Brownstein Hyatt Farber Schreck

Vol. 4, Issue 1 – January 2018

Welcome to *CEQA News You Can Use*, a quarterly publication of **Brownstein Hyatt Farber Schreck, LLP's Natural Resources lawyers**. This publication is intended to provide quick, useful bites of CEQA news that we hope can be a resource for your real-time business decisions. That said, it is not and cannot be construed to be legal advice. Enjoy!

1. CEQA laws passed in 2018

A number of CEQA bills became law in 2018, although none work significant modifications to the core CEQA statute. **AB 734** and **AB 987** provide litigation streamlining (based on AB 900 procedures) for the Oakland Sports and Mixed-Use Project, and City of Inglewood sports and entertainment project. **AB 1804** categorically exempts residential and mixed-use housing projects located in unincorporated areas from CEQA review, but only if such projects are sited on no more than 5 acres, are "substantially surrounded" by qualified urban uses, comply with general plan and zoning requirements, and do not cause significant environmental effects on transportation, noise, air quality, greenhouse gas emissions, or water quality, significant cumulative effects, or have unusual circumstances. **AB 2341** relieves a lead agency from considering aesthetic effects during CEQA review for refurbishment, conversion, repurposing, or replacement of an existing building that meets certain requirements. And **AB 2782** authorizes a lead agency to consider specific regionwide and statewide economic, legal, social, technological *benefits* of, and *negative* impacts of, *denying* a proposed project. Stay tuned for an update on 2019 CEQA bills later this year.

2. Long pending CEQA Guidelines update now in effect

The **CEQA Guidelines update** was approved by the Office of Administrative Law on Dec. 24, 2018, and is now in effect.

3. *Sierra Club v. County of Fresno*: the Supreme Court's latest on the standard of review and air quality analysis

The Supreme Court issued this stocking stuffer for CEQA plaintiffs on Dec. 24, four years after taking up the appeal. The court ruled on four issues: (1) the proper standard for judicial review of an EIR (Outcome: county lost), (2) should an EIR's air quality analysis explain specific health consequences (Outcome:

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county lost), (3) if a mitigation measure can later be upgraded for a measure based on better technology (Outcome: county won), and (4) if a mitigation measure can be adopted if it does not fully reduce a project's significant impacts (Outcome: county won). (***Sierra Club v. County of Fresno* (2018)**.)

CEQA plaintiffs regularly argue that a court should use *de novo* review because an EIR's analysis does not meet the letter of CEQA law, while lead agencies and project applicants respond that the deferential substantial evidence test applies instead. Who wins this battle often determines who wins the case. In *Sierra Club*, the Supreme Court ruled that *de novo* review applies if an EIR's analysis lacks "sufficient detail to enable those who did not participate in its preparation to understand and to consider meaningfully the issues the proposed project raises." The Court also ruled that courts should use a sliding scale for mixed questions of law and fact—with *de novo* review generally appropriate except where "factual questions predominate . . . ." Expect some confusion as the trial and appellate courts implement this decision. The Court also ruled that the county's EIR should have explained how significant air quality impacts translated to human health impacts. In response to the county's claim that such analysis was impossible, the Court noted, ". . . if it is not scientifically possible to do more than has been done . . ., the EIR itself must explain why . . . ."

The *Sierra Club* decision makes it even more important that (1) an EIR undergo a strong peer review to ensure conclusions flow clearly from the analysis, and (2) the lead agency responds in detail to all public comments on the EIR, even if it means explaining why further analysis is impossible.

4. Elections Code shortcut around CEQA has limits

A development agreement cannot be adopted by initiative, the Fourth District Court of Appeal ruled in *Center for Community Action and Environmental Justice v. City of Moreno Valley* (2018) 26 Cal.App.5th 689 (petition for certiorari to the California Supreme Court denied). According to the court, California law (see Gov. Code § 65867.5) does not allow for the adoption of a development agreement by initiative. Instead, a development agreement is a legislative act that must be approved by ordinance, subject to referendum. The court noted that development agreements are "negotiated contractual agreements," making them "unsuitable" for initiatives. Planning and zoning changes, however, may continue pursuant to initiative as they do not require negotiation. The court's holding has important implications for developers, as voter-sponsored initiatives are not subject to CEQA. (See *Tuolumne Jobs & Sm. Bus. Alliance v. Sup. Ct.* (2014) 59 Cal.4th 1029.)

5. Existing facilities categorical exemption upheld in San Diego

In ***San Diegans for Open Government v. City of San Diego***, the Fourth District Court of Appeal upheld the city's use of the existing facilities categorical exemption (CEQA Guidelines § 15301) to extend the lease for Belmont Park, an oceanfront amusement park. (2018 WL 7047276.) In 2015, the city signed an amended and restated lease agreement with Symphony Asset Pool XVI, LLC (Symphony) to support

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Symphony's $18 million investment in capital improvements and upgrades to the existing park and in exchange for an additional $5.9 million investment in the Plunge Swimming Pool facility. The city determined the amended lease was CEQA exempt pursuant to CEQA Guidelines § 15301 as a project involving "operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or *no expansion of use beyond that existing at the time of the lead agency's determination*." Not everyone was ready to dive into the upgraded facilities though. San Diegans for Open Government (SDOG) brought suit alleging that the city was taking them for a ride by proceeding without CEQA review. Because Symphony had already made the $18 million improvements when the city signed the lease, however, the Court of Appeal held the improvements were clearly existing facilities for the purposes of CEQA. The court also rejected SDOG's claim that the city's amended lease fell within the unusual circumstance exception to the categorical exemption because it found SDOG's attempt to show that increased revenue projections would cause significant traffic and noise impacts did not constitute substantial evidence of an impact.

6. Aesthetic impacts - lay opinions may stand out

When it comes to aesthetics, lay opinion can qualify as substantial evidence. (***Georgetown Pres. Soc'y v. Count y of El Dorado* (2018) 30 Cal.App.5th 358**.) Relying on a mitigated negative declaration (MND), the County of El Dorado approved a Dollar General Store in Georgetown, which is registered as a state historical landmark. Numerous comments received stated that the project was "too big and too boxy or monolithic to blend in" to the proposed site's historic character. These comments constituted substantial evidence—on the "nontechnical aesthetic issues of size and general appearance"—that the project might significantly impair the surrounding area's aesthetic value. Further, after distinguishing between the judicial deference afforded a MND (less) from a zoning or planning finding (more), the court found that the project's compliance with the county's Historic Design Guide did not insulate the county from this evidence.

7. San Diego County's Climate Action Plan found inadequate . . . again

San Diego County spent the last four years revising its Climate Action Plan (CAP) and preparing an EIR in response to the Fourth District Court of Appeal's 2014 ruling overturning its first CAP. (*Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152.) Now the county may have to start again. On Dec. 24, the trial court ruled both the county's CAP and EIR inadequate. The court took issue with the county's principle mitigation measure, which would have allowed project applicants to mitigate a project's greenhouse gas (GHG) emissions by purchasing offsets from a climate registry. The court found this measure inconsistent with the county's General Plan, which the court read as requiring GHG emissions reductions *within* San Diego County. The court also found fault with the EIR's environmental analysis in several ways. Combined with the **Fourth District's ruling in September** that the county's interim 2016 GHG guidelines were improper, count 2018 as a year the county would like to forget.

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