

## **Petitioners Failed to Show Subdivision Consistent With a Specific Plan EIR Was Outside the Scope of a Statutory Exemption**

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In [\*Citizens' Committee to Complete the Refuge et al. v. City of Newark et al.\*](#), the First District Court of Appeal (Div. 4) found the California Environmental Quality Act did not require subsequent or supplemental environmental review for the City of Newark's approval of a 469-lot residential subdivision project. Instead, the court affirmed the City's use of Government Code section 65457's CEQA exemption for projects consistent with a "specific plan" for which an environmental impact report (EIR) was previously certified.

The Specific Plan applicable to the area that includes subdivision project site – Areas 3 and 4 on land adjacent to the San Francisco Bay – allowed development of up to 1,260 residential units, a golf course and trails, and the filling of all wetlands (86 acres), which provides habitat for the endangered salt marsh harvest mouse. The related EIR provided a programmatic level environmental analysis of development, but acknowledged the ultimate development of the planning area could be less than the maximum development provided for in the Specific Plan.

The subdivision project proposed to fill and raise upland areas only (Area 4), instead of upland and wetlands areas, and proposed added riprap to armor the western sides of these upland areas. The subdivision project would also reduce the number of residential units to 874 and convey the area intended to be a golf course to the City, rather than developing the golf course as identified in the Specific Plan.

Petitioners Citizens' Committee to Complete the Refuge and Center for Biological Diversity (Petitioners)[1] contended the subdivision project's reductions in development footprint and the addition of riprap would affect the endangered salt marsh harvest mouse and its wetland habitat. Petitioners argued these changes would limit both the species' wetland migration and escape habitat during periodic flooding, and increase its proximity to rats and other predators.

Under Government Code section 65457, a residential project, including a subdivision, consistent with a "specific plan" for which an EIR has been certified after January 1, 1980, is exempt from the requirements of CEQA, unless a specific threshold identified in Public Resources Code

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section 21166 is triggered. Specifically, under Section 21166, when an EIR has been previously prepared, no subsequent or supplemental EIR (SEIR) is required except in the listed circumstances that would result in new or more significant impacts. These threshold events include, generally, where substantial changes are proposed in the project, substantial changes occur with respect to the circumstances in which the project is undertaken, or new information becomes available after certification of the EIR.

Carefully reviewing the analysis in the Specific Plan EIR, the Court made a number of determinations, leading to the ultimate conclusion that Petitioners failed to meet their burden to demonstrate the City's approval of the project under the statutory exemption (and sans SEIR) was not supported by substantial evidence. First, the Court found that because the EIR did not specify which plan area land would be developed, and – instead – assumed complete build-out of the development under the Specific Plan, the EIR, therefore, analyzed the project's impact on the harvest mouse's upland escape habitat. Second, the Court determined that, since the EIR's finding of no significant impact did not depend on full buildout of the golf course, the change to eliminate the golf course did not require further analysis. As to the riprap, the Court found that, although the Specific Plan EIR did not analyze the use of riprap for the purpose of armoring development on the upland areas, Petitioners failed to provide evidence to support their contention that the added riprap would create a substantial increase in the severity of conditions analyzed in the EIR, including the Specific Plan's impacts on the harvest mouse from rat predation. Lastly, while the Court admitted the Specific Plan EIR stated additional review may be required, the Court found the City's preparation and circulation of a "checklist" analyzing whether the circumstances under Section 21166 would occur for purposes of applying the exemption under Government Code section 65457 "constitute environmental review" consistent with the law and statements in the Specific Plan EIR. In making these findings, the Court acknowledged that the Government Code section 65457 exemption utilized by the City aims to increase housing supply and "reflects the Legislature's determination that the interest promoted is 'important enough to justify foregoing the benefits of environmental review.'"

The Court relied on the statutory language of both Government Code section 65457 and Public Resources Code section 21166, as well as CEQA Guidelines section 15162, in finding that substantial evidence supported the City's finding that none of the project changes would trigger an event as identified Section 21166. Not only did the Court conclude that Petitioners failed to meet their burden in demonstrating an SEIR was required, but the Court took it a step further finding that evidence demonstrated the proposed reduction in development indicated a lesser environmental impact.

Separately, Petitioners argued the City improperly deferred mitigation for sea level rise impacts based on statements in the subdivision project's hydrology report that the City would take an "adaptive" approach to managing future flooding from sea level risk towards the end of the century. Admonishing that sea level rise is not an impact of the project on the environment, the Court concluded the "adaptive" approach is therefore not "mitigation" subject to the limits on deferral under CEQA. Moreover, because the City's potential "adaptive" responses 50-80 years in the future were speculative, they could not be considered part of the current project.

While the application of CEQA's subsequent review rules under Public Resources Code section 21166 have been the subject of significant caselaw since the promulgation of the statute, this case distinguishes itself from past precedence. In its decision, the First District crystallized CEQA's desire for finality by identifying the the incredibly high standard set in law for requiring subsequent environmental review following the certification of a prior related EIR. Under the Court's analysis, this threshold is true for both project-specific and programmatic environmental review, especially in

instances in which the subsequent project represents a reduction from an identified maximum development scenario.

[1] Petitioners were joined by amicus Environmental Defense Center, Sierra Club, SF Baykeeper and The Ohlone Audubon Society

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