rather, the sole impact of the resolution was to exempt the district from the city's zoning ordinance. Instead, the district could carry out its CEQA responsibilities in the context of each of the 12 listed projects (as it had done – albeit erroneously – for the stadium lighting project).

Finally, the taxpayers argued the trial court erred in dismissing their claim seeking injunctive relief to force the district to reconsider its approval of the stadium lighting project in light of the city's zoning ordinance. When the district adopted the exemption resolution, however, its effect was to enable the project to proceed, notwithstanding its inconsistency with the zoning ordinance. The Court of Appeal upheld the trial court's decision to dismiss that claim.

San Joaquin Raptor Rescue Center v. County of Merced (2013) 216 Cal.App.4th 1167

The Fifth District ruled that a county planning commission violated the Brown Act by failing to list, as a distinct item on its agenda, consideration of adopting a negative declaration for a proposed subdivision.

The county planning commission posted an agenda including as an item the proposed approval of a subdivision to divide 380 acres into nine parcels ranging in size from 40 to 54 acres. The agenda did not state the commission would also be considering whether to adopt a mitigated negative declaration in connection with that proposal. At the hearing, the commission both adopted the negative declaration and approved the subdivision. The center submitted a letter objecting to the failure to include the negative declaration on the commission's agenda, and asking the commission to "cure and correct" this error by rescinding and reconsidering its decision. The commission refused. The center appealed the commission's decision to the board of supervisors. While the appeal to the board was pending, the center sued, alleging violations of the Brown Act and CEQA. The county demurred on the ground that the agenda complied with the Brown Act, and the center had not exhausted its remedies on its CEQA claim.

While the demurrer was pending, the board granted the administrative appeal and directed the commission to reconsider the project based on a revised agenda that specifically referenced action on the negative declaration. The commission did so, re-adopted the negative declaration and reapproved the project. The county's reply memorandum in support of its demurrer pointed out these facts, and asked the trial court to dismiss because the alleged Brown Act violation had been cured. The trial court overruled the demurrer. Roughly five months later, "in an ironic reversal of positions," the center moved for a judicial determination that the county had "cured and corrected" the alleged Brown Act violation, and the county – which had previously taken that very position – opposed the motion. The reversal of the parties' position arose out of the potential for an award of attorneys' fees under a "catalyst" theory under Code of Civil Procedure section 1021.5. The trial court denied the motion.

Following a trial on the writ petition, the trial court ruled: (1) the commission violated the agenda requirements of the Brown Act, (2) following the board's direction, the commission cured

and corrected the Brown Act violation, and (3) the center’s CEQA claim was also corrected by the commission’s later action, and was therefore moot. The trial court’s judgment stated the center “prevailed” for purposes of costs and fees. The county appealed.

The Brown Act provides that, at least 72 hours before a regular meeting, a local agency’s decision-making body must “post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting. . . .” (Gov. Code, § 54954.2, subd. (a)(1).) The body cannot consider any item not listed on the agenda.

The Court of Appeal held the commission violated this requirement. The adoption of the mitigated negative declaration was a distinct “item of business,” and was not subsumed by consideration of the subdivision map itself. As an “individual item of business,” the adoption of the proposed mitigated negative declaration “had to be expressly disclosed on the agenda; it was not sufficient for the agenda to merely reference the project in general.” Here, the agenda made no mention of the mitigated negative declaration, or otherwise referred to CEQA. Based on this determination, the trial court’s judgment correctly concluded that the center prevailed and was entitled to bring a motion for attorneys’ fees.

Parker Shattuck Neighbors v. Berkeley City Council (2013) – Cal.App.4th – [slip op. dated November 7, 2013, ordered published December 4, 2013]

A developer proposed to construct three mixed use buildings on the site of an existing car dealership. Together, the buildings included 155 residential units and over 20,000 square feet of commercial space. The developer performed Phase I and II reports of conditions at the site in light of its historic use. The reports indicated that underground storage tanks had been present at the site, but removed. The reports also recommended removal of a remaining tank. Stained soil was encountered when the remaining tank was removed. The stained soil was excavated. Soil and groundwater testing showed that low levels of hazardous substances were present, but the concentrations were too low to require further cleanup. The site was placed on the “Cortese list” due to an apparent release from the removed tank, but the listing showed the Regional Board had closed that file, such that no further action was required.

In 2010, the City approved the project based on CEQA’s “infill exemption.” The neighbors sued. The trial court found the City had modified the project without a public hearing. The City rescinded its approval. The developer re-submitted an application. This time, the City did not rely on the infill exemption; instead, the City circulated an initial study and proposed mitigated negative declaration. With respect to hazardous materials, the initial study recommended mitigation measures to address soil or groundwater that might be encountered during construction. An expert retained by the neighbors submitted a letter stating these measures were insufficient to protect construction workers and future residents. The City adopted the MND and approved the project. The neighbors sued. The trial court denied the petition. The neighbors appealed.

The neighbors argued the record contained a “fair argument” requiring the preparation of an EIR because the MND contained inadequate measures to mitigate the impact of excavating soil from the site. According to the neighbors, this soil threatened the health of construction workers and future residents.

The City argued that CEQA did not require an analysis of this issue because, under *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455 and its progeny, CEQA focuses

on the impact of a project on the environment, not the impact of the existing environment on a project's future residents. The Court distinguished this line of cases because, in this instance, the project did involve a physical change in environmental conditions: the disturbance of contaminated soil. The Court therefore agreed with the neighbors that disturbing contaminated soil can be a "physical change" in the environment requiring CEQA review. The existence of contaminated soil was not enough. Once a project involved disturbance of that soil, however, the analysis needed to consider the impact of that disturbance.

The neighbors argued that an EIR was required for any site on the Cortese list, citing Public Resources Code section 21084, subdivision (d). That statute prohibits an agency from relying on a categorical exemption if the project site is included on this list. The Court rejected this argument, stating: "[W]hether a project should be categorically exempt from CEQA is different from whether the project involves a significant effect on the environment. . . . As the City points out, a site may stay on the Cortese list even after a determination is made that no further remediation is required, and this is precisely what occurred in this case." Thus, including a site on the Cortese list did not necessarily mean that development of the site would result in significant environmental effects.

The Court expressed skepticism regarding whether "adverse effects confined only to the people who build or reside in a project can ever suffice to render significant the effects of a physical change. In general, CEQA does not regulate environmental changes that do not affect the public at large." In this case, the "the only people identified by [the neighbors] who potentially will be impacted by the project are those who will work on or live at the project site." Although CEQA does require consideration of a project's effect on human health generally, CEQA does not require an analysis of impacts solely on those people who will work or reside at a site.

Ultimately, the Court concluded it did not need to decide whether the potential effects of a physical change that poses risk only to the people who will construct and reside in a project may ever be deemed significant. That was because even if CEQA does require such analysis, the neighbors did not cite a "fair argument" that such impacts would be significant in this case. In arguing that the record did contain a fair argument, the neighbors cited the comments submitted by their expert. The expert cited evidence from the Phase I and II reports, which indicated that certain volatile organic compounds were present at concentrations exceeding screening level criteria. The experts stated that the presence of VOCs at these levels threatened future residents because vapors could travel through the soil into the buildings, and recommended that the City perform a "vapor-intrusion study." This comment did not constitute a "fair argument" because it merely proposed further investigation.

The expert also stated workers would be harmed by coming into contact with VOCs at concentrations exceeding screening levels. These levels, however, did not exceed Regional Board standards for non-potable water, and the record contained no evidence that construction workers might actually be harmed.

The Court concluded that, "even if health risks confined to a project's construction workers and future residents could ever trigger CEQA review, substantial evidence was not identified in the record to create a fair argument that the disturbance of contaminated soil may have a significant effect on the environment."

ENVIRONMENTAL IMPACT REPORTS

Habitat and Watershed Caretakers v. City of Santa Cruz (2013) 213 Cal.App.4th 1277

The Sixth District ruled that an EIR prepared to analyze proposed amendments to a city's sphere of influence did not analyze a reasonable range of alternatives, because the EIR did not consider an alternative that would restrict water supplies to the area proposed for inclusion in the expanded sphere.

UC Santa Cruz adopted a Long Range Development Plan ("LRDP") calling for development of a "North Campus." The city and UC entered into an agreement to resolve various disputes about expansion of the campus. UC committed to develop on-campus housing, provided the city obtained approval from the Local Agency Formation Commission ("LAFCO") to expand the city's sphere of influence to include the North Campus area. LAFCO approval was needed for the city to provide water and sewer service to this area. (Gov. Code, § 56133.) The city applied to LAFCO for the sphere expansion, and UC applied to LAFCO for approval of a water/sewer contract with the city. The city prepared an EIR. The EIR identified one significant and unavoidable impact: the city had insufficient water to supply the North Campus during drought conditions. Other impacts, while significant, could be mitigated. The city certified the EIR. Habitat sued. The trial court denied the petition. Habitat appealed.

Habitat argued the EIR contained insufficient information regarding the availability of city water supplies to serve the North Campus, and the impacts of going forward with the project despite the insufficiency of those supplies. The Court disagreed. The EIR described the city's existing and projected water supply and demand, acknowledged the city's supplies were inadequate, and predicted the situation would get worse. That situation would exist with or without the North Campus; supplying water to the North Campus would simply make a bad situation slightly worse. The EIR disclosed the supply/demand imbalance, and the project's potential to exacerbate that imbalance. Ultimately, the city could impose cutbacks on water use. That remedy might be harsh, but the EIR did its job by disclosing that it might be necessary. Although Habitat argued the EIR should have analyzed the biological impacts of drawing more water from its existing sources, the Court noted that the city did not propose to increase its supplies; instead, the city would implement conservation or curtailments or develop a desalination facility.

Habitat argued the EIR did not disclose increased erosion that would occur in the watershed where the North Campus would be located. The Final EIR's discussion of erosion cited to erosion control measures that UC had to carry out under a permit issued by the Regional Water Quality Control Board. Habitat argued that discussion was insufficient because the Regional Board requirements were not in the EIR itself. The Court disagreed, holding that the discussion was sufficient to inform decisionmakers.

Habitat claimed the EIR was inadequate because the city did not include a delineation of wetlands. Mitigation required a pre-construction delineation, followed by avoidance or compensation. That sufficed. Similarly, substantial evidence supported the EIR's conclusions regarding off-campus growth the North Campus would induce.

Habitat argued the project description was flawed because the EIR stated that, under the settlement agreement, the city was required to provide the North Campus with water and sewer service. In fact, the agreement merely committed the city to apply to LAFCO for the sphere amendment, and for UC to request LAFCO to approve the contract for extraterritorial service. The

whole of the project included not merely the city's decision to propose a sphere amendment, but also UC's request for approval of extraterritorial service, and LAFCO's decision on both the proposal and the request. Taken together, they represented the "project" for CEQA purposes. The Draft EIR, however, stated only that the project's objective was to apply to LAFCO for a sphere amendment, as required by the city-UC agreement. According to the Court, that was insufficient, because that described only the nature of the project, not its underlying purpose. The Final EIR made clear, however, that the project's objective was to provide water and sewer service to the North Campus in order to trigger UC's obligations under the agreement. Thus, the Final EIR remedied the problem.

Habitat argued the range of alternatives analyzed in the EIR was too narrow because it did not include an alternative that would reduce the project's impact on the city's water supplies. The Court agreed. The EIR had ruled out any alternatives that deviated from the terms of the city-UC agreement, on the theory that the city was legally obliged to fulfill its obligations. But LAFCO was not a party to the agreement and, because LAFCO was a "responsible agency," the EIR had to provide an adequate analysis for LAFCO's purposes as well. The EIR did look at an alternative that consisted of modifying the sphere of influence's boundaries. But the EIR did not analyze a "reduced development" or "limited water" alternative. "Reduced development" did not need to be analyzed, since by statute LAFCO had no authority to regulate directly the use of land. (Gov. Code, § 56375.) The city had an insufficient basis, however, for ruling out a "limited water" alternative. Such an alternative would at least partly meet the city's objectives. The rationale for omitting it from analysis – that UC might simply shift development onto its Main Campus – was a matter of speculation. Moreover, although LAFCO could not regulate land use, it could adopt conditions that imposed limits on the amount of water supplied by the city to UC. "Because the draft EIR and the final EIR failed to discuss any feasible alternative, such as a limited-water alternative, that could avoid or lessen the significant environmental impact of the project on the city's water supply, the alternatives discussions in the draft EIR and the final EIR did not comply with CEQA."

The Court rejected the balance of Habitat's arguments. To wit:

- Mitigation measures to address water supply shortfalls during droughts, which were drawn from the LRDP and required water conservation and similar measures, were sufficiently specific.
- The city's CEQA findings were inadequate to the extent they touched on alternatives because, as noted above, the EIR did not analyze a reasonable range of alternatives. The attack on the city's findings, however, was entirely derivative of Habitat's other claims and were otherwise adequate.
- The city's statement of overriding considerations cited six reasons why the city approved the project, despite its significant and unavoidable water supply impact. Three of these reasons – helping UC implement the LRDP, and fulfilling the city's obligations under the city-UC agreement – were invalid. The others, however, were supported by substantial evidence. Because one reason was enough, three were plenty.

Save Cuyama Valley v. County of Santa Barbara (2013) 213 Cal.App.4th 1059

The Second District deferred to a county's formulation of significance thresholds to address the hydrologic impacts of a proposed sand and gravel mine, and upheld the EIR's analysis despite modest flaws.

A gravel mine operator applied to Santa Barbara County for a use permit to establish a sand and gravel mine and operating facility in the bed of the Cuyama River. The county certified an EIR and approved the project. A citizens' group sued, alleging the EIR was defective in various respects. The trial court denied the petition. The citizens appealed.

The Court of Appeal concluded the EIR was adequate and affirmed. Specifically:

- CEQA did not require the county to go through a formal process in order to fashion a "significance threshold" for the mine's hydrologic impacts. Nor did the county have to explain why its threshold deviated from CEQA Guidelines Appendix G.
- The EIR found the mine's hydrological impact on the river would be "minor." This impact consisted of creating a "sediment deficit" in river flows, which would result in scouring of the riverbed. The citizens argued the mine's impact, together with another existing mine in the riverbed, would be of such magnitude that it would necessarily be significant. Substantial evidence, however, supported the EIR's conclusion that the mine would not degrade the riverbed or result in headcutting. The fact that experts (including U.S. EPA and the citizens group's own expert) disagreed was not determinative, given that substantial evidence supported the EIR's conclusions.
- Mitigation measures aimed at these impacts were adequate. The measures required the applicant to monitor the site for headcutting or other degradation, and take corrective action if such degradation appeared to be developing. The measure was not too vague, and provided sufficient assurance that identified problems could be addressed by reconfiguring the mine.
- The EIR used a threshold of 31 acre-feet per year to determine the significance of the project's groundwater use. This threshold applied on both a project-specific and cumulative basis, and was derived from a thresholds adopted by the county in 1992. The EIR found the 1992 threshold remained valid. The Court saw nothing wrong with this approach.
- To protect water quality, the county adopted a condition of approval requiring the operator keep the bottom of any pits at least six feet above groundwater levels. Data showed groundwater levels varied from 40 to 110 feet below the ground. The operator proposed to excavate to a depth of 90 feet. The citizens argued this meant groundwater would necessarily be exposed. The EIR therefore erred in identifying this impact as insignificant. The Court agreed. The error was harmless, however, since the county still adopted a condition of approval requiring the operator to avoid exposing groundwater, regardless of the depth at which it was encountered.

Save Panoche Valley v. San Benito County (2013) 217 Cal.App.4th 503

The Sixth District upheld a county's decision to cancel Williamson Act contracts and to approve a use permit for a large solar facility.

A solar company proposed to construct a 4,885-acre solar farm in Panoche Valley in rural San Benito County. The valley is grazing land west of Interstate 5. The company applied for a use permit. Because some parcels were subject to Williamson Act contracts, the company also applied to the county to cancel the contracts. The county prepared an EIR. The EIR's analysis included a smaller alternative, encompassing roughly 3,202 acres; the alternative avoided land containing the highest concentrations of protected species. The county certified the EIR and approved the project. A coalition of environmental groups sued. The trial court denied the petition. The coalition appealed.

The coalition argued the county violated the Williamson Act when it approved cancellation of the agricultural preserve contracts. Under the act, an agency can approve cancellation only if the agency adopts certain findings, and substantial evidence supports those findings. The findings adopted by the county in this case included determinations that (1) other public concerns substantially outweigh the objectives of the Williamson Act, and (2) there is no proximate, non-contracted land that is both available and suitable for the proposed use.

For the first finding, the Court concluded that substantial evidence supported the county's finding that the public interest in renewable energy substantially outweighed the purpose of the Williamson Act. This evidence included Legislative findings and statutes committing the state to move towards renewable forms of energy. The solar farm incrementally advanced those goals. The company committed to removing the panels after the termination of the project, which would enable agricultural activities to resume.

For the second finding, the coalition argued that non-contracted land suitable for a solar farm was available nearby. This land, however, was located roughly 60 miles away, in Fresno and Kings Counties. The solar company had approached the owner to reach agreement to use this land, but no agreement had been reached. Some of the land was under Williamson Act contract. Taken together, these facts supported the Board of Supervisors' finding that no non-contracted, proximate land was available for use as a solar farm.

The coalition argued the county violated CEQA in adopting findings that the site in Fresno/Kings Counties was infeasible. The county had rejected this alternative site on the ground that it was located in different counties, and for this reason there was no way to know whether the counties would approve a solar farm there. Other evidence indicated that permitting the alternative site would take much longer to accomplish, that the site might not be available, and that San Benito County would not reap the jobs or other benefits that the project would provide if located in Panoche Valley. The Court concluded substantial evidence supported the county's finding. Under CEQA, that the alternative site is located outside the agency's boundaries is not determinative; nevertheless, "whether or not an alternative site is located within the boundaries of a [c]ounty is certainly a factor that may be considered when determining a project's feasibility. The fact that there was not only evidence that the [alternative site] was not within the boundaries of the [c]ounty's jurisdiction, but that there was a private party that possessed most of the lands, is ample evidence supporting the infeasibility of the [alternative site]."

The coalition challenged the EIR's analysis of biological impacts. The Court rejected this challenge. Although the California Department of Fish and Wildlife (CDFW) expressed concern about the potential for "take" of a listed lizard species, the county incorporated CDFW's recommendations into its adopted mitigation measures. These measures did not constitute impermissible deferral; rather, the measures called for pre-construction surveys for sensitive species, and described the actions that had to be taken (e.g., relocation, buffer zones) if sensitive species were

found. Other measures required the solar company to enhance habitat, and to record conservation easements, on nearby rangeland to compensate for the loss of habitat for federal listed species. CDFW had misgivings, but the record contained substantial evidence that the mitigation lands had high value for the target species, and that the adopted mitigation ratios would be sufficient to avoid impacts to these species.

The EIR concluded the project would result in the conversion of agricultural land. The county adopted a mitigation measure requiring the solar company to establish agricultural conservation easements on specified amounts of rangeland or high-value agricultural land. Another measure required the company to disassemble the solar farm and to restore the site at the end of the project's useful life. Another measure required the company to offset the loss of cattle grazing land by introducing sheep grazing. The coalition argued this measure was insufficient because it would not create additional agricultural land to compensate for what would be lost. The Court rejected this argument, stating that the county's obligation was not to "net out" the impact to agricultural land, but simply to reduce the impact to insignificant levels. The adopted measures did that.

Finally, the Court held that substantial evidence supported the county's findings concerning the effectiveness of mitigation measures, the infeasibility of alternatives, and extent to which the project would help California meet its renewable energy goals.

North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors (2013) 216 Cal.App.4th 614

The First District reversed a trial court ruling, and upheld an EIR for a proposed desalination plant. The Court held the EIR contained an adequate analysis of aesthetic and land-use impacts, and the district did not need to carry out additional biological studies simply because another agency complained about the district's methodology.

In 2003, the Marin Municipal Water District (district) proposed building a desalination plant adjacent to San Pablo Bay. The district carried out a pilot program, circulated draft and final EIRs, and, in 2009, certified the EIR and approved the project. The alliance sued. The trial court granted the petition. The district appealed.

The trial court had ruled the EIR was inadequate in ten respects. The Court of Appeal reversed the trial court on all ten issues. Specifically:

- The project included constructing three large water storage tanks on prominent ridge tops. The EIR concluded that one of these tanks would not have a significant visual impact due to the topography of the site. The Court ruled the EIR, which included visual simulations and other information about the site, supported this conclusion.
- This tank was located in an area designated as open space in the County General Plan. The EIR acknowledged the inconsistency of this use in an open-space area. To mitigate this impact, the district adopted a measure requiring the acquisition of an equal amount of open space elsewhere in the area. The Court upheld this measure.
- The EIR concluded the other two tanks, on a different ridge, would result in significant visual impacts that were unavoidable. The district committed to develop and implement a landscaping plan that "would identify success metrics such as survival and growth rates for

the plantings.” The Court found the measure provided sufficient information regarding the required contents of the landscaping plan.

- The EIR included an analysis of seismic risks to the plant. The analysis summarized seismic hazards in the area, and concluded compliance with building codes would address these hazards. That sufficed.
- The trial court had ruled the EIR did not contain an adequate discussion of the frequency of shock-chlorination treatments that would be used to clean the plant’s reverse-osmosis membranes, and the risks associated with these treatments. The EIR described the shock-chlorination process, its frequency, and measures that would be taken to avoid accidental releases. That was enough.
- The EIR included an analysis of the risk that marine organisms would become entrained at the plant’s pumps. As part of this analysis, the district performed sampling of marine life in San Pablo Bay. The California Department of Fish and Game and NOAA Fisheries had criticized this sampling as too sparse to estimate the plant’s impacts. The EIR had responded that the sampling was sufficient to support the district’s conclusion that entrainment impacts would not be significant. The Court held that this difference of opinion did not mean the EIR was inadequate. The Court also noted that this sampling was not the only data relied upon by the district to characterize the project’s impacts on marine life.
- The project’s intake would be located on a reconstructed existing pier. That required driving up to 75 concrete piles into the bay. To address noise impacts to aquatic species, the adopted a mitigation measure that required the district to consult with NOAA Fisheries and to install “bubble curtains” or similar devices if evidence emerged that the pile driving was harming fish. The Court upheld this measure.
- The trial court had ruled that the EIR’s discussion of energy impacts was inadequate because it did not discuss a particular alternative—the use of green energy credits to mitigate energy impacts. The Court of Appeal held, however, that because the EIR had found that the energy impacts would be insignificant, there was no requirement to discuss mitigation measures.
- The EIR’s greenhouse gas emissions analysis concluded that the project would not interfere with Marin County’s goal to reduce GHG emissions by 15 percent. In addition, the district committed to energy only from renewable sources. The Court held that no mitigation was required for GHG emissions because the EIR did not find this impact would be significant. Even so, the record contained substantial evidence showing the feasibility of adhering to this commitment.
- Finally, the Final EIR included an analysis of a new alternative, which combined conservation with increased imports importing additional water via pipeline from the Russian River in order to address the district’s projected shortfall in supply. The Court ruled the inclusion of this alternative did not trigger the need to recirculate the Draft EIR. The Draft EIR had already analyzed in detail an alternative focusing on increased conservation. The record also contained substantial evidence supporting the district’s conclusion that increased importation from the Russian River was infeasible.

The trial court had upheld the adequacy of the EIR on 19 other issues. The alliance did not file a cross appeal, however, so the Court of Appeal did not reach these other issues. The Court of Appeal remanded the matter to the trial court with directions to deny the petition.

Masonite Corporation v. County of Mendocino (2013) 218 Cal.App.4th 230

The First District ruled that an EIR was deficient for failing to consider the use of agricultural conservation easements and in-lieu fees to mitigate the conversion of farmland caused by a mining project.

In 2008, Granite Construction Company applied to Mendocino County for a conditional use permit to develop a sand and gravel quarry on 65.3 acres – 45 of them classified as “prime farmland” – approximately one mile north of Ukiah. Most of the site was cultivated as a vineyard. Granite proposed reclaiming the area as open space after the mining operations had ceased. Reclaiming the land for agriculture was infeasible. The EIR identified the permanent loss of prime farmland as a significant and unavoidable impact. The county certified the EIR, approved the project, and adopted a statement of overriding considerations. Masonite, an adjoining property owner, sued. The trial court denied the petition. Masonite appealed.

The EIR concluded, and the county found, that no mitigation was possible to offset the loss of 45 acres of prime farmland. Masonite submitted comments stating the impact could have been mitigated by the acquisition of conservation easements on offsite properties, or by paying an “in-lieu” fee to fund such acquisitions. The State Department of Conservation submitted comments stating that an agricultural easement would offset the loss of farmland. The department also noted that, because the loss of farmland is felt beyond just the surrounding area, comparable replacement land did not need to be adjacent to the site. The county responded that an easement was not legally feasible in this case because an easement addresses only the indirect and cumulative effects of farmland conversion, and does not replace on-site resources. According to the county, indirect and cumulative impacts of farmland conversion occur when a project affects neighboring agricultural uses by increasing the speculative land value and farming costs due to land use incompatibilities and nuisance problems. The county felt that this risk was absent here because the nearest active agricultural operation was across the Russian River (a natural barrier).

The Court ruled that, because the county had found the mitigation to be legally infeasible, the finding was subject to de novo review. According to the Court, an agency’s conclusion that mitigation is infeasible is entitled to deference under the substantial evidence standard if infeasibility is based on economic, environmental, social, and technological factors. In this case, “[b]ecause the County decided that [easements] were not a legally feasible means to mitigate the loss of farmland at the [p]roject site, it never investigated whether [easements] were economically feasible, and there is no evidence to review.”

The Court noted that, if agricultural lands were preserved through conservation easements at a 1:1 ratio, then at least half the agricultural land in the region would be preserved. Furthermore, the preservation of substitute resources would comport with the CEQA Guidelines’ definition of “mitigation” in section 15370, subdivision (e). Case law on the use of conservation easements as mitigation for biological resources, the common usage of agricultural easements as mitigation by local governments, and the Legislature’s policy to preserve agricultural land also influenced the court’s decision. The Court concluded that agricultural easements are legally feasible mitigation

measures. For this reason, the county had to explore the economic feasibility of such easements in a supplemental EIR.

The Court also required the county to consider the economic feasibility of in-lieu fees as an alternative to a conservation easement. The county had rejected the idea in the EIR as legally infeasible because the county's lack of a comprehensive farmland mitigation program legally precluded it from accepting in-lieu fees. The Court was unconvinced, noting that third parties were available that could accept the in-lieu fees for conservation programs, and then use those fees to buy easements.

Friends of Oroville v. City of Oroville (2013) 219 Cal.App.4th 832

The Third District ruled that an EIR prepared for a Wal-Mart "superstore" did not contain substantial evidence supporting the conclusion that the store's greenhouse gas emissions would be insignificant.

Wal-Mart proposed to replace an existing store with a new store of roughly double the size. The city prepared and certified an EIR, and approved the project. The "Friends" sued. The trial court denied the petition. The Court of Appeal reversed, publishing only the portion of its decision addressing claims related to the EIR's analysis of greenhouse gas ("GHG") emissions.

The city evaluated the project's GHG emissions to determine whether the project would "significantly hinder or delay California's ability to meet the reduction targets" established by AB 32. The Scoping Plan prepared by the California Air Resources Board ("CARB") to implement AB 32 called for reducing the State's GHG emissions by 30% from "business as usual" emissions by 2020, or roughly 10% from emissions in 2010 (when the city prepared the EIR). The EIR also analyzed the extent to which the project implemented mitigation measures recommended by CARB and the Attorney General.

The EIR estimated GHG emissions attributable to the project. Roughly two-thirds of these emissions would come from vehicles traveling to and from the site. Total emissions would be roughly 15,000 metric tons of carbon dioxide equivalents (CO₂e) per year. The EIR identified the recommended measures incorporated into the project (e.g., efficient lighting, landscaping, etc.). The EIR concluded the project's contribution to State-wide emissions would be miniscule – roughly 0.003% of State-wide emissions in 2004.

The court held that, while the city had discretion to use the AB 32 targets as a threshold, the record did not contain substantial evidence supporting the conclusion that the project would meet this standard. The problem was two-fold.

First, the EIR's focus on the project's relative contribution to State-wide CO₂e emissions – 0.003% – was "meaningless." "The relevant question to be addressed in the EIR is not the relative amount of GHG emitted by the [p]roject when compared with California's GHG emissions, but whether the [p]roject's GHG emissions should be considered significant in light of the threshold-of-significance standard of Assembly Bill 32, which seeks to cut about 30 percent from business-as-usual emission levels projected for 2020, or about 10 percent from 2010 levels."

Second, the EIR did not estimate emissions from the existing Wal-Mart. Nor did the EIR provide a quantitative or qualitative estimate of the reduction in GHG emissions that would occur due to the mitigation measures incorporated into the project. None of these measures pertained to

transportation-related emissions, even though two-thirds of the project's GHG emissions were attributable to transportation. Thus, the EIR "ignore[d] the elephant in the room – 68 percent of the [p]roject's GHG emissions come from motor vehicles." Although the traffic study suggested trip-generation rates would be reduced at a larger, integrated store, other portions of the study suggested the store would attract shoppers from a larger geographic area, such that there would be no reduction in vehicle miles travelled.

The court concluded that the record did not contain substantial evidence supporting the EIR's conclusion that the significance threshold for GHG emissions – compliance with AB 32's reduction targets – would be met.

San Diego Citizenry Group v. County of San Diego (2013) 219 Cal.App.4th 1

The Fourth District rejected a broad attack on an EIR certified by San Diego County to support the adoption of an ordinance allowing boutique wineries a "by right" permit in eastern portions of the county.

San Diego County wished to promote the development of boutique wineries. In 2006, the county board of supervisors began exploring ways to allow boutique wineries to expand and operate by right in order to simplify the permitting process. In 2008, the county adopted a mitigated negative declaration and approved an ordinance allowing boutique wineries in new zoning designations by right if on public roads. Wineries on private roads needed an administrative permit or private road maintenance agreement. The county repealed the ordinance and decided to prepare an EIR. In 2009, the county released a draft EIR. The EIR concluded the ordinance would cause 22 significant and unmitigated environmental impacts as a result of approving an unlimited number of future wineries by-right. These impacts fell within seven resources areas, including air quality, biological resources, cultural resources, hydrology and water quality, noise, transportation, and water supply/groundwater supply. In 2010, the county published a final EIR, approved the ordinance, and adopted a statement of overriding considerations. The "San Diego Citizenry Group" sued. The trial court denied the petition. Petitioner appealed.

Petitioner challenged the county's project objectives. Petitioner argued the county had erred by failing to make a "preliminary policy determination" regarding the objectives for the project, and the EIR improperly relied on these objectives when analyzing the feasibility of mitigation measures. The court disagreed, noting that the county included within the EIR a "statement of the objectives sought by the proposed project" in compliance with CEQA Guidelines section 15124. CEQA did not require such a preliminary determination; rather, CEQA authorized an agency to delegate to staff the task of preparing the EIR.

Petitioner argued the EIR was inadequate because it did not discuss "any 'additional' mitigation measures in 'meaningful detail.'" The court noted the petitioner did not identify any potentially feasible mitigation measures that the EIR omitted. The county was not required to engage in an extensive discussion of infeasible mitigation measures, including mitigation measures that are incompatible with the project's "core" objectives. Requiring the county to analyze the incorporation of mitigation measures or alternatives that would defeat a project's primary objectives would run contrary to CEQA's definition of "feasible."

Petitioner attacked the adequacy of the EIR's discussion of impacts to private roads caused by the ordinance because the EIR rejected a mitigating traffic measure previously adopted in 2008.

That measure had required wineries to obtain a permit or agreement for wineries located on private roads. The court concluded, however, that the county was not required to adopt the 2008 traffic measure simply because the county had adopted it in the past. Moreover, because the measure required a permit or agreement, it was inconsistent with a fundamental project objective: establishing a “by right” permitting system for boutique wineries. The county therefore had discretion to reject this measure.

Petitioner attacked the substance of the EIR on various grounds. Specifically:

- Focusing on potential future impacts to traffic, petitioner argued the EIR analysis was insufficient because the county did not use its “best efforts” to predict how many by-right wineries could be developed under the ordinance. The court disagreed, noting that the EIR did not “simply state that the level of development is unknown and then label each impact as significant without meaningful analysis or discussion.” The county based a prediction of future boutique winery development on the pattern of development of existing grape growers and wineries. The county had surveyed 26 existing wineries, 11 of which responded, with eight indicating an intention to convert to boutique wineries under the proposed ordinance. The final EIR analyzed the amount of traffic each new boutique winery would generate and determined the maximum concentration of wineries that could be developed. Thus, the final EIR adequately analyzed the project’s traffic impacts based on existing and anticipated development.
- Petitioner argued the EIR did not sufficiently identify project impacts to water supplies. The court disagreed, noting that the final EIR met the standard under *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412 that “a conceptual plan EIR, such as one for a general plan amendment to allow proposed development,” must identify “the likely source of water for new development, noting the uncertainties involved, and discussing measures being taken to address the situation in the foreseeable future.” The county collected survey data from wineries located in San Diego and Riverside counties to better estimate impacts on water supplies. That was sufficient.
- Petitioner argued the final EIR’s discussion of grading permits was “materially misleading” by suggesting that the requirement to obtain grading permits would mitigate a winery’s impacts. The court noted, however, that the EIR had not made such a claim.

Petitioner argued the board of supervisors’ statement of overriding considerations was invalid because the final EIR was deficient and did not provide a basis for the findings. The court disagreed. The EIR had relied on conservative assumptions and disclosed potential environmental impacts in an informative matter. The board therefore had discretion to rely on the EIR when it adopted the statement of overriding considerations.

Petitioner argued the ordinance was inconsistent with the county’s general plan. Specifically, the petitioner argued the ordinance allowed by-right wineries in environmentally constrained areas for which the general plan requires environmental review of development projects. The court found, however, that an EIR is not required to be consistent with a general plan; instead, the EIR must identify and discuss any such inconsistencies. The EIR in this case sufficiently discussed the alleged inconsistency, and petitioner did not meet its burden of proof to show that the county’s decision to exclude wineries from the environmentally constrained area provisions of the general plan was “unreasonable.”

Finally, the court ruled the trial court had erred when it ordered petitioner to reimburse the county for the cost of preparing certain transcripts for the record of proceedings. The disputed transcripts involved Planning Commission hearings on the proposed ordinance. The transcripts were prepared after the board adopted the ordinance. Public Resources Code section 21167.6, subdivision (e)(4), requires the party preparing the record to include transcripts or minutes “that were presented to the decisionmaking body prior to action on environmental documents or on the project.” In this case, the transcripts were not “presented to the [board]”; rather, they were prepared after the lawsuit was underway. For this reason, they were not a proper part of the record. The trial court had ordered petitioner to pay approximately \$6,000 for the costs of preparing these transcripts. The appellate court reduced the cost award by that amount.

Neighbors for Smart Rail v. Exposition Metro Line Construction Authority (2013) 57 Cal.4th 439

For the second time in three years, the California Supreme Court issued a decision addressing the lead agency’s discretion to rely on a “future baseline” against which to measure the impacts of a project in an EIR. The clarity of the decision is diminished by the fractured nature of the Court’s majority, concurring and dissenting opinions. Although six justices ruled in favor of the agency, they did so for different reasons. The lone dissenter’s rationale generally aligned with the three-justice lead opinion.

In 2007, the Exposition Metro Line Construction Authority (“authority”) commenced the CEQA process to construct the “Exposition Corridor Transit Project (Expo Phase 2).” The project involved constructing light-rail transit line from a station in Culver City to a terminus in Santa Monica. Expo Phase 2 project was designed to provide high-capacity transit service between the Westside area of Los Angeles and Santa Monica, creating an alternative to the area’s congested roadways. In 2010, the authority certified a final EIR and approved the project. “Neighbors” sued. The trial court denied the petition. The Court of Appeal affirmed. The Supreme Court granted a petition for review to address two issues: (1) the propriety of the EIR’s exclusive use of a “future conditions” baseline to assess the project’s impacts on traffic and air quality, and (2) the adequacy of mitigation measures for potentially significant spillover parking effects in areas near planned transit stations.

On the “baseline” issue, Justice Werdegar’s lead opinion provided an overview of leading CEQA cases that discuss the use of a future conditions baseline, paying special attention to *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, and *Sunnyvale West Neighborhood Association v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351. The lead opinion concluded that unusual aspects of a project or surrounding conditions can justify a departure from the “normal” use of an existing conditions baseline prescribed by CEQA Guidelines section 15125, subdivision (a). Thus, while lead agencies have the discretion to “omit an analysis of the project’s significant impacts on existing environmental conditions and substitute a baseline consisting of environmental conditions projected to exist in the future, the agency must justify its decision by showing an existing conditions analysis would be misleading or without informational value.” The Court explicitly disapproved *Sunnyvale West*, *supra*, 190 Cal.App.4th 1351, and *Madera Oversight Coalition v. County of Madera* (2011) 199 Cal.App.4th 48, insofar as they held that an agency can never employ the exclusive use of a future conditions baseline.

Justice Werdegar then proceeded to scrutinize the authority's exclusive use of a future baseline. The record showed that the authority commenced its CEQA analysis in 2007. The authority anticipated that the project would commence operations in 2015. The EIR used projected conditions in the year 2030, with and without the project, to analyze the project's traffic and air quality impacts. Justice Werdegar was untroubled by the decision to omit a "baseline 2007" discussion; after all, by the time the project commenced operations in 2015, those conditions would no longer exist, so it made little sense to analyze them. Justice Werdegar did not feel the same way, however, about the omission of a near-term (2015) analysis. The EIR's approach meant that the light rail line would be operational for 15 years, without any analysis or disclosure of what the project's impacts would be during this 15-year period. Justice Werdegar found that the record did not contain substantial evidence to support the decision to omit an analysis of project impacts on near-term (2015) conditions. Four justices agreed.

Justice Werdegar went on to find, however, that this omission was not prejudicial. Justice Werdegar parsed the EIR's traffic study, and noted "the lack of grounds to suppose the same analysis performed against existing . . . conditions would have produced any substantially different information." Justice Werdegar's opinion was carefully worded to limit the lead opinion's conclusion – that the EIR's failure to analyze the project's effects on existing traffic and air quality conditions had no prejudicial effect – to "these particular factual circumstances."

Justice Liu agreed with Justice Werdegar on all but the "prejudice" issue. Justice Liu concluded that the "EIR's failure to measure impacts against a baseline of existing conditions . . . deprive[d] the public of relevant information about the project."

Justice Werdegar closed with a short discussion of the adequacy of mitigation measures for spillover parking effects. The authority and the Metropolitan Transportation Authority (Metro) had adopted a series of measures proposed by the EIR to address the risk that communities would be overwhelmed by people using on-street parking near light-rail stations. The measures required monitoring on-street parking, Metro's financial and administrative assistance with appropriate permit parking programs, and Metro's commitment to work with local jurisdictions to decide on other options (time-restricted, metered, or shared parking arrangements) if necessary. Petitioner argued the record did not contain substantial evidence of the feasibility of this measure, citing *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1260-1262. The Court disagreed. While acknowledging that the authority and Metro "cannot guarantee local governments will cooperate to implement permit parking programs or other parking restrictions," the Court found that the record supported the conclusion that local municipalities "can and should" cooperate. All seven justices agreed.

Concurring and dissenting, Justice Baxter (joined by Chief Justice Cantil-Sakauye and Justice Chin) rejected the lead opinion's baseline analysis. According to Justice Baxter "an agency retains discretion to omit an analysis of a project's likely impacts with an existing conditions baseline, so long as the selected alternative of a projected future conditions baseline is supported by substantial evidence and results in a realistic impacts analysis that allows for informed decisionmaking and public participation." In this case, Justice Baxter found the authority "did not abuse its discretion in forgoing an existing conditions baseline in favor of a 2030 baseline," because substantial evidence supported this approach as a realistic baseline for analyzing the project's impacts. Justice Baxter criticized the lead opinion's heightened test as unsupported by the statute.

To tally up the outcome:

- All seven justices agreed the *Sunnyvale West* and *Madera Oversight* decisions were wrong in treating the “future baseline” issue as a question of law. All seven justices agreed that such claims are subject to the “substantial evidence” test. *Sunnyvale West* and *Madera Oversight* are no longer good law on this issue.
- Four justices (Werdegar, Kennard, Corrigan, Liu) agreed that an agency has discretion to use a “future baseline” in lieu of an “existing conditions” baseline, but only if the agency can muster substantial evidence to explain why an analysis based on “existing conditions” would be misleading or useless. Although this is a “substantial evidence” question, these four justices believe the agency has a heightened burden of proof to explain why a departure from the normal “existing conditions” approach is warranted.
- These same four justices applied this heightened burden to the authority and concluded that, in this case, the authority did not justify its decision to use a future 2030 baseline. They therefore ruled the EIR was flawed.
- Three of the four justices (Werdegar, Kennard, Corrigan) concluded the error was not prejudicial because, even if the EIR did not expressly focus on this information, near term (2015) traffic and air quality impacts could be teased out of the information included in the EIR, and those impacts would be no worse than they would be over the long term (2030).
- One justice (Liu) found this error prejudicial and would have struck down the EIR.
- Three justices (Baxter, Cantil-Sakauye, Chin) agreed that the use of a future baseline is subject to review for substantial evidence, but saw no reason to depart from the typical, deferential formulation of that test. Thus, if a lead agency reasonably believes that the baseline should reflect “future conditions,” then these justices would defer to that approach if substantial evidence supports it. They would not impose a further duty on the agency to explain itself.
- These same three judges concluded that, under the conventional “substantial evidence” standard of review, the authority’s EIR, and its exclusive use of a year 2030 baseline, was adequate. For this reason, these three justices did not reach the “prejudice” issue.
- In sum, there are four votes for Justice Werdegar’s heightened substantial evidence test for evaluating an agency’s use of a future baseline. As to the baseline issue, however, there are not four sure votes for anything else.
- All seven justices agreed the agencies’ “spillover parking” mitigation, and their “can and should” finding, was adequate.

South County Citizens for Smart Growth v. County of Nevada (2013) 221 Cal.App.4th 316

The Third District ruled that Nevada County did not need to recirculate a draft EIR for a proposed shopping center based on the county planning commission’s decision to endorse a staff-recommended alternative that emerged after the county published the final EIR.

In 2005, a developer filed an application to construct a small shopping center anchored by a grocery store. In 2007, the county released a draft EIR. In October 2008, the county released a final EIR that included comments on the draft EIR and responses to those comments. In January

2009, county staff recommended a modified version of the project in order to address traffic and air quality impacts that the EIR found to be “significant and unavoidable.” The staff recommendation capped commercial development, increased open space, disallowed fast food restaurants, and expanded a wetland buffer. The planning commission recommended that the county Board of Supervisors certify the EIR and approve the staff recommendation. Based on the commission’s recommendation, the developer devised two alternative redesigns that responded to staff’s proposal, albeit with some tweaks. Staff embraced the developer’s second redesign proposal. In May and June 2009, the planning commission concluded the EIR encompassed the second redesign, and recommended approval. In July 2009, at the outset of the Board of Supervisors’ hearing, Smart Growth’s counsel submitted a lengthy comment letter attacking the EIR. The county continued the hearing. In August 2009, the board certified the EIR and approved the project. The petitioner sued. The trial court denied the petition. In April 2011, the petitioner appealed.

First, Smart Growth argued the county violated CEQA by failing to prepare and recirculate a draft EIR to analyze the impacts of the “staff alternative.” According to Smart Growth, once the planning commission voted to recommend the staff alternative, the county had to recirculate the draft EIR, the failure to do so deprived the public of the opportunity to comment on a feasible alternative, and by not recirculating the draft EIR the county failed to proceed in the manner required by law.

The Court disagreed. According to the Court, the duty to recirculate arises only if the information is “significant new information,” and the agency’s determination whether the new information is “significant” will be upheld if supported by substantial evidence. Thus, “Smart Growth bears the burden of proving a double negative, that the County’s decision not to revise and recirculate the final EIR is not supported by substantial evidence. That is, Smart Growth must demonstrate that there is no substantial evidence to support a determination that the staff alternative was not significant new information. For the staff alternative to be significant new information, it must be feasible; it must be considerably different from other alternatives previously analyzed; it must clearly lessen the significant environmental impacts of the proposed project; and the project’s proponents must decline to adopt it. Smart Growth has the burden to demonstrate that there is no substantial evidence to support a negative finding on any of these factors in order to establish that the County abused its discretion in failing to recirculate the EIR.” (Citations omitted.)

The Court concluded that Smart Growth did not meet its burden to show that the staff alternative was considerably different from those already analyzed in the EIR. The EIR looked at four alternatives. Staff’s recommendation provided more open space than any of these alternatives, but that in itself was not enough to show that it was considerably different from those already analyzed in the EIR. Nor did Smart Growth explain how the staff alternative would clearly lessen the significant impacts of the project.

Second, Smart Growth argued the county violated CEQA by failing to adopt findings regarding the feasibility of the staff alternative. According to Smart Growth, once the planning commission found the staff alternative sufficiently feasible to recommend approval of the alternative to the board, the board had to either adopt the staff alternative or make findings setting forth the reasons why the staff alternative was not feasible. Again, the Court disagreed. Smart Growth did not argue, and thus conceded, that the draft EIR analyzed a reasonable range of alternatives. Under such circumstances, the board was not required to make an express finding of feasibility as to an alternative that emerged after the publication of the EIR.

Third, Smart Growth argued the county violated CEQA by relying on future, unapproved traffic improvements to conclude the project's traffic impacts would be insignificant. The road in question – Combie Road – was projected to operate at LOS F under its existing designation as a “major collector.” The county's traffic study determined that the road actually functioned as a “minor arterial” because it served as a thoroughfare through the area. Under this alternative functional designation, LOS was adequate. The Court ruled the county acted within its discretion in focusing on how the road actually functioned, rather than based on its formal designation. The record showed the county planned to widen Combie Road, and that the project was fully funded, lending further support to the County's decision to evaluate the road as a “minor arterial.” Because the analysis focused on the functioning of the road, rather than on future traffic improvements, the county was not obliged to condition the project on the future expansion of the roadway.

SUPPLEMENTAL REVIEW

Latinos Unidos de Napa v. City of Napa (2013) 221 Cal.App.4th 192

The First District ruled that “substantial evidence” supported the City of Napa's determination that, in amending its General Plan to increase densities at certain locations throughout the city, the impacts of those amendments fell within the scope of those disclosed in the program EIR certified by the city when it adopted its General Plan.

In 1998, the City of Napa certified a program EIR and approved a General Plan update. Beginning in 2008, the city embarked on proposed amendments to its Housing Element. The proposed amendments included amending the Land Use Element to increase the minimum residential densities in certain areas designated for mixed uses, and to increase the maximum permitted densities in certain other areas designated for multi-family residential uses. The net effect was to increase permitted density by 88 units. In May 2009, the city prepared an initial study to analyze the impacts of the amendments. The study concluded the impacts of the amendments would remain “within the scope” of the impacts identified in the 1998 General Plan EIR. In June 2009, the city received comments, including a letter from a traffic engineer, stating that a supplemental EIR was required to account for the additional density. The city responded to the comments, in which staff rejected the comments from the traffic engineer as “misleading and inaccurate.” In July 2009, the City Council adopted a finding that the amendments were within the scope of the 1998 EIR, and approved the amendments. The petitioner – an advocacy group focused on increasing affordable housing opportunities in the area – sued. The trial court denied the petition. The petitioner appealed.

The petitioner argued the “fair argument” standard of review applied to its claims, citing the First District's opinion in *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307. The city disagreed, arguing that its decision should be upheld if supported by “substantial evidence.” The Court agreed with the City that the “substantial evidence” test applied because the amendments addressed the same geographic area that was covered by the 1998 program EIR.

The petitioner argued the 1998 program EIR did not provide adequate coverage for the 2009 amendments, citing the comments submitted by the traffic engineer. The Court disagreed, characterizing the amendments as “limited,” and not authorizing any actual, physical development. The impacts of the 2009 amendments were a byproduct of increasing minimum or maximum densities in certain areas within the city. In particular, the amendments authorized an increase in 88

residential units. This increased density, however, was offset by two factors: (a) many of the projects approved by the city resulted in fewer units than the number allowed under the applicable General Plan designations – that is, they built out at less than the maximum permitted density; and (b) the city’s growth rate was slower than anticipated in the 1998 program EIR. As a result, the impacts of increasing density in 2009 remained “within the scope” of – that is, no greater than those disclosed in – the 1998 EIR. Under the substantial evidence test, the fact that the traffic engineer disagreed was immaterial, insofar as the city responded to these comments. The petitioner bore the burden of proof to show the absence of substantial evidence, and in this case the petitioner did not carry that burden.

CERTIFIED REGULATORY PROGRAMS

POET, LLC v. State Air Resources Board (2013) 217 Cal.App.4th 1214

The Fifth District struck down the California Air Resources Board’s approval of the nation’s first “low carbon fuel standard” regulations because CARB approved the regulations before it completed the CEQA process under its certified regulatory program. The Court allowed the regulations to remain in place, however, while the agency fixed the CEQA violations.

In April 2009, the California Air Resources Board adopted a resolution approving regulations establishing “low carbon fuel standards” (LCFS) for purposes of reducing the State’s greenhouse gas emissions, as required by the California Global Solutions Act of 2006 (Assembly Bill 32). The regulations consisted of “early action” aimed at reducing the carbon content of transportation fuels used in California. The resolution designated CARB’s executive officer as the “decision maker” assigned to respond to certain remaining environmental issues. The board gave the executive officer authority to modify and adopt the regulations, but did not provide the officer with the option of declining to implement them.

The plaintiffs in the case included POET, LLC, which produces corn ethanol in the Midwest. POET challenged the regulations, claiming CARB violated CEQA during the adoption process. The trial court denied the petition. The plaintiffs appealed.

As a threshold matter, the Court of Appeal concluded CARB’s actions were subject to CEQA. CARB contended that, because it operates a certified regulatory program, CARB is required to follow only the procedures set forth in regulatory program. The Court disagreed. Certified regulatory programs are exempt from CEQA’s procedural requirements regarding preparation of negative declarations and EIRs under Public Resources Code section 21080.5, which provides that a state agency’s preparation of environmental documents under its own regulatory program may serve as the functional equivalent of an EIR. The Court noted, however, that this exemption is narrow and such regulatory programs remain subject to “CEQA’s broad policy goals and substantive standards,” including the timing of environmental review and approval of projects.

The Court concluded that approval of the project under CEQA occurred when CARB’s decision-making body (the board) approved the resolution in April 2009. CARB argued approval did not occur until the executive officer took final action on the regulations the following year. The Court applied *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116 (*Save Tara*) as “the leading case regarding the application of the definition of ‘approval’ under CEQA Guidelines section 15352.” The *Save Tara* Court articulated a general test for determining the point at which agency action on a proposed project necessitates CEQA review. *Save Tara* involved a condition requiring post-approval

EIR certification in an agreement to convey property. The Fifth District extended the *Save Tara* test to “projects undertaken by public agencies under certified regulatory programs.” The Court held that the board’s 2009 approval of the LCFS regulations constituted “approval,” based on the clear language in numerous board documents, as well as the practical effects of the action.

From there, the Court concluded CARB violated CEQA because it did not complete the environmental review process under its certified regulatory program until after the board had adopted the resolution. This “premature approval” decided a controversial issue involving carbon intensity values assigned to ethanol produced from corn based on the indirect effects of converting land to corn production. CARB, in delegating subsequent environmental review authority to the executive officer, had denied the officer the authority to modify this aspect of the regulations. That violated CEQA.

The Court also held CARB “violated a fundamental policy of CEQA” by improperly delegating responsibility for completing the environmental review process to its executive officer. “For an environmental review document to serve CEQA’s basic purpose of informing governmental decision makers about environmental issues, that document must be reviewed and considered by the same person or group of persons who make the decision to approve or disapprove the project at issue.” This principle “applies with equal force whether the environmental review document is an EIR or documentation is prepared under a certified regulatory program.”

The Court further held that CARB violated CEQA when it deferred formulating mitigation measures for NO_x emissions from biodiesel fuel. Courts have recognized an exception to the general rule prohibiting the deferral of the formulation of mitigation measures under CEQA Guidelines section 15126.4, subdivision (a)(1)(B). Under this exception, an agency must commit to “specific performance criteria for evaluating the efficacy of the measures implemented.” In this case, the Court held that CARB’s statement that future rules would “establish specifications to ensure there is no increase in NO_x” did not provide objective performance criteria.

The Court directed the trial court to issue a writ of mandate compelling CARB to set aside its approval of the LCSF regulations. The Court also exercised its discretion under Public Resources Code section 21168.9, however, and allowed the LCSF program to remain in place pending CARB’s “diligent” efforts to comply with CEQA. The Court concluded that “the environment will be given greater protection” if the program were left in place while CARB addresses the problems identified by the Court.

LITIGATION

Alliance for the Protection of the Auburn Community Environment v. County of Placer (2013) 215 Cal.App.4th 25 [statute of limitations]

The Third District ruled that a petitioner that missed the CEQA statute of limitations was not entitled to relief under Code of Civil Procedure section 473.

Placer County certified an EIR and approved a project proposed by Bohemia Properties. The project consisted of a 155,000 square-foot building. The county approved the project on September 28, 2010, and filed a notice of determination (“NOD”) the following day. The statute of limitations for a CEQA lawsuit expired 30 days later, on October 29, 2010. The Alliance filed a CEQA petition on November 1, 2010. Bohemia demurred. The Alliance responded by filing a

motion for relief under Code of Civil Procedure section 473 based on mistake or excusable neglect. The trial court declined to grant relief and dismissed the lawsuit. The Alliance appealed.

The Alliance argued the trial court should have granted relief under section 473. The Alliance claimed the late filing resulted from miscommunication between the attorney and its filing service. By the time the service understood the need to file on October 29, it was too late, and the clerk's office had closed.

The Court of Appeal ruled dismissal was proper under *Maynard v. Brandon* (2005) 36 Cal.4th 364, in which the Supreme Court stated that relief under section 473 is not available for dismissals based on missing the statute of limitations, where the statute is cast in mandatory terms.

Here, the 30-day statute of limitations was established by Public Resources Code section 21167. The statute does not provide for extending the limitations period on a showing of good cause. No published decision had held that Code of Civil Procedure section 473 provides relief from a litigant's failure to file its petition within the 30-day limitations period under Public Resources Code section 21167. Under the statute, such relief was unavailable.

May v. City of Milpitas (2013) 217 Cal.App.4th 1307 [statute of limitations]

The Sixth District concluded a CEQA action was barred by the 30-day statute of limitations established by Government Code section 65457; CEQA's 35-day statute for exempt projects did not apply.

In 2008, the city certified a program EIR for its "Transit Area Specific Plan." In 2011, a 732-unit condominium project was proposed within the area covered by the specific plan. On November 1, 2011, the city adopted a resolution approving the condominium project. The city's resolution stated the project was exempt from CEQA review because the project was consistent with the 2008 specific plan. On November 3, 2011, the city filed a Notice of Exemption for the project. On December 7, 2011, petitioners sued. The city and developer demurred on the ground that the action was time-barred by the 30-day statute of limitations under Government Code section 65457, subdivision (b), and CEQA Guidelines section 15182. The trial court sustained the demurrer. The petitioners appealed.

The Court concluded the 30-day statute of limitations in Government Code section 65457 applied. Enacted in 1984, Government Code section 65457 provides an exemption from CEQA for residential development projects that are consistent with a specific plan for which an EIR was certified after January 1, 1980. The exemption is qualified; it provides that a supplemental EIR for the specific plan must be prepared if any event listed in Public Resources Code section 21166 triggers the need for supplemental review. Under subdivision (b) of Government Code section 65457, where a public agency approves a project using the exemption in section 65457, a legal challenge alleging that a supplemental EIR for the relevant specific plan was required must be filed within 30 days of the agency's decision to "carry out or approve the project." This limitations period is mirrored in CEQA Guidelines section 15182, subdivision (e).

The Court found that the city's resolution factually invoked Government Code section 65457's exemption and that the petition essentially alleged that a supplemental EIR for the 2008 specific plan is required because substantial changes to the circumstances had occurred and new information had come to light. Although neither the resolution nor the notice of exemption expressly referenced section 65457, the Court concluded that the resolution invoked section 65457's

exemption because it stated that the project was “consistent with the certified EIR for the Transit Area Specific Plan.” The Court also found that the resolution’s reference to CEQA Guidelines section 15168, subdivision (c)(2), implied that the city had concluded no events listed in Public Resources Code section 21166 had occurred. Similarly, the Court found that the resolution’s reference to CEQA Guidelines section 15061, subdivision (b)(3), reflected the City’s conclusion that the residential development project would not cause any new environmental effects. The Court found that the 30-day statute of limitations under subdivision (b) of section 65457 had started running upon the city’s decision to approve the project on November 1, 2011. Consequently, the trial court properly sustained the demurrer because the action filed was filed more than 30 days later.

The petitioners argued their petition sought a “free-standing EIR” or a mitigated negative declaration, not a supplement to the 2008 EIR. The Court disagreed, noting that one purpose of section 65457 is to excuse residential development projects from having to do a “free-standing EIR” or negative declaration if they are consistent with an approved specific plan.

The Court also concluded that the 35-day statute of limitations established by Public Resources Code section 21167, subdivision (d), did not apply. The exemption provided under the Government Code was not among those listed or adopted under Public Resources Code section 21084, and thus was not among those addressed section 21167. The same was true with respect to the exemption established by CEQA Guidelines section 15061, and corresponding 35-day statute of limitations established by 15112, subdivision (c)(2). To the extent any conflict existed between the statute of limitations in Government Code section 65457 and the statutes of limitations in CEQA, the later-enacted and more specific statute of limitations controlled. Because Government Code section 65457 and Public Resources Code section 21167 both apply to CEQA challenges, they are equally specific to CEQA claims. Therefore, because Government Code section 65457 was enacted after Public Resources Code section 21167, the statute of limitations in section 65457 prevailed.

California Clean Energy Committee v. City of San Jose (2013) 220 Cal.App.4th 1325 [exhaustion]

The Sixth District ruled the City of San Jose improperly delegated the task of certifying an EIR to its planning commission as an unelected advisory body, and held a petitioner exhausted its remedies despite its failure to appeal the planning commission’s decision to the city council.

In June 2011, the City of San Jose released a draft EIR analyzing the impacts of a comprehensive update of the city’s General Plan. Petitioner California Clean Energy Committee (CCEC) submitted a detailed comment letter attacking the EIR. In September 2011, the city’s planning commission certified a final EIR and recommended approval of the plan. CCEC did not appeal the planning commission’s decision to certify the EIR, but it did submit a follow-up letter encouraging the commission to reconsider its decision. In November 2011, the city council adopted the updated General Plan; the city council also adopted a resolution stating it had independently reviewed the EIR and certified its adequacy. CCEC sued. The city moved for summary judgment based on CCEC’s failure to exhaust its administrative remedies. The trial court granted the motion. CCEC appealed.

The Court of Appeal reversed based on its conclusion that the city had improperly delegated authority to certify the EIR to the planning commission. Public Resources Code section 21151 provides that the lead agency may delegate certain duties under CEQA to unelected decision-making

bodies. The duties that may be delegated include the certification of an EIR, provided the unelected body has the ability to approve or disapprove the project at issue.

The city's municipal code delegated certain duties to various bodies within city's organizational structure. The municipal code assigned to the planning commission responsibility for certifying EIRs for projects requiring environmental review. Having certified the EIR, the commission could then take action on the project (if it had authority to do so), or make recommendations to the city council. The planning commission's decisions could be appealed to the city council within three business days.

In this case, the planning commission did not have authority to adopt the new General Plan. For this reason, the planning commission was not a "decision-making body" with respect to the General Plan. Insofar as CEQA authorizes delegation only to an unelected "decision-making body," the delegation to the planning commission in this instance was improper.

The city argued that, under its municipal code, the certification process was bifurcated, such that the planning commission performed some CEQA functions, and the city council performed others. The Court ruled that CEQA prohibited such partial delegation to a non-decision-making body. The Court distinguished *California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227, in which the Regents delegated authority to certify an EIR to one of its committees, because in that case the Regents' committee was also a decision-making body.

The Court criticized the city's bifurcated process because it could "produce a situation in which the city council could be bound by a finding that it finds flawed – that the final EIR is complete and in compliance with CEQA." "[T]he city council, as the decisionmaking body with respect to the [General Plan], is the entity tasked with certifying that the final EIR was compliant with CEQA. The delegation as part of its certification duty to the planning commission, as a nonelected nondecisionmaking body, therefore improperly segregated environmental review from project approval."

The city council ultimately adopted a separate resolution certifying the EIR. That decision did not suffer from the same defect, because the council *was* the decision-making body. The Court therefore turned to whether CCEC's letters were sufficient to exhaust its remedies. Because the planning commission's certification of the EIR was improper, CCEC was not required to file an administrative appeal of the commission's decision. Thus, the issue was whether CCEC's comment letter to the planning commission adequately exhausted its administrative remedies. CCEC's comment letter cited specific aspects of the EIR that CCEC felt were inadequate. That comment letter was before the city council at the time it certified the EIR. The claims in CCEC's petition largely tracked those in its comment letter. "Since the city council had the comment letter at the time it certified the final EIR and approved the project, [the city council] was fairly apprised of CCEC's objections. Accordingly, CCEC exhausted its administrative remedies."

Comunidad en Accion v. Los Angeles City Council (2013) 219 Cal.App.4th 1116 [request for hearing]

The Second District held (1) a city's permit decision on a solid waste facility is not a state-funded program and therefore its decisions is not subject to the antidiscrimination statute that applies to state-funded activities, and (2) the trial court abused its discretion in failing to excuse a one-week delay in requesting a hearing beyond the 90-day CEQA deadline.

In May 2010, the Los Angeles City Council certified an EIR and approved an application to construct a solid waste transfer station, an expanded materials recycling facility, and an expanded green waste processing center at the Bradley Landfill site in Sun Valley, Los Angeles. A community organization -- Comunidad en Accion -- sued. Comunidad alleged the facility subjected Sun Valley residents, most of whom are Latino, to a disproportionate amount of pollution in violation of Government Code Section 11135. That section prohibits discrimination based on, among other things, national origin and ethnic group identification. Comunidad also alleged the EIR violated CEQA. The trial court granted the city's motion for summary judgment. Comunidad appealed.

First, to succeed in its section 11135 claim, Comunidad had to show the discriminatory "program or activity . . . is funded directly by the state, or receives any financial assistance from the state." Comunidad argued the city received funding from the state, which it used to finance activities carried out by its local enforcement agency. The Court rejected this argument. Comunidad's complaint attacked the city's exercise of its land-use authority to approve a permit for the project. The complaint did not attack the LEA's exercise of its enforcement authority under State law. The Court acknowledged that the city's solid waste program, and the LEA's enforcement program, were intertwined, in that the city depended upon the LEA's function in order to comply with state law. The Court also acknowledged that the city housed the LEA offices; that State law required the LEA to review and comment on permitting decisions; and that the LEA depended on State funding to carry out its mission. The fact that the programs were intertwined, however, did not mean they were one and the same. In particular, the LEA did not answer to the city, but to CalRecycle. The Court therefore affirmed the trial court's decision to dismiss the section 11135 claim. Justice Rubin dissented from this portion of the opinion.

Second, the Court ruled the trial court abused its discretion in dismissing Comunidad's CEQA claim. Under Public Resources Code section 21167.4, the petitioner in a CEQA lawsuit must file a request for a hearing within 90 days of filing the petition. If the petitioner does not request a hearing prior to this deadline, a party can move for dismissal, or the court can dismiss the claim on its own motion. In this case, the 90-day deadline passed, and the applicant moved to dismiss the CEQA claim. The next day, counsel for Comunidad filed a "request for hearing." The request was filed seven days late. Comunidad also requested relief from its mistake under Code of Civil Procedure section 473. Counsel filed a declaration stating the deadline was missed due to a calendaring error, and to a family illness that required counsel to be out of state in the two weeks leading up to the 90-day deadline. The trial court denied the request for relief under section 473 and dismissed the CEQA claim. The Court of Appeal reversed. It concluded that the trial court erred in denying Comunidad's relief from default. According to the Court, "[t]he one-week delay in requesting a hearing was an isolated mistake in an otherwise vigorous and thorough presentation of Comunidad's claims." The failure to correctly note the date was a clerical, calendaring mistake. Relief under section 473 was available for an excusable mistake of this sort.

Citizens for Ceres v. Superior Court (2013) 217 Cal.App.4th 889 [record of proceedings; privileges]

The Fifth District ruled that the pre-approval exchange of documents between the lead agency and the applicant waives privileges that might otherwise apply with respect to excluding those documents from the record of proceedings.

Wal-Mart applied to the city for land-use approvals necessary to build a 300,000-square-foot shopping center to be anchored by a 200,000 square-foot “superstore.” The city certified an EIR and approved the project. The “citizens” sued. The city prepared a draft index to the record of proceedings. The citizens objected, noting that the draft index did not contain any documents exchanged between Wal-Mart and the city. The city responded that all such communications had been between counsel for the city and for the developer and, as such, were privileged. The city provided a privilege log, but maintained there was no obligation to do so. Following motions and roughly seven months of skirmishing, the trial court upheld the city’s assertion of the attorney/client and work-product privileges as to the omitted documents. The citizens filed a writ seeking immediate review of the trial court’s ruling. The Court of Appeal issued a stay.

The citizens argued that Public Resources Code section 21167.6, subdivision (e), supersedes all evidentiary privileges. The citizens noted that language identifying the required contents of the record was subject to the introductory clause at the beginning of this section: “notwithstanding any other provision of law.” That language, according to the citizens, meant that the categories of documents listed in the statute had to be included in the record, even if those documents were otherwise privileged under some other law. The Court disagreed, stating the Legislature did not intend to abrogate all privileges for purposes of compiling CEQA administrative records.

The Court then addressed whether the attorney/client and work-product privileges may apply to documents shared between the lead agency and the developer – that is, whether the “common interest” doctrine applies such that sharing documents in this manner does not constitute a waiver of these privileges. Prior to approving the project, the lead agency is presumed to be neutral, and focused solely on CEQA compliance. Under CEQA, the agency must remain open to mitigation measures or alternatives, including the “no project” alternative. Indeed, an agency violates CEQA by committing to a project before the CEQA process is completed. “[T]he lead agency’s obligation not to commit to the project in advance, but instead to carry out an environmental review process and create environmental documents that reveal the project’s impacts without fear or favor, and only then make up its mind about project approval, means the agency cannot have an interest, prior to project approval, in producing a legally defensible EIR or other environmental document that supports the applicant’s proposal. At the same time, of course, the applicant’s primary interest in the environmental review process is in having the agency produce a *favorable* EIR that will pass legal muster. These interests are fundamentally at odds. ¶¶ The relationship between a lead agency and project applicant is unique. Before project approval, the agency must *objectively judge* whether the project as proposed is environmentally acceptable and therefore must make a decision about *whether* it will align itself with the applicant in part, in whole, or not at all. Only after approving the proposal can the agency be said to join forces with the applicant. There may be, and typically are, extensive communications between them, but they cannot yet be said to be ‘on the same side.’ Before project approval, therefore, the agency does not have even partially common interests with the applicant. The nature of its interest is held in abeyance until it decides whether to approve the project.”

That does not mean an agency cannot be favorably disposed towards a project from the outset. Nor does it mean that the agency and the applicant are prohibited from working together on the preparation of CEQA documents. It does mean, however, that the interests of the agency and the developer are fundamentally different, such that “preapproval disclosure of communications by one to the other waives any privileges the communications may have had.” Allowing the attorney/client privilege to apply would “encourage[e] strategizing between a private applicant and a government agency to meet a future challenge by members of the public to a decision in favor of the

applicant” at a time when “the agency has not, and legitimately could not, have yet made that decision.” Similarly, “[t]he purpose of the attorney work-product doctrine is to allow attorneys to advise and prepare without risk of revealing their strategies to the other side or of giving the other side the benefit of their efforts. Before completion of environmental review, the agency cannot have as a legitimate goal the secret preparation, in collaboration with the applicant, of a legal defense of a project to which it must be still uncommitted.”

The Court acknowledged its decision was inconsistent with *California Oak Foundation v. County of Tehama* (2009) 174 Cal.App.4th 1217, to the extent that decision is construed as applying to the pre-approval exchange of documents.

The Court concluded the city and Wal-Mart waived the attorney-client and the work-product privileges with respect to communications they shared with each other before the city approved the project. After project approval, by contrast, their interests were aligned in defending the record; for this reason, the common-interest doctrine meant that sharing the documents did not waive an otherwise applicable privilege.

Golden Gate Land Holdings, LLC v. East Bay Regional Park Dist. (2013) 215 Cal.App.4th 353 [remedies]

The First District upheld a trial court’s decision to order a limited remedy for a CEQA violation in an eminent domain proceeding initiated by a park district.

The East Bay Regional Park District (the “district”) adopted a resolution of necessity to condemn eight acres along the east bay shoreline owned by Golden Gate Land Holdings (“GGLH”). The district sought to acquire this land to complete a shoreline park and to construct a segment of a trail circumnavigating San Francisco Bay. The district found its decision was categorically exempt from CEQA. GGLH sued, arguing the district should have prepared an EIR. The trial court agreed and granted the petition, but did not direct the district to rescind its resolution of necessity. That enabled the district to proceed with its condemnation action despite the issuance of the writ. GGLH appealed.

First, the district argued the appeal was moot. The district requested judicial notice of resolutions in which it certified an EIR for the same project, and adopted a new resolution of necessity based on the certified EIR. The district also pointed to the return on the writ it had filed with the trial court, which attached these same documents. The Court of Appeal held, however, that the appeal was not moot. GGLH’s appeal focused on the propriety of the limited remedy ordered by the trial court, not whether the district had complied with that limited remedy. The Court of Appeal could still grant effective relief by ordering the district to set aside its resolution of necessity. For these reasons, the appeal was not moot.

Second, GGLH argued the trial court’s remedy violated CEQA. GGLH argued that, after concluding the district had violated CEQA, the trial court was required to direct the district to vacate its resolution of necessity. GGLH noted that the district’s CEQA violation—an improper conclusion that its resolution of necessity was categorically exempt—encompassed the whole of the district’s decision; there was no way to parse one aspect of the project from another. Thus, according to GGLH, the trial court should not have allowed portions of the project to proceed under Public Resources Code section 21168.9.

In this case, the entire “project” consisted of acquiring and developing the shoreline property for public recreation. The activities implementing that project, however, could be parsed;

they consisted of initiating eminent domain proceedings, acquiring the land, and constructing the improvements. The first activity – launching the condemnation process by adopting a resolution of necessity – would not cause impacts. The purpose of the project was, at least in part, to preserve open space or parkland, uses which in and of themselves would not cause a physical change in the environment (and thus would not necessarily require any CEQA review). There was no evidence that, by continuing the eminent domain proceedings, the district would prejudice its future consideration or implementation of alternatives or mitigation measures. In particular, allowing that action to proceed would not prejudice the district’s CEQA analysis, so long as the district did not commit millions of dollars to a particular trail alignment by actually acquiring the land prior to completing the CEQA process. Similarly, construction of the park and trail improvements could not occur until after the district completed the CEQA process. For these reasons, the trial court did not misinterpret section 21168.9, or abuse its discretion in exercising its equitable powers under that statute.