Save Our Access v. City of San Diego
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Summary by Tina Wallis, Founder/President of Wallis Law Group, Inc.

Overview: *A recent CEQA case shows the importance of carefully reviewing a prior CEQA document when evaluating if subsequent CEQA review is required. The case also shows the importance of email communications included in an administrative record.*

What is subsequent CEQA Review: Subsequent CEQA review occurs when there is a prior CEQA document and a change to a project or an action that was studied in the prior CEQA document is being implemented. Given that CEQA became law in 1970, and land uses have evolved since then, evaluating the need for subsequent CEQA review is a timely issue.

Once a CEQA document is certified, the principle of finality controls and lead agencies are prohibited from requiring more CEQA review except for three circumstances. Mere change, new information or even a new environmental impact is not enough. The change, information, or impact, must result in a new, significant environmental impact or a substantial increase in the severity of the previously studied impact. Likewise, new mitigation measures or alternatives are not enough to trigger subsequent CEQA review. The new measures or alternatives must substantially reduce a significant effect, and the applicant must reject the new mitigation measure or alternative. (Pub. Res. Code, § 21166 and 14 Cal. Code Regs., § 15162.)

The three circumstances that trigger subsequent CEQA review are: (1) a substantial change in the project that requires significant revisions to the prior CEQA document; (2) substantial changes to the circumstances under which the project is undertaken; and (3) new information of substantial importance, which could not have been known when the prior CEQA document was adopted, shows more significant effects that were not previously studied, a substantially more severe significant effect than was studied in the prior CEQA document, or previously rejected alternatives or mitigation measures are now possible and the applicant rejects them.

In this case, the City of San Diego had a long-standing community plan – the "Midway-Pacific Highway Community Plan" for the city's Coastal Zone. The city first adopted the plan in 1970. In 1972, voters adopted a thirty-foot height limit for the plan area. The purposes of the height limit were beach accessibility for all, preserving the status quo by preventing sea walls, avoiding high population density with concomitant parking, congestion, crime, and other issues. Other documents said the plan's purpose was to preserve the unique character of San Diego's Coastal

Zone and statements that high rises obstruct ocean breezes, sky, and sunshine. The city updated the plan in 1990 and again in 2018. The city certified an EIR for the 2018 update.

In 2020, the city began the controversial process of eliminating the thirty-foot height limit. The administrative record included emails from staff members stating that the 2018 EIR did not analyze removing the thirty-foot height limit. As the process and controversy grew, staff changed their position and claimed that the 2018 EIR studied removing the thirty-foot height limit, relying on density and base zoning height limits. Staff also conducted a "consistency analysis" and concluded that removing the height limit was consistent with the 2018 EIR. Staff also opined that removing the height limit would not result in any significant environmental impacts.

The court undertook a de novo review to determine if the city followed CEQA's procedural requirements and applied the substantial evidence standard of review to determine if there was evidence in the record supporting the city's claim that no subsequent CEQA review was required because removing the height limit was consistent with the 2018 plan update. The court scrutinized the administrative record and found there was no substantial evidence supporting the city's findings. In addition to reviewing the staff emails saying the 2018 EIR did not study removing the height limit, the 2018 plan update said all new construction would be subject to the thirty-foot height limit to protect coastal views.

The court reiterated that CEQA documents are disclosure documents that should inform the public. Information should not be buried and must be presented so that it adequately informs the public and decision-makers.

Because the court found that the 2018 plan and EIR did not include removing the thirty-foot height limit, it applied the fair argument standard and ruled that removing the height limit may have significant adverse effects on the environment. Thus, the city had failed to comply with CEQA and must do so before it can eliminate the thirty-foot height limit in its Coastal Zone.

Pro Tip:

When considering whether subsequent review is required under CEQA, be sure you have all relevant documents. Consider CEQA's requirements EIRs must useful to decision makers and the public, must be in plain language, and should summarize technical data. (Pub. Res. Code, § 21003, subd. (b) and 14 Cal. Code Regs., 15147.)

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