



Are Urban Land Uses And Project Design Components Fungible For CEQA Project Description Purposes As Long As Maximum Possible Environmental Impacts Are Disclosed And Analyzed? Second District Doesn't Think So, Holds Controversial Millennium Hollywood Project EIR's "Blurry" Project Description Violates CEQA

By [Arthur F. Coon](#) on August 29, 2019

In an opinion originally filed on July 31, and belatedly ordered published on August 22, 2019, the Second District Court of Appeal (Division 3) affirmed a judgment granting a CEQA writ petition invalidating the final EIR and project entitlements for the Millennium Project, a controversial proposed mixed-use development on a 4.47-acre parcel straddling Vine Street and surrounding the historic Capital Records Building in Hollywood. *Stopthemillenniumhollywood.com, et al. v. City of Los Angeles, et al. (Millennium Hollywood LLC, Real Party in Interest)* (2019) ___ Cal.App.5th ___. The Court upheld the trial court's finding that the EIR violated CEQA's requirement for a stable and finite project description as a matter of law. Reasoning that "the project description is at the heart of the EIR process in this case," the Court found it "not necessary to reach appellants' [the City and developer Millennium]" challenges to several other grounds upon which the trial court issued its writ, including findings that the EIR's transportation analysis improperly failed to use responsible agency Caltrans' methodology, that its analysis of cumulative traffic impacts was unsupported by substantial evidence, and that a condition of approval improperly expanded the approved project uses beyond those actually analyzed in the EIR. It also declined to address plaintiff/cross-appellant's claim that the City failed to notice and consult with the California Geological Survey regarding potential seismic hazards.

Background

Developer Millennium initially proposed a 2008 project described as a mixed-use development of approximately 492 residential units, a 200-unit luxury hotel, 100,000 square feet of offices, a 35,000-

square foot sports club/spa, 11,000-plus square feet of commercial uses, and 34,000 square feet of food/beverage uses, which would also preserve and maintain the historic Capital Records Tower and Gogerty Building as an office and music recording facility. According to the Court, “[t]he 2008 project application specifically described what Millennium proposed to build” on each of the project site’s two lots in great detail including descriptions of the nature, uses, height, and square footages of all individual buildings, and included “[d]etailed site plans, locations, and elevations for the buildings, architectural renderings of the buildings themselves, and the related features of the development[.]”

After being advised the 2008 project’s enclosed balconies would exceed the general plan’s allowable 6:1 floor area ratio (FAR) and thus require a variance, Millennium took no further action until submitting another project application for the site in 2011. The 2011 project application, according to the Court, “shared similarities with the 2008 proposal,” but lacked “any description or detail regarding what Millennium intended to build.” Further, “[t]his lack of detail about the proposed project and what it would look like and for what uses it would be built continued throughout the environmental review process.” Per the developer’s lawyer, the 2011 project was “a concept plan and several land use scenarios” and the project description described “an impact ‘envelope’ within which a range of development scenarios can occur.” The City’s initial study described construction of 1,052,667 square feet of new floor area, preservation and maintenance of the historic buildings as office and music recording facilities, and a maximum floor area (existing buildings plus new construction) of 1,166,970 square feet with a 6.1 FAR averaged across the project site. Per the Court, the initial study did not specifically identify, quantify or locate the project’s contemplated mix of land uses within the building sites, and “did not include any drawings or renderings of what Millennium proposed to build, the number of buildings, their shape and size, their location within the building sites, or the purposes to which they would be put. The only stable and finite description of buildings at the site was the size, location, and purposes of the existing Capitol Records Tower and Gogerty Buildings.” Further, “[t]he initial study incorporated a land use equivalency program (LUEP) as part of the project description” allowing the transfer of floor area among project parcels, which “could result in several potential development scenarios” that “would occur within the development thresholds contemplated in the Development Agreement including the not-to-exceed FAR.” The Court stated “the initial study failed to describe a stable or finite commitment regarding the uses to be made of the undisclosed and undescribed constructed buildings.”

The Draft EIR likewise contained “very few” specifics, indicating the project would implement a Development Agreement (DA) that “established detailed *and flexible* development parameters” for the site and would also “grant flexibility regarding the final arrangement and density of specific land uses, siting, and massing characteristics subject to detailed development controls” to be adopted as development regulations in conjunction with the proposed DA. Because of the contemplated flexibility in the project, the DEIR studied a “concept plan” representing a potential development scenario, and two other possible “residential” and “commercial” scenarios. The DEIR’s approach in analyzing the various scenarios was to “analyze[] the greatest possible impact on each environmental issue area” under the premise that “[t]he most intense impacts from each scenario represent the greatest environmental impacts permitted for any development scenario for the Project” and that “[t]he Project may not exceed any of the maximum impacts identified for each issue area from” any of the scenarios. The development regulations established height zones and maximum floor plates for the potential towers, and the project was confined to “a pre-determined massing envelope” and subject to various other zoning-like standards and parameters governing lot coverage, FAR, setbacks, and open space, as well as other “grade level standards.” The DEIR’s conceptual scale and massing renderings were not intended as proposed building designs, and were presented for purposes of assessing the most impactful massing options possible for the ultimate project. According to the Court, the upshot of this approach was that “other than being assured that ten viewpoints would be preserved, the public had no idea how many buildings or

towers would be built and where they would be located on the project site. Instead, the public had only conceptual drawings of a development that might not be built.”

The 2013 Final EIR included the same project description as the DEIR, and it included many public comments complaining that the “description made it impossible for them to participate meaningfully in the CEQA process.” The gist of the complaints was that the “project ... does not include a specific proposal” and that ultimate uses, locations, designs and impacts remained unknown, including “fail[ure] to disclose and analyze basic things” like project ingress and egress points, which allegedly made assessment of traffic impacts in a very congested area “impossible.” Per the Court, “[d]espite these objections, the City made no modification to the project description in the final EIR[,]” and the City approved the project.

The Litigation And The Trial Court’s Order

Plaintiff’s ensuing lawsuit alleged three CEQA claims. Its first cause of action alleged that the EIR “fail[ed] to provide an accurate, stable, and finite project description.” The second alleged City prejudicially erred by declining to study project traffic impacts on the 101 Freeway despite Caltrans’ direction to do so. The third cause of action alleged City failed to consult with the California Geological Survey regarding potential seismic hazards.

The trial court granted plaintiff’s writ petition as to the first and second claims and denied it as to the third. Relying on the holding of *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, that “[a]n accurate, stable, and [consistent] project description is the *sin[e] qua non* of an informative and legally sufficient EIR[,]” it explained that “a shifting project description may confuse the public and public decision-makers, thus vitiating the EIR’s usefulness as a vehicle for intelligent public participation.” A project description should thus “be sufficiently detailed to provide a foundation for a complete analysis of the environmental impacts,” include all project components, and apprise the parties of the project’s “true scope.”

The trial court found the EIR’s project description “was neither stable nor finite” and provided only a “blurred view of the project,” which as approved was essentially “an “*envelope*” of *potential* residential, commercial, retail and office projects that would not have more than a maximum design mass and height, and would create no more than maximum levels of air pollution and traffic impacts.” The trial court found that analyzing a “set of environmental impact limits” rather than environmental impacts for a defined project violated CEQA, and the EIR therefore failed as an informational document. It distinguished a case where unusual circumstances (ongoing hazardous materials contamination requiring future cleanup of unknown duration) precluded the project description from containing more meaningful information than basic physical parameters (street layouts) and conceptual elements (building shapes and landscape designs) (see, *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036), noting “the Millennium project site did not contain hazardous substances or other external variables that made the nature and timing of development unknown or unknowable, nor was there any planned supplemental environmental review, any external conditions creating uncertainty, or any reason the project developer could not be specific about details.” The trial court rejected “uncertainty about market conditions or the timing of ... build-out” as sufficient justifications “for the ambiguous and blurred Project Description.”

The trial court additionally found a portion of the environmental analysis to be improperly deferred, reasoning that without knowing which “concept” would ultimately be built the EIR could not and did not explain how the project would not exceed maximum impacts, and no additional CEQA review was required to ensure such impacts would not be exceeded by the project as finally designed and built.

The Court of Appeal's Decision

The Court of Appeal affirmed the judgment as to the first cause of action only, and found it unnecessary to address any other issues. Applying a de novo standard of review to the question whether the EIR's project description complied with CEQA (citing *Washoe Meadows Community v. Department of Parks & Recreation* (2017) 17 Cal.App.5th 277, 286-287; *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 513), it held that the project description "is an indispensable element of both a valid draft EIR and final EIR" and that it "must be accurate, stable and finite."

Applying *County of Inyo's* articulation of CEQA's requirement of "a definite and unambiguous project description," it noted that in that case the defect in the shifting project description did not affect the EIR's environmental impact analysis, but it nonetheless did "vitiat[e]" the "EIR process as a vehicle for 'intelligent public participation'" by "draw[ing] a red herring across the path of public input." Discussing the *Washoe Meadows* case and its recent reiteration of CEQA's requirement of a "clear and unambiguous project description[.]" the Court stated: "It did not matter to th[at] ... court that the draft EIR thoroughly analyzed the alternative that was ultimately selected in the final EIR." Applying the project description principles discussed in those and other cases, the Court held:

"In this case, the project description is not simply inconsistent, it fails to describe the siting, size, mass, or appearance of any building proposed to be built at the project site. The draft EIR does not describe a building development project at all. Rather, it presents different conceptual development scenarios that Millennium or future developers may follow for development of this site. These concepts and development scenarios – none of which may ultimately be constructed – do not meet the requirement of a stable or finite proposed project."

The Court further complained that the development regulations incorporated into the project description provided little information about the project's actual design and simply imposed "vague and ambiguous" limits on the range of future construction choices, and that "no particular structure or structures are required to be built." It rejected appellants' assertion that the EIR's discussion of the "conceptual 'impacts envelope' of project alternatives" satisfied CEQA "so long as the worst [sic]—case—scenario environmental effects have been assumed, analyzed, and mitigated[.]" holding that "CEQA's purposes go beyond an evaluation of theoretical environmental impacts." The Court held the project description failed to meet CEQA Guidelines § 15124's basic project description requirement, omitting technical construction characteristics such as "site plans, cross-sections, building elevations, or illustrative massing to show what buildings would be built, where they would be sited, what they would look like, and how many there would be." Nor, according to the Court, were there "practical impediments" to Millennium providing "an accurate, stable, and finite description of what it intended to build" and it pointed to the detailed 2008 proposal as evidence of the same. Concluding that the CEQA project description error was prejudicial because "the failure to include relevant information preclude[d] informed decision making and informed public comment [citing *Washoe Meadows*, at 290]," regardless of whether a different outcome would have resulted from compliance, the Court held "the trial court correctly invalidated the EIR and granted the CEQA writ petition."

In a single paragraph at the conclusion of its discussion, the Court held – citing two *non-CEQA* cases as supposedly controlling authority – that it need not reach the remaining issues raised by the parties, including "whether the City is required by law to use Caltrans's methodology for the study of traffic effects, whether the City was required to consider cumulative [transportation] effects, including those on the 101 Freeway, ... and whether the seismic issues were sufficiently disclosed. In a footnote, it stated that "[c]ontrary to appellants' contention at oral argument, Public Resources Code section 21168.9 does not

mandate that we rule on every issue presented on appeal” but instead “provides that the trial court’s order upon remand, shall include only those mandates that are necessary to achieve CEQA compliance.”

Conclusion and Implications

Notwithstanding the Court of Appeal’s (and trial court’s) somewhat simplistic analysis of the project description issues, a lot more was clearly at play and at stake in this case, as well as in similar urban development scenarios. Apart from impacts on cultural and historical resources and aesthetic impacts (which were apparently not issues in contention here), the usual environmental impact “flashpoints” of major urban infill redevelopments like the Millennium project usually include traffic and transportation impacts, air quality and GHG impacts, and density (in terms of height, massing, setbacks, FAR and open space). Unlike the far different subsurface water extraction (*County of Inyo*) and river restoration/golf course reconfiguration (*Washoe Meadows*) projects involved in the project description cases it purported to follow, the case presented to the Court of Appeal here did not involve unclearly defined and potentially widely varying changes and impacts to natural resources and rural settings, but instead rather fungible development impacts in an intensely urban development setting. The Millennium project at issue appeared to present no exception to the typical impact concerns of such urban infill developments, and after abandoning its “Great Recession”-era 2008 application, the developer obviously wanted sufficient flexibility – and CEQA coverage – to meet changing market conditions during what would likely be a lengthy build-out period. Perhaps ambitiously, but certainly not unreasonably, it sought comprehensive entitlements with “front-loaded” CEQA review that would assess and mitigate for “worst-case-scenario” environmental impacts from maximum uses, heights, FAR, densities, intensities, development footprints, and “envelopes,” etc.

While this approach did produce a “blurred” project description that, perhaps, had more similarities to a specific plan or zoning ordinance in many respects than a site-specific development project, the developer likely felt unable to predict with any greater specificity the development that would ultimately emerge. Its goal did not appear to be to “hide the ball” on analyzing, disclosing and mitigating for environmental impacts, however, but, instead, to “cap” and mitigate for the maximum level or “worst case scenario” of those fungible urban environmental impacts. Apparently, according to the Second District, CEQA does not allow a modern developer such flexibility unless further site-specific environmental review with more concrete technical details is assured and performed before the project components are “finalized” and built. While there is surely much more to be said on all these issues, the Court’s relatively brief – and initially unpublished – opinion here was not up to that task.

The Court’s opinion, in my view, would have been better off remaining unpublished. This is not only due to its relatively brief and somewhat simplistic analysis eliding the important issues discussed above, but because its second major holding – that it need not reach the remaining CEQA issues – is just wrong on the law and bad policy as well. Resolving outstanding discrete issues – such as, for example, whether a responsible agency’s preferred methodology for analyzing an impact must be adopted by the lead agency as a matter of law (answer: it doesn’t) – serves to prevent endless rounds of CEQA litigation and provides critical guidance to lead agencies attempting to prepare a legally-compliant EIR on remand. Somehow, the Court overlooked all the relevant CEQA case law authorities on this issue, as well as the relevant and controlling CEQA statute, Public Resources Code § 21005(c), which provides: “It is the further intent of the Legislature that any court, which finds, or, in the process of reviewing a previous court finding, finds, that a public agency has taken an action without compliance with this division, shall specifically address each of the alleged grounds for noncompliance.”



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