



Flunking CEQA’s “Fair Argument” Test: Third District Affirms Judgment Upholding MND for El Dorado County Bridge Replacement Project, Rejects Arguments Based on Alleged Significant Impacts on Fire Evacuation Routes During Construction As Insufficient To Require EIR

By [Arthur F. Coon](#) on June 21, 2021

In a partially published unanimous opinion filed June 16, 2021, authored by a jurist who is also a noted CEQA expert (Acting Presiding Justice Ronald Robie), the Third District Court of Appeal affirmed the trial court’s judgment denying a writ petition challenging El Dorado County’s mitigated negative declaration (MND) for and approval of the Newtown Road Bridge at South Fork Weber Creek Replacement Project. *Newtown Preservation Society, et al. v. County of El Dorado, et al.* (3d Dist. 2021) ____ Cal.App.5th _____. In the published portion of its opinion, the Court of Appeal held that petitioners/appellants erroneously framed the “fair argument” test in terms of the project having “potentially significant impacts on resident safety and emergency evacuation,” whereas the correct test is “whether the record contains substantial evidence that the project may have a significant effect on the environment or may exacerbate existing environmental hazards.” It held appellants “failed to carry their burden of showing substantial evidence supports a fair argument of significant environmental impact in that regard.” (In the *unpublished* portion of its opinion, which won’t be analyzed in further detail in this post, the Court held the County did not impermissibly defer mitigation, and it declined to consider two other arguments because they added nothing to the fair argument analysis and/or constituted new theories or arguments raised for the first time on appeal.)

The County’s MND and Fire Hazards Analysis

The County’s adopted final MND, in its hazards and hazardous materials section, stated the bridge replacement project would impair or physically interfere with an adopted emergency response or evacuation plan, and expose people or structures to a significant risk of loss, injury, or death involving wildland fires, but that such impacts would be less than significant. While the small bridge’s construction

would temporarily close Newtown Road to through traffic at the project site, County's contingency plans involving numerous alternative emergency evacuation routes under various scenarios, all to be coordinated with the County Sheriff's Emergency Services Office and the County's Fire Protection District (both of which expressed they were "comfortable" with the options), were determined to reduce adverse impacts to a less-than-significant level.

A significant contingency in the alternative evacuation scenarios involved the possible construction of a temporary emergency access route across South Fork Weber Creek just west and downstream from the proposed bridge, which would connect up again with Newtown Road just upstream (and east) from the project area. This potential temporary emergency access route, which would require the County to acquire a temporary construction easement costing taxpayers tens of thousands of dollars and would impact a private owner's land, was contemplated to be constructed only if various conditions and factors occurred – the primary factor being the timing of the start of construction and whether it would extend into the fire season. In other words, if bridge construction – anticipated to take several months – started early enough in the year to be sufficiently complete to allow emergency access through the project site when potentially needed during the fire season, construction of this temporary emergency access route would be less likely to be needed, whereas the opposite would be true if bridge construction started later in the year and would not allow emergency access through the site during fire season.

At issue was potential impairment of access for evacuation purposes to the easterly intersection of Newtown Road and Fort Jim Road for 47 developed parcels along Newtown Road, east of its westerly intersection with Fort Jim. The County determined that numerous evacuation options existed for its Emergency Services Office to evacuate those parcels should a fire occur and block Newtown Road east of its westerly intersection with Fort Jim. In addition to the possible access through the project site to the easterly intersection (should construction be sufficiently advanced) and the potential temporary emergency access route (should it be constructed), no fewer than five other evacuation route options leading to numerous other roads (for egress leading to destinations including Pleasant Valley and Placerville), as well as a large clear space area allowing for nearby sheltering in place, would be available.

The Petitioners/Appellants' Litigation

Dissatisfied with the County's MND and its mitigation in this regard, appellants sued. They essentially argued (as relevant to their appeal) that substantial record evidence supported a fair argument of significant impacts on public safety requiring an EIR. More specifically, they asserted that the MND failed to adequately address the significant impact of closing the bridge without committing to construction of the temporary evacuation route in the event of fire, and that in the absence of such a commitment, the many alternative evacuation plans were insufficient to mitigate the impact of area residents' exposure to wildfire dangers to a less-than significant level.

After issuing a detailed and extensive tentative ruling rejecting appellants' arguments, the trial court denied their writ petition, and the Court of Appeal affirmed that judgment on appeal.

The Court of Appeal's Opinion and Fair Argument Analysis

The Court of Appeal first rejected appellants' argument that the various evacuation options discussed in County's master response to comments number 3 were not properly incorporated into the MND, because that argument was not raised either in the trial court or appellants' opening brief on appeal. The Court of Appeal then set forth the applicable legal principles governing CEQA's "fair argument" test, and quoted at length from the trial court's detailed final ruling analyzing appellants' proffered evidence and whether it

constituted the requisite “substantial evidence” supporting a fair argument that the project would have significant unmitigated environmental impacts.

Preliminarily, and before addressing appellants’ evidence in detail, the Court of Appeal observed that they had erroneously framed the applicable fair argument test as whether the project would have significant impacts on *resident safety and emergency evacuation*. The correct question was instead whether the project may have a significant effect on the *environment*. The CEQA Guidelines Appendix G checklist questions, including whether the project would expose people or structures to a significant risk of loss, injury, or death involving wildland fires, do not extend the EIR requirement to situations where the environment affects the project, rather than the other way around (citing *South Orange County Wastewater Authority v. City of Dana Point* (2011) 196 Cal.App.4th 1604, 1616); and CEQA does not generally require analysis of how *existing* hazards or conditions might impact project users or residents unless the project might *exacerbate* existing environmental hazards. (Citing *California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, 392.) Accordingly, the issue was whether appellants had presented “substantial evidence supporting a fair argument that the project may have a significant effect on the environment or may exacerbate existing environmental hazards.” The Court concluded they had not.

The Court held that the testimony of several area residents relating to their past experiences with wildfires related to *existing* hazards that might affect them during construction, not impacts caused or exacerbated by the project, and also constituted non-expert opinion without any identified factual foundation. As such, it did not constitute substantial evidence supporting the required fair argument. (Citing *Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal.App.5th 677, 691.)

Similarly, the letter of a retired CalFire aerial firefighter, expressing concerns with the “lack of an emergency evacuation route during project construction” and opining evacuation would be “problematic” and likely trap residents by “block[ing] one of the primary escape routes,” lacked any identified factual foundation in the record “given the existence of the evacuation routes and options identified in the record.” Accordingly, it was mere speculation rather than substantial evidence supporting a fair argument that the project may cause new or exacerbate existing environmental hazards; further, nothing in the letter set forth facts establishing that the ex-firefighter was an expert in ground evacuation routes, a technical area the Court held requires expertise rather than mere lay opinion to constitute substantial evidence. (Citing *Joshua Tree*, at 690-691.) By contrast to appellants’ failure to point to any record evidence showing the ex-firefighter had any “experience in determining, directing, or effecting evacuation routes[,]” the County had consulted with the Emergency Services Office and County Fire, agencies with expertise that expressed they were comfortable with the County’s project and evacuation options.

The comments of another resident – the owner of the property through which the potential temporary emergency access route would be constructed – and those of the appellants’ attorney likewise did not amount to substantial evidence under the fair argument test. They failed to explain the alleged relevance of comments that area fires historically moved from west to east in relation to the numerous evacuation options identified, and they were unsubstantiated to the extent they asserted – in the face of the numerous identified routes – that residents would lack any emergency evacuation route. Comments regarding a prior, allegedly similar project’s limitation of residents’ fire season evacuation routes failed to explain how that alleged limitation constituted a significant impact, or how it was a relevant comparison to this project with all of its specifically identified evacuation routes. None of the comments explained how the project may cause any new or exacerbate any existing environmental hazards. And while Nagel was also an experienced firefighter, she, too, lacked demonstrated experience in determining, directing or effecting evacuations, and her lay opinions in a technical area requiring expertise thus failed to constitute substantial evidence.

The Court of Appeal distinguished three prior cases cited by appellants, in which courts relied on local residents' lay testimony to support a fair argument, as standing for the proposition that "lay testimony may constitute substantial evidence when the personal observations and experiences directly relate to and inform on the impact of the project construction. In contrast to the public comment in those three cases, here, the comments lacked factual foundation and failed to contradict the conclusions by agencies with expertise in wildfire evacuation with *specific* facts calling into question the underlying assumptions of their opinions as it pertained to the project's potential environmental impacts." Nothing in the comments or record supported the argument that using the Newtown Road Bridge was the only viable evacuation route for fires starting west of the project site.

The Court of Appeal found no need to address appellants' argument that the County failed to properly reject the public comments for lack of credibility because it did not first identify the evidence it found non-credible with sufficient particularity. (See, *Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187, 208.) In light of its conclusion that appellants had failed to identify substantial evidence supporting a fair argument that the project may have a significant impact on the environment or may exacerbate existing environmental hazards, addressing the credibility issue was unnecessary.

Conclusion and Implications

The Court of Appeal's opinion is significant and enlightening in several respects. First, it serves as a good general reminder that while the "fair argument" test presents a *low* threshold, that does not equate to *no* threshold, and where petitioners fail to carry their burden to point to *substantial evidence* in the record supporting the requisite fair argument, a negative declaration will be upheld. Second, to constitute substantial evidence, testimony must have an adequate factual foundation (so as not to be speculative), and lay opinion will not suffice in technical areas requiring expertise (such as adequacy of wildfire evacuation routes). Third, petitioners must be mindful of the limits of CEQA analysis – i.e., it is generally concerned only with the project's impacts on the environment, not vice versa – and how that affects the framing of the project "impact" to which substantial evidence and a fair argument must be directed. Given the recent increase in CEQA litigation challenging lead agencies' analysis of projects' wildfire-related impacts, the Court's opinion provides helpful guidance to litigants by reminding them that the relevant potential project impacts to be analyzed under CEQA are not impacts to public safety or evacuation routes, but to the existing environment and exacerbation of existing environmental hazards. Appellants' evidence here failed to squarely address the relevant impacts and came up short as a matter of law.

Questions? Please contact [Arthur F. Coon](#) of Miller Starr Regalia. Miller Starr Regalia has had a well-established reputation as a leading real estate law firm for more than fifty years. For nearly all that time, the firm also has written *Miller & Starr, California Real Estate 4th*, a 12-volume treatise on California real estate law. "The Book" is the most widely used and judicially recognized real estate treatise in California and is cited by practicing attorneys and courts throughout the state. The firm has expertise in all real property matters, including full-service litigation and dispute resolution services, transactions, acquisitions, dispositions, leasing, financing, common interest development, construction, management, eminent domain and inverse condemnation, title insurance, environmental law and land use. For more information, visit www.msrllegal.com.