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# First District Affirms Judgment Upholding Statutory CEQA Exemption For Housing Project Consistent With EIR-Reviewed Specific Plan, Rejects Claims That Changes In Project Or Circumstances Required Subsequent EIR

By Arthur F. Coon on February 8, 2022

In an opinion filed on December 29, 2021, and later ordered published on January 25, 2022, the First District Court of Appeal (Div. 4) affirmed a judgment upholding the City of Newark's (City) use of Government Code § 65457's CEQA exemption for a 469-lot residential subdivision on land adjacent to San Francisco Bay. Plaintiffs unsuccessfully challenged the City's 2019 subdivision map approval based on the claim that a subsequent EIR was required due to changes in the project and circumstances allegedly showing it would have new significant impacts on the endangered salt marsh harvest mouse ("harvest mouse") and its wetlands habitat. *Citizens' Committee to Complete the Refuge, et al. v. City of Newark et al., (SI XVII, LLC, et al, Real Parties in Interest)* (2022) ___ Cal.App.5th ___.

## Factual And Procedural Background

The City certified an EIR in 2010 and approved a specific plan for certain land (Areas 3 and 4) next to the Bay, which allowed development of up to 1,260 residential units and a golf course and trails. Area 4 contains wetlands habitat for the harvest mouse. Petitioner CCCR successfully challenged that 2010 EIR in court; in correcting its identified deficiencies, the City adopted a recirculated EIR (REIR). The REIR clarified it was providing a *program level* analysis of development of housing and a golf course in Area 4 based on the *maximum level* of development permitted there under the specific plan, which was 1,260 total residential units in Areas 3 and 4, development of all 316 acres in Area 4, and essentially filling *all* wetlands (86 acres) in Area 4. The REIR acknowledged the ultimately approved development could be smaller, and stated the City would proceed under CEQA Guidelines § 15168 (describing program EIRs and their use with later activities) in evaluating later specific development proposals, and use a checklist or initial study to determine whether the environmental review for such proposals would be an exemption,

addendum, tiered negative declaration, or subsequent or supplemental EIR. The REIR also quoted section 15168(c)(5)'s statement that subsequent activities could be found within the scope of the project described in the program EIR and thus require no further environmental documents.

The REIR found that habitat destruction from filling wetlands, building houses next to them, and cat, racoon, and rat predation could have significant impacts on the harvest mouse, and it imposed mitigation. It also discussed climate change and sea level rise impacts, noting the Bay level could rise as much as 5.5 feet by 2100, and that the rise could occur at an accelerated rate. It found use of fill to raise Area 4 housing units 10 to 14.5 feet above sea level would protect them from flooding until 2100 in all but the most extreme scenario, and that because of uncertainty in sea level rise projections it was unclear whether additional fill would provide better protection in an extreme scenario than a regional adaptive strategy, such as levees or flood walls.

In 2019, the City approved the 469-lot subdivision for Area 4, with no golf course, and with dedication of much of one 100-acre subarea to the City. This development was less dense than that analyzed by the REIR and allowed under the specific plan, which would have permitted 874 units. Using a checklist to determine whether the REIR adequately addressed the subdivision map approval's impacts, the City concluded the map was consistent with the specific plan and that no changed circumstances or new information triggered the need for additional environmental review.

CCCR sued again, this time joined by Center for Biological Diversity, challenging the 2019 map approval under CEQA. The trial court denied the petition, finding the record contained substantial evidence supporting the City's determination that further environmental review was unnecessary; petitioners appealed and the Court of Appeal affirmed.

## The Court of Appeal's Opinion
## Applicable Legal Rules

The Court of Appeal first reviewed the applicable legal principles governing programmatic analysis, the Government Code § 65457 exemption, and CEQA's subsequent review rules under Public Resources Code § 21166. Unlike project EIRs, tiered EIRs allow analysis of broad overall impacts at a first-tier programmatic level, such that they need not be reassessed in subsequent project phases. (Citing *Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 959, my September 22, 2016 post on which can be found ***here***.)

Government Code § 65457's statutory CEQA exemption covers any residential development project, including subdivisions and zoning changes, "undertaken to implement and . . . consistent with a specific plan for which an [EIR] has been certified after January 1, 1980," but is subject to an exception if a post-specific plan event occurs under Public Resources Code § 21166 that requires a supplemental EIR. Section 21166 provides that no subsequent or supplemental EIR is required unless one or more of three triggering events occur: (1) substantial project changes requiring major EIR revisions; (2) substantial changes in circumstances requiring major EIR revisions; or (3) new information unknown and unknowable when the EIR was certified as complete becomes available. (Pub. Resources Code, § 21166(a)-(c).) The Government Code § 65457 exemption applies only if Section 21166's requirement for a supplemental EIR is not triggered, or if it is triggered, a supplemental EIR is prepared and certified. (Citing *Concerned Dublin Citizens v. City of Dublin* (2013) 214 Cal.App.4th 1301, 1310-1311, my April 10, 2013 post on which can be found ***here***.)

An agency's determination whether Section 21166's criteria are met is deferentially reviewed for substantial evidence support, with courts resolving reasonable doubts in favor of the agency's decision.

**The Court's Rejection Of Plaintiffs' Arguments For A Subsequent Or Supplemental EIR Based On New Or More Severe Impacts To The Harvest Mouse**

Plaintiffs didn't dispute that the subdivision map approval was a residential development project implementing and consistent with City's specific plan, so the issue before the Court was whether project changes, changed circumstances, or new information triggered the Section 21166 exception to Government Code § 65457's exemption. Plaintiffs argued three project changes form the specific plan triggered the requirement for a subsequent EIR: (1) fill of only uplands and not wetlands (which allegedly inhibited wetland migration), (2) omission of the golf course (which allegedly deprived the harvest mouse of "escape habitat" or "refugia" during periodic flooding of its wetland habitat), and (3) riprap armoring of banks of elevated upland acres next to wetlands (which allegedly increased predation to the mouse by allowing rats to next closer to its habitat). The Court held that substantial evidence supported the City's conclusion that none of these changes would significantly increase impacts to the harvest mouse beyond what the REIR addressed, i.e., the complete and maximum development of all 316 developable acres of Area 4. By contrast, the subdivision map project would develop only 96.5 upland acres, and provide far fewer residential units, indicating a *lesser* environmental impact than was previously analyzed.

Nor was the Court persuaded by Plaintiffs' argument that the REIR's language itself contemplated subsequent environmental review rather than an exemption. Per the Court:

> "The mere fact that the REIR anticipated some additional review but the City determined the subdivision map had no additional impacts warranting review is not improper or even remarkable. The City's preparation of the checklist and determination that the Government Code section 65457 exemption applies constitute environmental review, so the City acted consistently with both the law and with the statements in the REIR."

(Citing *Dublin, supra,* 214 Cal.App.4th at 1317.)

Addressing plaintiffs' specific arguments regarding new impacts, the Court held the REIR addressed the impact of loss of upland escape habitat and found it would be less than significant because the uplands were degraded by regular discing and ripping for agricultural use, and this finding did not depend on the golf course providing any escape habitat. Appellants' argument that new information showed regularly disced agricultural land provided suitable habitat also failed because the information relied on was actually known prior to certification of the REIR. Appellants did not argue the uplands' value as habitat had changed, and if they believed their information showed the uplands had more habitat value than City recognized, they were required to raise that issue as a challenge to the REIR.

The REIR concededly disclosed indirect impacts of wetlands-adjacent development on harvest mouse habitat and mitigated for such impacts; further, by developing fewer acres, impacts were reduced.

The REIR did not discuss the use of riprap to armor the slopes of the filled and raised development areas and protect them from erosion from waves and tidal flooding. However, section 21166 and CEQA Guidelines § 15162(a)(3)(D) only require a subsequent or supplemental EIR when *substantial* project changes will require *major* EIR revisions "due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects." The Court held the new use of riprap did not meet this standard because the EIR already examined the issue of rat predation on the harvest mouse (which plaintiffs claimed riprap would increase), and plaintiffs had cited to no evidence that the riprap would substantially increase the severity of such predation effects as analyzed in

the REIR; thus, City's position that required mitigation will continue to reduce rat predation impacts as described in the REIR was supported by substantial evidence. Per the Court:

> We recognize that by rejecting appellants' arguments regarding the riprap, we are allowing the City's development to proceed despite a potential increase in the impact on the harvest mouse to some degree. However, Government Code section 65457 compels this result by setting a higher threshold for review of a residential development consistent with a previously analyzed specific plan than for a project tiered under a program EIR.

(Citing *Friends, supra,* 1 Cal.5th at 960.)

The Court recognized that in this respect the Section 65457 exemption, which aims to increase housing supply, is like other *statutory* CEQA exemptions in that it "reflects the Legislature's determination that the interest promoted is 'important enough to justify foregoing the benefits of environmental review.'" (Citing *Dublin, supra*, 214 Cal.App.4th at 1312.)

**The Court's Rejection of Plaintiffs' Arguments Concerning Sea Level Rise**

The Court also rejected plaintiffs' arguments that changed circumstances and new information concerning sea level rise required another EIR, which it characterized as variations on their harvest mouse habitat arguments. The plaintiffs' "new information and circumstances" were "scientific insights concerning the amount and rate of sea level rise that emerged after the City certified the REIR." While conceding the City was not required to conduct a "reverse-CEQA" analysis of effects of sea level rise on the project, they argued that "the City was nonetheless required to examine whether the project risks exacerbating the effects of sea level rise on the environment because of how the project interacts with wetlands in the area." This argument invoked the concept of wetland migration, i.e., the movement of wetlands to higher areas as sea levels rise and former wetlands become submerged, and contended that "coastal squeeze" from uplands development will effectively eliminate the wetlands at the project site. But the Court held that even accepting that wetlands migration must be analyzed as part of a project's "exacerbation" of the effects of sea-level rise under the Supreme Court's *CBIA* decision, the argument still failed because "these dynamics are not new in relation to this project[.]" Wetlands migration was mentioned in an appendix to the City's original 2010 EIR (to which plaintiffs themselves cited), and the REIR assumed all developable areas in Area 4 would be developed and impacted. Thus, plaintiffs should have raised their argument in response to the REIR, if not the original 2010 EIR. Nor did plaintiffs' invocation of "new scientific studies showing an increased rate of sea level rise" change this conclusion. "[T]he REIR anticipated the new information that appellants rel[ied] on" by "not[ing] that the rate of sea level rise was uncertain and might be accelerating [.]" Further, the specific plan provided no mitigation for thwarted wetland migration, so the overall wetlands impact was the same – loss of the wetlands – even though they might be lost at a faster rate. Thus, the Court concluded that "sea level rise does not make the impacts of thwarted wetland migration substantially more severe in a way that would trigger the section 21166 exception to the Government Code section 65417 exemption."

**The Court's Rejection of Plaintiffs' "Deferred Mitigation" Objection To City's Adaptive Management Approach To Sea Level Rise Between Years 2070 – 2100.**

Finally, the Court rejected plaintiffs' "deferred mitigation" objection to a hydrology report attached to the City's checklist which stated City would take an adaptive approach to managing sea-level rise flooding of the project toward the end of the century (such as by building levees or floodwalls to protect the raised

and filled residential areas). The Court held the argument was "misplaced" because sea level rise is not an environmental impact caused by the project that the REIR or checklist needed to address at all; for the same reason, City's adaptive responses to it "are not mitigation measures and not governed by the rules concerning deferred mitigation." (Citing *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 851, my March 3, 2020 post on which can be found ***here***.) Nor was the Court persuaded by plaintiffs' reply brief argument that the adaptive strategy was a reasonably forseeable future project requiring analysis, both because it was belatedly raised and need not be considered, and because "City's potential responses to [uncertain] environmental conditions between 50 and 80 years from now cannot be considered part of their current project," and its analysis of its future responses' impacts would be based on speculation.

## Conclusion and Implications

While decided in the context of a statutory CEQA exemption intended to promote housing (Gov. Code § 65457), this case turned on the application of CEQA's subsequent review rules under Public Resources Code § 21166, which determined whether an exception to the exemption would apply. In holding that the requirement for subsequent EIR was not triggered under those rules, the First District zeroed in on a few very significant points. First, the standard for requiring another EIR after a (presumptively valid) one has already been prepared is a pretty high threshold, even in the case of a programmatic analysis, especially where the latter analyzed a maximum development scenario under a plan and the subsequent project has a smaller footprint. Second, where the alleged significant impacts aren't of a new type, they must be shown to be *substantially more severe* than those analyzed in the prior EIR; subsequent review isn't an occasion to revisit the prior analysis, only changed circumstances are at issue, and unless the impacts are shown to be *substantially more severe,* the statutory presumption against a further EIR prevails. Third, "new information" and "changed circumstances" are not shown merely by new twists on old issues – the "new information" must have been *unknown* and *unknowable* at the time the prior EIR was prepared, not merely new data or information already anticipated by the prior EIR. Finally, an EIR is not expected to be a crystal ball capable of analyzing and mitigating speculative climate change impacts that may occur many generations in the future, and an agency's intention to rely on adaptive management as needed to address such issues does not create a reasonably foreseeable project or trigger the need for CEQA review or the application of CEQA's rules on deferred mitigation.

*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.msrlegal.com.*