

2023 Year-in-Review CEQA Litigation

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Despite repeated attempts at reform by the Legislature, the California Environmental Quality Act (CEQA) continues to be a minefield for those assigned with the herculean task of complying with the law's myriad of directives. Add to the already inherent complexity of CEQA, judicial interpretation of its provisions has wide-reaching implications that can create even more potential pitfalls for those required to abide by its mandates, including decisionmakers and project proponents. Below are the summaries of the most notable CEQA cases from 2023, broken down by category.

I. CEQA Exemptions

Save Livermore Downtown v. City of Livermore (2023) 87 Cal.App.5th 1116. The First District Court of Appeal upheld the use of Government Code section 65457's CEQA exemption for a multifamily affordable housing project. Section 65457's exemption applies to residential development projects that are consistent with a specific plan for which an environmental impact report (EIR) has been certified after January 1, 1980, so long as none of the factors for supplemental environmental review under Public Resources section 21166 have been triggered. This decision also highlighted that, whether reviewed under CEQA or the Housing Accountability Act (HAA), the standard of review of a City's General Plan consistency finding is essentially the same.

In this case, the City of Livermore pre-prepared and certified a subsequent EIR in 2009 for an amendment to its Downtown Specific Plan, which would increase the development allowed in the Specific Plan area, including the project site. This EIR analyzed, among other impacts, the potential presence of hazardous materials on the project site due to the historic railroad, automotive, and dry-cleaning uses at or adjacent to the project site. The EIR concluded that development on the project site could expose construction workers and occupants to hazardous concentrations of contaminants from soil and groundwater and imposed a mitigation measure requiring a licensed professional to prepare a soil and groundwater investigation work plan to evaluate potential hazardous materials. In 2021, the Regional Water Quality Control Board (RWQCB) informed the City that it had identified certain metals and volatile organic compounds in the soil and groundwater on the project site. *Save Livermore Downtown*, a community group, argued that (i) the reports prepared by the RWQCB and the subsequent City consultant following certification of the EIR constituted "new information," necessitating the preparation of a new subsequent or supplement EIR (SEIR) for the project and (ii) a CEQA exemption could not apply because the 2009 EIR was a programmatic EIR (PEIR) that contained only a cursory analysis of the hazardous materials on the project site.

The Court disagreed, emphasizing that a high threshold must be met for “new information” to trigger the need for an SEIR. To this end, the Court found that the aforementioned reports were not “new information” that was not or could not have been known when the EIR was certified. The Court also rejected the petitioner’s argument that a CEQA exemption cannot apply, noting that there is no blanket prohibition against using a CEQA exemption for PEIRs.

Not crucial to this decision, but of interesting note, was the fact the Court upheld the trial court’s assessment of a \$500,000 bond against the petitioner pursuant to Code of Civil Procedure section 529.9 for costs and damages incurred by the project applicant for petitioner’s litigation-related delays.

[*Pacific Palisades Residents Assn v. City of Los Angeles* \(2023\) 88 Cal.App.5th 1338](#). The Second District Court of Appeal denied a challenge to a proposed eldercare facility, which alleged violations of CEQA, the local zoning code and Coastal Act. The Court focused on the CEQA claim that took issue with the City of Los Angeles’s use of the Class 32 “infill” categorical exemption. Here, the petitioner argued the project resulted in aesthetic impacts and was not architecturally compatible with the neighborhood. Therefore, per the petitioner, the project was precluded from qualifying for an infill exemption because it was not consistent with all applicable General Plan policies. Using the substantial evidence standard and standard deference to the City’s interpretation of its own General Plan, the Court concluded that a reasonable person could agree with the City’s findings of consistency. Noting that others may disagree with the City, the Court upheld the City’s exemption determination.

As it related to the Zoning Code, the Court concluded that the “plain English interpretation of the zoning code” foreclosed any argument that the facility was not permitted on the lot.

Lastly, the court rejected petitioner’s challenge under the Coastal Act, explaining that it is for the California Coastal Commission (CCC), to weigh conflicting evidence related to petitioner’s appeal of the project’s coastal development permit (CDP) and that petitioner failed to demonstrate that the CCC’s decision was unsupported by substantial evidence.

[*Lucas v. City of Pomona* \(2023\) 92 Cal.App.5th 508](#).^[1] In yet another decision from the Second Appellate District, the Court affirmed the City of Pomona’s use of a statutory exemption for its Commercial Cannabis Overlay Permit Program under CEQA Guidelines section 15183, finding that the program required no additional environmental review. This decision is noteworthy for the Court’s broad interpretation of the statutory exemption, holding – under the substantial evidence standard of the review – that (i) the City’s zoning ordinance, General Plan Update, and EIR that do not address “density” may still qualify as exempt under CEQA Guidelines section 15183, and (ii) uses, including cannabis-related uses, that are not literally included in land use plan documents, may be determined to be sufficiently similar to existing and defined land uses allowed by underlying zoning. The decision also reiterated that Section 15183 is a statutory provision, and, as such, is “absolute.” Per the Court, a public agency needs to examine only those environmental effects that are peculiar to the project and were not addressed or were insufficiently analyzed as significant effects in the prior EIR, and, unlike categorical exemptions, Section 15183 is not subject to exceptions.

This decision is also noteworthy given the state’s year-old requirement that all cannabis operator applicants comply with CEQA.

[*United Neighborhoods for Los Angeles v. City of Los Angeles* \(2023\) 93 Cal.App.5th 1074](#).^[2] The Second District Court of Appeal affirmed a judgment voiding the City of Los Angeles’s reliance on

the CEQA Class 32 Infill Exemption for a hotel project in Hollywood that would demolish 40 rent-stabilized units (RSO). The Court emphasized the City's failure to adequately assess the project's consistency with *all* applicable General Plan policies, as required by CEQA Guidelines section 15332(a). This case provides a good reminder of the deference afforded to public agencies when determining which general plan policies apply to a project. Importantly, the Court clarified that this determination must be supported by substantial evidence, and the additional deference afforded to public agencies when weighing *conflicting* General Plan policies does not apply. Per the Court, "[t]he principle that the City is uniquely positioned to weigh the priority of competing policies does not extend to the question of which policies are to be placed on the scales." Here, the administrative record included no evidence demonstrating that the City assessed consistency with policies in the Housing Element related to preserving existing affordable housing, even though the hotel project proposed to remove existing RSOs. As such, the Court could not defer to the City's interpretation of City General Plan policies where there is "no indication the City weighed and balanced all applicable policies."

[California Construction and Industrial Materials Association/Ventura County Coalition of Labor, Agriculture and Business v. County of Ventura \(2023\) 97 Cal.App.5th 1](#). The Second District Court of Appeal affirmed the validity of a Ventura County ordinance that created wildlife migration corridor overlay zones covering approximately 163,000 lessdeveloped acres of the County, including 10,000 acres of classified mineral resources. In its straightforward analysis, the Court rejected the argument that the County's adoption of the ordinance violated the requirements of the Surface Mining and Reclamation Act of 1975 (SMARA) and CEQA. As to SMARA, the Court, in a *de novo* review, interpreted what constitutes a "permitted use" based on the plain language of the act and relied heavily on the fact that the ordinance only authorized what the County was already permitted to do so pursuant to its general plan. As to the claims of CEQA violations, the Court agreed with the applicability of the 2 categorical exemptions – Class 7: Actions by Regulatory Agencies for Protection of Natural Resources and Class 8: Actions by Regulatory Agencies for Protection of the Environment – by (again) citing the plain language of the statute. The Court also found that petitioners failed to make any showing that the "unusual circumstances" exception applied to these exemptions. Lastly, because the County required preservation of wildlife corridors when granting a mining approval, the Court held there was not a fair argument that there was a reasonable possibility the ordinance would result in an adverse effect on the environment.

II. Historical Resources

[Preservation Action Council of San Jose v. City of San Jose \(2023\) 91 Cal.App.5th 517](#). The Sixth Appellate District upheld the City of San Jose's rejection of proposed compensatory mitigation (in the form of funding other historic buildings) for demolition of a historic building when certifying an SEIR for the development of office towers. Despite the fact [that] compensatory mitigation could theoretically occur, the Court held the City's findings of infeasibility were supported because there were no other buildings in the downtown area with the same architectural style, period of significance, and purpose. In its holding, the Court invoked the U.S. Supreme Court decisions in *Nollan* and *Dolan* when finding the petitioner's proposed compensatory mitigation lacked rough proportionality and nexus requirements as identified in CEQA Guidelines section 15126.4(a)(4). The Court also reasoned that the loss of non-transferable historic preservation was not equivalent to the loss of ecological habitats and threatened species.

In addition, the Court held the City's responses to comments were legally sufficient despite a lack of detail. It reasoned that the final SEIR's discussion of the mitigation measures combined with the draft SEIR was a sufficient response to the comments and satisfied the requirement for the City to respond

with “good faith, reasoned analysis.”

[*Coalition for Historical Integrity v. City of San Buenaventura* \(2023\) 92 Cal.App.5th 430](#). The Second District Court of Appeal upheld the City of San Buenaventura’s removal and relocation of a bronze statue of Father Junipero Serra. This decision highlights that, despite a statutory presumption of historical significance, an agency may make a finding to the contrary regarding a particular resource so long as the agency bases its decision on substantial evidence. Here, in 1936, a concrete statue of Father Junipero Serra was erected in front of the Ventura County Courthouse (now City Hall). The original statute subsequently deteriorated and was replaced in 1989 with a bronze replica. In 2020, a City-hired consultant concluded that the replica was not a historic landmark, despite being listed as one by the City. In affirming the City’s relocation of the replica following the 2020 study, the Court held that the City’s decision did not require CEQA review because the City’s finding that the bronze statue was never culturally or historically significant rebutted any presumption of historical value, and CEQA Guidelines section 15061(b)(3) therefore was properly applied. Moreover, the Court emphasized that removing the bronze statute did not violate either a specific plan or the municipal code because there were no prohibitions on removing property lacking historical value.

III. Standard of Review

[*Santa Rita Union School District v. City of Salinas* \(2023\) 94 Cal.App.5th 298](#). The Sixth District Court of Appeal reversed the trial court, finding that an EIR need not analyze the impacts of a speculative alternative scenario. Here, the City of Salinas’s West Area Specific Plan established a long-term development framework that anticipated an increase in housing over the next several decades. Analysis of this additional housing identified an indirect effect related to the limited capacity of schools servicing the area. Accordingly, the related EIR assumed that new schools would be built to accommodate the new residents. Two school districts challenged the City’s certification, arguing the EIR failed to include a range of more feasible options to address the increase in the area’s student population. The districts cited the historic underfunding as a hindrance to the construction of the anticipated new facilities. The Court rejected this argument, concluding that the information provided by the school districts was too uncertain and vague to require inclusion in the EIR. In reversing the lower court’s decision, the Court also found that a lead agency is not required to evaluate the phasing of decades-long projects because the ultimate development of the Specific Plan area would be subject to a variety of unpredictable factors.

Related to this, the Court clarified that the omission of information from an EIR *may* constitute a failure to proceed in the manner required by law if (i) the analysis is clearly inadequate or unsupported, *and* (ii) the omitted information is both required by CEQA and necessary to informed discussion. Such an instance is to be reviewed *de novo*. Here, the Court found that the question of whether the EIR was required to discuss the situation in which new schools were not built was a mixed question of law and fact, requiring application of the deferential substantial evidence standard of review.

The Court also ruled on several procedural issues. First, the Court held that the City’s voluntary compliance with the writ of mandate did not moot or waive the City or real party-in-interest’s separate right to appeal; should the appellants prevail, City’s certification of the EIR would be restored. Second, the Court held that the trial court’s entry of judgment, not the court’s prior order, triggered the deadline to appeal the trial court’s decision.

[*Historic Architecture Alliance v. City of Laguna Beach* \(2023\) 96 Cal.App.5th 186](#). The Fourth District Court of Appeal upheld the application of Class 31 categorical CEQA exemption to the remodel and

expansion of a historic home, which was supported by substantial evidence. In challenging this project, the petitioner argued that a CEQA exemption could not be used in this instance because there was a fair argument that the project would result in a substantial adverse change in the significance of a historical resource, thereby triggering the historical resource exception to a categorical exemption. The Court rejected this argument, finding that (i) the determination that a categorical CEQA exemption applies is a factual one that is subject to review under the deferential substantial evidence standard, and (ii) when applying the historical resource exception, the fair argument standard does not apply. In making the latter finding, the Court determined the application of the historical resource exception depended on whether the project complied with the *Secretary of the Interior's Standards for the Treatment of Historic Properties (Standards)* in accordance with the Class 31 exemption. Because substantial evidence supported the City's determination that the Project satisfied the *Standards*, the City's reliance on the Class 31 exemption and finding that the historical resources exception did not apply was similarly supported.

IV. Climate Change/GHG

[IBC Business Owners for Sensible Development v. City of Irvine \(2023\) 88 Cal.App.5th 100](#). The Fourth Appellate District held the City of Irvine's reliance on an EIR addendum to approve the redevelopment of a parcel in the Irvine Business Complex (IBC) violated CEQA. Specifically, the Court held that (i) the environmental impacts associated with the project were not within the scope of the PEIR related to the buildout of the IBC, and (ii) the Class 32 infill exemption did not apply because the project involved unusual circumstances that may cause significant environmental impacts. Total development within IBC was capped at full buildout (post-2030), with each parcel assigned a development budget. The City had authorization to approve the transfer of development rights from one parcel to another within the IBC so long as the development (or redevelopment) would not result in adverse effects to the City's infrastructure and services and would not cause "adverse impact on the surrounding [traffic] circulation system." The proposed redevelopment called for the replacement of a 2-story, approximately 70,000 square-foot warehouse with 5- and 6-story office buildings totaling 275,000 square feet and a 7-story parking. While the Court found the project would not cause adverse impacts on the circulation system, even using the deferential substantial evidence standard of review, the Court determined there was insufficient evidence to demonstrate that the project would comply with the IBC's net-zero greenhouse gas (GHG) emissions threshold. The Court specifically noted that part of the evidentiary problem was the addendum's failure to quantify the project's anticipated GHG emissions – underscoring the importance of including all the key evidence in the administrative record.

The Court then found the alternative argument that the project was exempt from further CEQA review was similarly lacking. First, the Court found the record demonstrated that unusual circumstances exist, specifically noting the project is much larger than others within proximity of the project and significantly increases the intensity budgeted for the site. Second, the Court found that there was a reasonable possibility of the project's significant environmental impacts due to the potentially significant GHG impacts that could not be mitigated below the level of significance.

[Tsakopoulos Investments, LLC v. County of Sacramento \(2023\) 95 Cal.App.5th 280](#). The Third District Court of Appeal upheld the County of Sacramento's methodology used to assess a project's climate change impacts under CEQA. In denying the petitioner's argument that the County used the same statewide "business-as-usual" goal or a "onesize fits all" approach for all types of projects rejected by the courts in *Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204 and *Golden Door Properties, LLC v. County of San Diego* (2018) 27 Cal.App.5th 892, the Court found the County properly developed County-specific numeric thresholds. The decision emphasizes

the rule that an agency is afforded substantial discretion to choose its thresholds of significance, assumptions, and methodology, so long as that choice is supported by substantial evidence. As it relates to the GHG significance threshold, this decision endorses the use of the California State Air Resources Board's (CARB) emission reduction goals for a project level if the lead agencies incorporate sector and region-specific data when determining a project's GHG impacts.

V. Alternatives

[*Yerba Buena Neighborhood Consortium, LLC v. Regents of Univ. of California* \(2023\) 95 Cal.App.5th 779](#). In affirming the certification of an EIR related to the expansion of the University of California San Francisco (USCF) Parnassus campus, the First District Court of Appeal rejected the petition on 5 independent grounds.

First, the Court found the project EIR considered a reasonable range of alternatives and was not required to consider an alternative that included the construction of a large hospital building at a different UCSF campus. In making this holding, the Court reinforced the principles that (i) alternatives analysis is not required to include both alternatives to the project and alternatives to its location, and (ii) "alternatives" as defined under CEQA are alternatives to the project as a whole, not alternatives to only one component of the project, such as one building in a campus-wide redevelopment plan.

Second, the Court held that, while the EIR improperly declined to analyze the impact on public transit, the error is not prejudicial. Specifically, the Court determined that this error did not preclude informed participation by the public or decisionmakers in a manner that required invalidation of the EIR.

Third, the Court found the EIR was not required to analyze visual impacts, which are deemed not significant as a matter of law under Public Resources Code section 21099(d)(1). This section provides that the aesthetic impacts of a "residential, mixed-use residential, or employment center project on an infill site within a transit priority area shall not be considered significant impacts on the environment." In supporting this conclusion, the Court noted that (i) despite the campus's "Public" zoning on San Francisco's zoning map, the city's zoning did not govern, (ii) the university's own "functional zones" allowed commercial uses, and (iii) the project satisfied the restriction of "employment center projects" to sites that are zoned for commercial use.

Fourth, the Court held that UCSF was not required to adopt mitigation preserving historically significant buildings, even if they could be repaired and reused for some other purpose. According to the Court, such an alternative may be rejected as infeasible if it is "impractical or undesirable from a policy standpoint." Such decision is a policy judgment worthy of deference, not a "narrowly technical assessment."

Lastly, the Court concluded the EIR's wind impact mitigation measure constituted a sufficiently specific performance standard. The decision is in stark contrast to *East Oakland Stadium Alliance v. City of Oakland* (2023) 89 Cal.App.5th 1226 (discussed below), which reached the opposite result.

VI. Project Description

[*Save Our Capitol! v. Dept. of General Services* \(2023\) 87 Cal.App.5th 655](#). The Third District Court of Appeal held that an EIR for the demolition and replacement of the State Capitol Building Annex (Annex) failed to comply with CEQA as it related to the EIR's project description and analysis of aesthetic impacts, historical resources, and alternatives. Of particular interest, the Court held the EIR must contain a particular visual simulation to ensure the public meaningfully understands the

project's impacts, imposing a new substantive requirement contrary to long-established CEQA principles prohibiting such action.

- *Project Description.* In rejecting a large swath of petitioners' arguments, the Court agreed with petitioner that the Department of General Services (DSG) failed to disclose the exterior design of the Annex, which now included glass, prior to the preparation of the final EIR (FEIR). The Court also noted that between the draft EIR (DEIR) and the FEIR, the document changed the description of the Annex from "consistent" with the Capitol Building that would create a "one-building" feel to "compatible" with the Capitol Building in the FEIR, clarifying that the "one-building" feel referred to the interior consistencies between the buildings. These late changes "thwarted the public's ability to participate in the process and comment meaningfully on the EIR." The project description was inadequate, and neither the DEIR nor the public could properly consider project impacts.
- *Impact Analysis.* Again, the Court sided with DSG on *most* of the allegations related to impact analysis and found the EIR was supported by substantial evidence. However, due in large part to the issues with the project description, the Court agreed with the petitioners that the EIR did not adequately analyze the project's impacts on aesthetics and historical resources (discussed in more detail below). The Court rejected all petitioner's challenges to the EIR's analysis of impacts on biological resources, noting that no CEQA "statute, Guideline, or reported case law... requires an EIR to inventory or identify every plant and tree a project may affect." The Court similarly found the EIR's analysis of traffic and utility impacts were supported by substantial evidence.
 - **Aesthetic Impacts.** The Court held the EIR did not adequately analyze the project's impacts on the western scenic vista of the Capitol Building. Per the Court, without this, the EIR did not allow either DGS or the public to meaningfully consider the results on the scenic vista. Interestingly, the Court admitted that "CEQA does not expressly require visual simulations;" however – as noted above – the Court concluded the EIR was required to include a visual rendering of the east-facing vista due to the significance of the building's historic role and the numerous governmental programs for the beautification of the area.
 - **Historical Resources Impacts.** Because the final exterior design of the building was included in the FEIR, and not provided previously for public comment, the FEIR did not include written responses to CEQA concerns raised by the public regarding the impacts to the historic Capitol Building. Such responses are an integral part of an EIR's analysis, and, without this, the Court found the EIR's historical resource analysis deficient in violation of CEQA.
- *Analysis of Alternatives.* The Court's holdings related to the EIR's analysis of alternatives were similarly bifurcated. First, the Court found DSG failed to identify a reasonable range of alternatives that would (i) attain most of the project's objectives *and* (ii) avoid or lessen the project's environmental impacts when it identified clearly inferior alternatives that could be easily eliminated by failing to meet one aforementioned criterion. Specifically, the Court also held the alternatives analysis was inadequate because the EIR did not consider an alternative that would attain most of the project's objectives while lessening its significant impacts on the West Lawn.
- *Remedy.* On rehearing, the court concluded that the deficient portions of the EIR were severable from the portions of the EIR that addressed the impacts of Annex demolition and the Annex renovation alternatives. As such, the trial court was directed to issue a peremptory writ of mandate to partially decertify the EIR for revision and recirculation. This decision allowed DSG to commence demolition activities during the period in which DSG is remediating the problematic sections of the EIR.

[Claremont Canyon Conservancy v. Regents of Univ. of California \(2023\) 92 Cal.App.5th 474](#). The First District Court of Appeal determined that CEQA does not impose a bright-line rule requiring a tree-by-tree inventory for wildfire risk reduction projects. Instead, the Court found (i) the requirement of a legally adequate project description can be satisfied in various ways; (ii) is largely dependent on the type of project proposed; and (iii) if appropriate, it may account for potentially changing site conditions through the application of established standards and other criteria identified in the EIR. In this case, the Court was adjudicating a challenge to the University of California Berkeley's (UC Berkeley) plan to implement fuel break and fire hazard reduction projects in the East Bay Hills, an area historically prone to wildfire. The Court found the project description was sufficient to understand the plan's environmental impacts, including objective criteria for vegetation removal, even though it did not include a detailed tree inventory or disclose the exact number of trees that would be removed. Specifically, the Court concluded the project description contained meaningful information about the project "while providing for flexibility needed to respond to changing conditions that may affect the precise number of trees that will be removed in the project areas." The Court also noted that UC Berkeley's factual determinations as to the infeasibility related to the implementation of a tree inventory should be afforded deference.

VII. Exhaustion of Administrative Remedies

[Arcadians for Environmental Preservation v. City of Arcadia \(2023\) 88 Cal.App.5th 418](#). The Second Appellate District considered a challenge to the City of Arcadia's approval of a second-story addition to a single-family home. In challenging this decision, the petitioner's primary allegations were that the city council had erred in finding the project categorically exempt from CEQA. The Court upheld the determination that, prior to bringing its lawsuit, the petitioner failed to exhaust administrative remedies on the question of whether the project fell within the scope of the Class 1 exemption and, therefore, was barred from challenging the approval. In making this finding, the Court determined petitioner's general objections referencing the need for an EIR and potential environmental impacts were insufficient to provide notice sufficient to satisfy the exhaustion requirement. In addition to this deficiency, the Court noted that petitioner did not demonstrate that the City (i) failed to proceed in a manner required by law when it impliedly found no exception to the CEQA exemption applied, or (ii) erred in concluding the cumulative effects exception did not apply.

[American Chemistry Council v. Dept. of Toxic Substances Control \(2022\) 86 Cal.App.5th 146](#). The Fifth District Court of Appeals held that the CEQA statute of limitations expired while the petitioner believed it was still in the process of exhausting its administrative remedies. In this opinion, the Court reviewed whether the Department of Toxic Substances Control (DTSC) acted within its authority and properly complied with the California Administrative Procedure Act but violated CEQA when it enacted a regulation listing spray polyurethane foam systems containing unreacted methylene diphenyl diisocyanates (spray foam systems) as a priority product under California's "Green Chemistry" law and Safer Consumer Products regulations.

As it related to CEQA, the Court held the claims against DTSC were time-barred because petitioners did not file their lawsuit until more than a year after the listing decision – well beyond the 180-day statute of limitations. The Court observed nothing in the dispute resolution provisions within the Safer Consumer Products Regulations suggests applicability to CEQA. Therefore, petitioners had no duty to exhaust their administrative remedies related to CEQA claims through the dispute resolution process that petitioners engaged in prior to bringing their lawsuit. The Court further rejected petitioners' argument in the alternative that the CEQA statute of limitations did not begin to run until the administrative appeal process was completed because there was no final agency action until that process was resolved. The Court found that CEQA's limitations period begins to run on the date the

project is approved by the public agency and is not retrIGGERED on each subsequent date that the public agency takes some action toward implementing the project, such as DTSC's decision to deny petitioners' administrative appeal.

VIII. Tiering

[Save Our Access v. City of San Diego \(2023\) 92 Cal.App.5th 819](#)^[3] The Fourth District Court of Appeal held the City of San Diego's approval of a ballot measure to remove the local 30-foot coastal height limit required further environmental review, and provided clarity for determining when a "later activity" is beyond the scope of an existing PEIR under CEQA. Using the fair argument test, the Court held that a proposed ballot measure initiated by the City of San Diego to exclude the Midway-Pacific Highway Community Plan area from a voter-enacted height limit did not qualify as a "later activity" within the scope of the existing PEIR for the Community Plan Update because the PEIR relied on the height limit in its analysis of the potential environmental impacts. The Court held that the proper remedy is for the City to conduct further analysis of the potential impact of taller buildings in the Community Plan area in order to comply with CEQA before proceeding with the ballot measure.

[Olen Properties Corp. v. City of Newport Beach \(2023\) 93 Cal.App.5th 270](#). The Fourth Appellate District upheld the City of Newport Beach's approval addendum to its 2006 PEIR as part of its General Plan Update to allow for the development of a 312-unit apartment complex within the "Koll Center." Petitioner challenged the addendum, arguing (i) the City was required to prepare an SEIR to analyze alleged "new conditions" not addressed in the 2006 EIR, including CEQA amendments related to the analysis of traffic impacts, which supplanted level of service (LOS) analysis with vehicle miles traveled (VMT) analysis, and (ii) the project was inconsistent with the City's land use policies. Using the differential substantial evidence standard, the court disagreed, finding that, in the instance of a prior EIR that used the LOS methodology in the traffic analysis, the addendum may also use that methodology. The Court further held that changes to regulations alone are not "new information" that would trigger the need for a SEIR, as long as the underlying environmental issue was known and addressed in the initial EIR.

[Marina Coast Water District v. County of Monterey \(2023\) 96 Cal.App.5th 46](#). Reversing the trial court, the Sixth District Court of Appeal upheld Monterey County's reliance on a prior EIR to approve construction of a desalination plant to provide water to the Monterey Peninsula. The Court specifically rejected petitioner's contentions that (i) Public Resources Code section 21166 mandated the County prepare an SEIR due to perceived "changed circumstances," and (ii) the County's statement of overriding considerations could not justify the environmental impacts of the desalination plant.

In response to petitioner's demand for additional environmental review in accordance with Section 21166, the Court issued the following holdings:

- *New Water Sources*. The Court found that the City of Marina's denial of a CDP for slant wells required to draw ocean water into the desalination plant did not constitute changed circumstances under Section 21166. The Court noted that the CCC still had jurisdiction as to the CDP, meaning the wells were still a viable water supply source.
- *Triggering Condition 22*. The County approved the project subject to conditions, including "Condition 22," which required future County approval in the instance of construction delays or interruptions lasting 5 or more years, or the plant became infeasible to operate due to a lack of water supply. The Court disagreed with petitioner's categorization of Condition 22 as a future action, noting that Condition 22 merely acknowledged the potential for uncertainty but did not demonstrate it was reasonably foreseeable that it would be triggered.

- *Groundwater Gradient*. The Court found substantial evidence related to current groundwater conditions in the record that supported the County's decision. Petitioner's submission of a contradictory expert opinion that showed the wells could contain more freshwater than anticipated due to a shifting gradient was "competing data" that was insufficient to find the EIR deficient as a matter of law.
- *Expanding Pure Water Monterey*. Adoption of a pared down version of the project, which included a supplemental water purchase agreement (Pure Water Monterey) did not necessitate additional review. The Court cited a less than 2% difference between the originally proposed and approved projects.
- *Groundwater Storage Potential*. The Court found the possibility of new capacity was not novel, even if the quantity of the potential itself was substantial.

In rejecting petitioner's argument that the City's denial of the well permit meant the County needed to evaluate water-related benefits as if the project had no water source, the Court held it was proper for the County to evaluate the whole project instead of a component-by-component basis.

Lastly, the Court upheld the County's statement of overriding considerations, finding that – despite the omission of a potential for a new water source – the County made a "good faith effort to inform the public." The Court then went a step further, noting that even if the County had violated CEQA by this omission, it created no prejudice to the public.

IX. Mitigation Measures

[*East Oakland Stadium Alliance v. City of Oakland* \(2023\) 89 Cal.App.5th 1226](#). The First District *mostly* upheld an EIR for the extensive redevelopment of a 50-acre site used primarily for truck parking and container storage for the Oakland Waterfront Ballpark District, which included extensive residential, retail, commercial, entertainment venues and public space in addition to the new Oakland A's ballpark. While the Court, by and large, affirmed the adequacy of the EIR, the decision's most notable holding involved the Court's umbrage with a wind mitigation measure.

The court found the wind mitigation measure improperly deferred mitigation by failing to provide an adequate performance standard, and – instead – provided a "goal." The EIR concluded that the project will have significant and unavoidable wind impacts as a result of tunneling effects created by the construction of tall buildings. In response to this impact, the City adopted a mitigation measure that required a wind tunnel analysis for buildings that exceed 100 feet and required the A's to work with a wind consultant to identify mitigation strategies to prevent additional exceedances of the City's wind threshold, without unduly restricting the development. Per the Court, the measure improperly balanced a reduction in impacts with restriction to development potential, without identifying an acceptable common ground. The Court also identified issues with the measure's failure to (i) define "unduly" or "development potential" or (ii) identify the strategies that could feasibly achieve the performance standard. Lastly, the Court also concluded that the City could not seek reprieve from these issues under the statement of overriding considerations.

In addition to the wind impacts, the Court issued a far-ranging 72-page opinion, also made the following findings:

- *Safety and Hazards Impacts*. Petitioners raised a number of objections to the mitigation measures intended to address safety hazards related to Union Pacific Railroad Company (UPRR), despite the EIR's determination that the project would still result in significant and unavailable impacts. The Court rejected all such contentions.

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- **Infeasible Mitigation.** Petitioners argued the mitigation measure requiring fencing along the UPRR tracks was infeasible because of UPRR's exclusive right-of-way. Despite this property right, the Court found the fence would prevent pedestrians from crossing the tracks, thereby producing the desired minatory effect.
 - **Standard of Review.** Petitioners also charged that "substantial evidence" supported their argument that a proposed pedestrian overcrossing would be ineffective and, therefore, infeasible. The Court noted that petitioners misstated the standard of review – the question is whether substantial evidence supports the City of Oakland's conclusion, *not petitioners'*. To this end, the Court found substantial evidence, including the City's statement of overriding considerations, demonstrates the proposed overcrossing would significantly mitigate (but not eliminate) hazard impacts by diverting people from accessing the at-grade intersections.
 - **Exhaustion of Administrative Remedies.** Although the petitioners submitted lengthy comments regarding permanent closures, the Court held petitioners' single "isolated and unelaborated" reference to temporary closure of the at-grade Embarcadero West track intersections was insufficient to exhaust their administrative remedies related to the EIR's impact analysis.
 - **Hazardous Materials Impacts.** Petitioners also raised a number of challenges to the mitigation measures intended to hazardous materials. The Court's opinion similarly disabused petitioners of these arguments.
 - **Risks to Existing Conditions.** The Court found EIR's hazardous substances analysis adequately identified and addressed potential risks related to the potential penetration of the concrete cap covering the site (preventing the escape of its existing soil contaminants). Specifically, the Court noted the EIR discussed existing covenants and risk management measures.
 - **Scope of Analysis.** The Court also found the EIR and related Health Risk Assessment (HRA) appropriately included the discussion of "hydrocarbon oxidation products" (HOPs) in the EIR's analysis of total petroleum hydrocarbons. Therefore, a separate analysis was not necessary. Relatedly, the Court rejected the argument that the HRA was "outdated" because of an ecological risk assessment that predated recognition of HOPs as a separate pollutant.
 - **Deferred Mitigation.** The Court found the EIR's deferral of formulation of the specifics of mitigation measures to a required, later-prepared remedial action plan (RAP) did not constitute deferred mitigation. The Court's determination was due, in part, to: (i) the mitigation measures required achievement of the identified target clean-up levels prior to issuance of a development permit; (ii) the identification in the EIR of the requisite contents of the RAP; (iii) the requirement that the RAP be approved by DTSC prior to the issuance of a development permit; and (iv) the site's extensive history of remedial measures.
 - Related to the RAP, the Court found the DEIR was not required to be recirculated in order to provide information about soil and groundwater contamination remedial measures contained in a draft RAP completed after issuance of the FEIR. Specifically, the Court found that neither removal action plan contemplated in the DEIR to RAP in the FEIR nor the provision of the draft RAP in the FEIR were not significant new information triggering recirculation. The Court also noted that public review and comment on the RAP would be provided during DTSC's approval process.
 - **Air Quality Impacts.** Petitioners argued the EIR should have assumed 100 hours of annual generator use in accordance with the Bay Area Air Quality Management District (BAAQMD) instead of the 50-hour assumption adopted by the City. In rejecting this argument, the Court noted that the BAAQMD guidance applies to areas designated as "high fire risk." However,

because the site was not designated as such, it would not be “reasonably foreseeable” to assume the project would use the emergency generators for 100 hours in any given year in response to regular power shut-offs. The Court also rejected petitioners’ argument that the EIR did not adequately address air quality impacts associated with the truck users that will be displaced by the project. Specifically, the Court found that, given the fact that no reliable methods existed for determining the number of truckers who would relocate and to what locations, the EIR correctly concluded such impacts were speculative and needed not be further analyzed.

- *GHG Emission Impacts*. The Court rejected petitioners’ arguments that (i) “no net increase” was not an appropriate performance standard for measuring GHG emissions and (ii) the City improperly deferred mitigation for related measures. As to the former, the Court held that the EIR used appropriate performance standards. The Court then took this further, and held the mitigation based on this performance standard identified both a series of measures that must be incorporated into the GHG mitigation plan, along with an extensive list of possible additional measures. As to the latter, the Court found that, because this preparation of the GHG mitigation plan was required prior to the approval of any project building permit, the mitigation was therefore adequate.
- *Cumulative Impacts*. The Court determined the Port of Oakland and U.S. Army Corps of Engineer’s feasibility study, undertaken during the preparation of the EIR, did not render the possible expansion of the Port’s turning basin a “probable future project” for which cumulative impacts must be analyzed. To support this determination, the Court noted there was no complete plan of action and a lack in details sufficiently certain to allow for meaningful analysis.
- *Findings*. In assessing petitioners’ self-characterized opposition to the City’s findings, the Court found the argument was actually a challenge to the adequacy of EIR’s analysis of Alternative 3. As this claim was not exhausted during the administrative process, such a claim was barred. The Court deftly denied “such a circumvention of CEQA’s procedural requirements.”

Despite this largely positive opinion (and the 3 years it took to draft the EIR), the A’s are still moving to Las Vegas.

X. Impact Analysis

[*Make UC a Good Neighbor v. Regents of University of California \(2023\) 88 Cal.App.5th 656*](#). In one of the most highprofile cases of the year, the First Appellate District ruled that CEQA requires that (i) public agencies to consider increased social noise generated by residential use (here, student parties) as an environmental impact; and (ii) when a lead agency has identified potential sites for future development and redevelopment in a programmatic planning document, the agency is required to revisit alternative locations for a proposed site-specific project within the program. The Supreme Court has granted review of this controversial decision (Case No. S279242). Additionally, the State Legislature has enacted Assembly Bill 1307 in response to this appellate decision.^[4]

[*County of Butte v. Dept. of Water Resources \(2023\) 90 Cal.App.5th 147*](#). The Third Appellate District took on litigation that has been ongoing, in some capacity, since 2008. In the most recent iteration of litigation, petitioners alleged the EIR for the relicensure of the hydropower facilities at the Oroville Dam as part of the State Water Project (SWP) was insufficient for a myriad of reasons. In response, the Court upheld the conclusion that the potential climate change impacts *on* the project were too speculative, given the information available in 2008 when the EIR was certified, and that no further evaluation was necessary.^[5] The court also rejected the petitioners’ claim that the Department of

Water Resources (DWR) was required to quantify potential fiscal impacts because plaintiffs were unable to establish a link between any economic effect and a physical change in the environment caused by the project. In addressing petitioners' allegations related to water quality impacts not barred by the exhaustion doctrine, the Court held that the EIR made clear that compliance with water quality standards was a necessary part of the licensing procedure and required State Water Resources Control Board oversight. Additionally, the Court found the EIR sufficiently demonstrated that the upcoming potential changes to the SWP would not affect the project's release requirements because such changes were not reasonably foreseeable. Lastly, in upholding the \$675,087 costs award for DWR's preparation of the administrative record, the Court was not persuaded by petitioners' claim that DWR unreasonably "[r]an up the cost bill" to cover budget deficiencies.

XI. Baseline

[*Save North Petaluma River and Wetlands v. City of Petaluma* \(2022\) 86 Cal.App.5th 207](#). The First Appellate District upheld an EIR that utilized a special status species dated 3 years prior to the issuance of the Notice of Preparation (NOP) because the City conducted site visits and more timely information to supplement the survey when identifying the existing condition. The Court noted that the survey was not invalidated simply because it preceded the NOP. The Court was also unpersuaded by petitioners' argument that CEQA required an evacuation and egress study in light of neighbor comments concerning flooding and grassfire hazards, in part due to the fact petitioners could not point to an adopted emergency response or evacuation plan that would be impaired by the apartment complex project.

XII. Anti-SLAPP and Malicious Prosecution

[*Jenkins v. Brandt-Hawley* \(2022\) 86 Cal.App.5th 1357](#). To the delight of many governmental agencies and developers, the First District Court of Appeal found that CEQA lawsuits can be subject to malicious prosecution actions. The underlying action challenged the Town of San Anselmo's approval of the Jenkinses' demolition and replacement of a blighted one-bedroom, built in 1909. When approving the application, the Town determined the project categorically exempt from CEQA, and that the existing on-site bungalow was not historically, culturally, or aesthetically significant. Neighbors opposing the project hired Susan Brandt-Hawley, a prominent, experienced CEQA plaintiff's attorney to unsuccessfully challenge the project. Following the trial court decision in their favor, the Jenkins filed a malicious prosecution action against Brandt-Hawley, arguing the attorney intentionally misrepresented facts. Brandt-Hawley brought an anti-SLAPP^[6] action to dismiss the case. The Court affirmed denial of this motion, finding the Jenkinses had established a sufficient probability of prevailing on their contentions that Brandt-Hawley's Municipal Code and CEQA claims were legally untenable. In its decision, the Court highlighted that Brand-Hawley (i) never quoted the alleged unambiguous Municipal Code text her case relied on and (ii) did not fairly present the record. The Court also noted that any reasonable attorney would know that an interpretation of the Municipal Code's permissive language as mandatory would be rejected for numerous reasons. Not only is the decision notable for its potential deterrence for Not-In-My-Backyard (NIMBY) litigants, but the law also holds that a party successful in bringing a malicious prosecution suit is entitled to damages, including their attorneys' fees.

[*Durkin v. City and County of San Francisco* \(2023\) 90 Cal.App.5th 643](#). The First District Court of Appeal held invalid a grant of the real party-in-interest's ("real party") anti-SLAPP special motion to strike on the basis that the real party's actions were not impetus for the petitioner's underlying complaint challenging the City and County of San Francisco's denial of its application for a residential renovation project following the real party's opposition of the project during the

administrative proceedings. The Court noted that it made no difference whether the real party's appeal preceded or triggered the events leading to petitioner's action against the City. Instead, the Court held that the main question was whether the speech or the petitioning activity itself was the wrong complained of and not a step leading to an act by a third party. Here, the Court determined that all of the elements of petitioner's action related to the acts or omissions of the City, not the real party. Therefore, the Court held that the petitioner's action did not arise from the real party's activity. Thus, the order granting the anti-SLAPP motion was improper. However, the Court denied petitioner's request for sanctions because the real party reasonably relied on anti-SLAPP case law procedurally similar to this case at bar, and, accordingly, the real party's anti-SLAPP motion was not frivolous.

XIII. Injunctive Relief

[*Tulare Lake Canal Co. v. Stratford Public Utility District* \(2023\) 92 Cal.App.5th 380](#). The Fifth Appellate District held that, when considering a request for injunctive relief, a court must assess the harm to the public interest when the lead agency does not make an adequate effort to comply with CEQA. Moreover, the Court found that such harm does not necessarily be accompanied by a showing of a likely environmental harm when the violation occurs during the initial stage of CEQA review. In addressing Tulare Lake Canal Company's application for a preliminary injunction to halt construction and operation of a water pipeline approved without preliminary CEQA review, the Court determined that the pipeline was a discretionary project. Thus, the Stratford Public Utility District's apparent CEQA non-compliance was a "near certainty" and its failure to inform the public about the environmental impacts of the pipeline caused the public harm. The Court noted an alternative holding would incentivize project proponents to withhold information until completion of construction.

[*Anderson v. County of Santa Barbara* \(2023\) 94 Cal.App.5th 554](#). The Second District Court of Appeal found that CEQA cannot be weaponized to prevent a public official from exercising the discretion normally afforded to the enforcement of applicable public nuisance laws. The Court relatedly found that code enforcement activity cannot be subject to an injunction when the underlying activity is a crime. This decision was in response to petitioners' use of a strip of land abutting their properties made private by their installation of "No Parking" signs and other deterrents, despite the fact that the land was part of the County of Santa Barbara's right-of-way and the petitioners failed to obtain encroachment permits. The COVID lockdown resulted in an unusually large number of hikers use of a hiking trail by the right-of-way, which resulted in the discovery of the petitioners' unpermitted use of the County's property. The County subsequently ordered the removal of all obstructions – a decision determined to be exempt from CEQA because it involved restoration of an existing roadway for public safety. In reversing the injunction granted to petitioners, the Court held state law, particularly Code of Civil Procedure section 526, County ordinances, and the CEQA prohibited the use of an injunction "to prevent the execution of a public statute by officers of the law for the public benefit." The Court noted that because parking had historically been authorized in this right-of-way the restoration of access did not constitute a new project, eliminating the possibility that the action would result in irreparable harm.

XIV. Statute of Limitations

[*Committee to Relocate Marilyn v. City of Palm Springs* \(2023\) 88 Cal.App.5th 607](#). The Fourth Appellate District found that, when material changes are made to a project *after* the filing of a Notice of Exemption (NOE), the 35-day statute of limitations is replaced with the default 180-day statute of limitations, which commences when the petitioner knew, or should have known, about the changes to the project. Here, the Court held that an amended writ petition challenging a city's street closure

project was not time-barred despite its first alleging CEQA violations more than 35 days after the City's filing of a NOE because the City subsequently changed its project from a street vacation to a temporary street closure.

XV. Other

[Robinson v. Superior Court \(2023\) 88 Cal.App.5th 1144](#). The Fifth District Court of Appeal found that Southern California Edison Company (SCE), an investor-owned public utility, is not required to comply with CEQA in an action for eminent domain to condemn an easement across a landowner's property for the purpose of maintaining transmission lines. The Court noted that CEQA only applies to "discretionary projects proposed to be carried out or approved by *public agencies*" and that SCE is not a public agency. The Court further noted that if SCE sought an approval from the California Public Utilities Commission (CPUC), which was not required in the condemnation process, then the CPUC would have been required to comply with CEQA as it is a public agency.

[Save Berkeley's Neighborhoods v. Regents of the Univ. of California \(2023\) 91 Cal.App.5th 872](#). The First District Court of Appeal ruled that CEQA challenges a long-range development plan (LRDP) that included an updated student population baseline and analysis of academic space and campus housing were moot due to an updated SEIR that addressed the concerns raised in prior litigation, and in light of Senate Bill 118, which clarified that "enrollment or changes in enrollment, by themselves, do not constitute a project" for purposes of CEQA.

[McCann v. City of San Diego \(2023\) 94 Cal.App.5th 284 \(McCann II\)](#). The Fourth Appellate District held that the trial court exceeded its authority and abused its discretion in retaining jurisdiction and failing to discharge a writ. At issue was the trial court's order for the City of San Diego to set aside its approvals for underground existing overhead utility lines following the trial court's determination that the related MND failed to properly analyze whether the project was consistent with the City's Climate Action Plan. After the City complied with the entirety of the order and brought forth a return on the writ, the trial court refused to discharge the writ. The Court found the court exceeded its jurisdiction as the City's return to writ demonstrated full compliance with that CEQA.

[Friends of Oceano Dunes v. California Coastal Commission \(2023\) 90 Cal.App.5th 836](#). The Second District Court of Appeal upheld the decision to deny a motion filed by a number of "interested" parties to intervene in a consolidated action challenging an amendment to a CDP to, among other things, phase out off-highway vehicle use at the Oceano Dunes State Vehicular Recreation Area on CEQA and Coastal Act grounds. In so doing, the Court explained that when a nonparty has an interest in defending litigation challenging an agency's decision that is identical to the agency's, it must make a compelling showing of inadequacy of representation to support intervention as of right. The Court held that where, as here, a nonparty offers no (i) new arguments, (ii) evidence its arguments will not be made, or (iii) evidence the agency will inadequately represent its interests in the specific issues being litigated, the nonparty has failed to make the required showing. A "me too" argument is not adequate for a by right role in the prosecution of the case. The Court also held that a trial court has broad discretion when considering permissive intervention in complex litigation involving multiple parties, particularly when the participation of the nonparty would be duplicative, thereby placing undue burden on the court.

[1] A comprehensive review of this case can be found [here](#).

[2] A comprehensive review of this case can be found [here](#).

[3] A comprehensive review of this case can be found [here](#).

[4] A comprehensive discussion of this bill can be found [here](#).

[5] *The Court clarified, “[n]one of this, however, is to say that DWR could reach the same conclusion today.”*

[6] California’s anti-SLAPP (strategic litigation against public participation) regulations prevent certain free speech conduct from being the basis of a lawsuit.

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