



First District Rejects CEQA Challenges To EIR For Petaluma River Apartment Project, Upholds Special Status Species Baseline And Public Safety/Emergency Access Impacts Analyses As Supported By Substantial Evidence

By [Arthur F. Coon](#) on December 19, 2022

In an opinion filed on November 14, and later certified for publication on December 13, 2022, the First District Court of Appeal (Div. 3) affirmed a Sonoma County Superior Court judgment upholding the EIR for a 180-unit apartment complex proposed on a 15.45-acre parcel of vacant land along the Petaluma River. *Save North Petaluma River and Wetlands v. City of Petaluma (J. Cyril Johnson Investment Company, Real Party in Interest)* (2022) ___ Cal.App.5th ___. The issues considered on appeal involved the adequacy of the EIR’s environmental “baseline” for its analysis of potential special status species impacts and the adequacy of its analysis of alleged public safety/emergency evacuation impacts.

Factual and Procedural Background

Over a long history dating back to an original 2003 proposal of a 312-unit apartment complex, the project evolved considerably during the lengthy CEQA review process.

The location and nature of the project site, which includes various grassland, oak woodland, riparian woodland, mixed woodland, seasonal wetlands, river, and other habitats, and the likely presence there of numerous special status animal species, necessitated a complex environmental and regulatory review process requiring not only city, but numerous state and federal resource agency approvals.

Following a July 2007 Notice of Preparation (NOP), the City’s adoption of a new General Plan 2025 further complicated development of the site, requiring a 200-foot development set back from the Petaluma River’s centerline and calling for construction of a flood terrace system (modifying the river channel to accommodate a 100-year storm event), while also increasing the site’s allowable density and

listing it in the Housing Element's Land Inventory of Opportunity sites. Real Party thereafter revised the project to achieve compliance and reduced it to 278 units.

After the City's meetings in late 2015 with various regulatory agencies, CDFW, RWQCB, and NOAA Fisheries Service all conducted site visits and provided input on issues the EIR should address. As a result, a "Habitat Mitigation Monitoring Plan" was created to address mitigation for impacts from the river terracing required by the new general plan; to preserve high value riparian habitat; to increase aquatic habitat and improve existing habitat values and functions; and to improve the river's flood capacity. The plan was incorporated into the Biological Resources chapter of the DEIR, which was published in March 2018.

Following 1½ years of public comments and hearings before the planning commission and city council, the FEIR with responses to comments was issued in October 2019, and it included a further revised proposed project of 205 units that it concluded reduced or eliminated several potentially significant impacts identified in the DEIR.

After the planning commission recommended certification of the FEIR, but did not recommend approval of necessary rezoning, real party submitted a further-reduced 180-unit version of the project that shrunk its footprint, increased the river setback, preserved two riparian wetlands and additional trees, and redesigned the flood terrace, so as to reduce flood impacts and vehicle trips.

On the afternoon of February 3, 2020, the same date as the City Council meeting to consider the FEIR and project approval, Petitioners submitted a comment letter challenging numerous aspects of the EIR. Notwithstanding this "late hit," the Council proceeded with its hearing, and after considering a detailed staff memo covering the project's history, public comments, the real party's public outreach, and numerous responsive project revisions, and the revised project's satisfaction of the previously expressed planning commission concerns and its coverage within the FEIR, and after several hours of deliberation and public comment at the hearing, the City Council voted to certify the FEIR, and ultimately to approve the zoning amendments.

Petitioners then sued, challenging the FEIR on numerous grounds, including the two raised on appeal, and the trial court denied their writ petition in a 45-page decision. Petitioners appealed and the Court of Appeal affirmed.

The Court of Appeal's Decision
Special Status Species/Baseline Issues

After reciting CEQA's standards of review applicable to EIR challenges, the Court addressed petitioners' two claims in order, beginning with their contention that the EIR failed to properly analyze the project's impacts on special status species.

The Court noted that the EIR's 70-page biological resources impact analysis was prepared by an expert biologist who investigated the site after the 2007 NOP and also supported his analysis by relying on a number of other sources, including a 2004 WRA Special Status Species Report, site visits, state and federal plant and wildlife databases, regulatory agencies' input, arborist reports, and vegetation and environmental communities mapping. The EIR described existing conditions and concluded no special status plant species had high or moderate potential to occur or would likely be present on the site. It concluded there was a moderate to high potential for several special status bird species to occur in the project area, that such species could forage or nest on the project site, and that based on existing habitat conditions four special status birds species and raptors had a moderate-to-high potential for occurrence

on the site. The EIR recommended two mitigation measures: (1) preconstruction nesting surveys if grading/construction would occur during nesting season and implementation of specified mitigation measures overseen by a qualified biologist if active nests were found, and (2) pre-construction tree roost surveys by a qualified biologist and other measures to protect bats during all tree removal and vegetation management activities. It concluded these measures would prevent harm to special status birds and bats and mitigate potential impacts to a less than significant level.

The EIR reported three special status fish species as known or suspected to occur in the site's adjacent river stretch, and possible presence of the California Red-Legged Frog (CRLF) and Western Pond Turtle, although there was "low potential" for the latter to occur in the uplands development portion of the site due to lack of suitable habitat there. However, it concluded the river terrace aspect of the project could result in direct and indirect adverse effects on those species and on fish species and their habitat, through grading, vegetation trimming, and unintentional sediment and petrochemical introduction. The EIR recommended mitigation for these potential impacts including: obtaining all required federal and state regulatory agency (USACE, RWQCB, CDFW) approvals and permits and complying with their terms and conditions and avoidance and minimization measures; limiting work in the river area to specific dates (to avoid impacts to spawning fish and nesting birds); requiring USFWS-approval biologist preconstruction surveys to determine CRLF and Western pond turtle presence within 48 hours of beginning grading; requiring the biologist to work with the agencies to determine whether and to what extent relocation and/or exclusion buffers will be appropriate if species are detected; and implementing resource agency-required or approved BMPs and other measures during construction.

The FEIR concluded that implementing all identified mitigation measures would reduce potential project impacts on special status species to a less-than-significant level.

Petitioners' main argument was that the City failed to investigate baseline conditions for special status species *as of the 2007 NOP date* because the record contains no evidence of 2007 special status species reports or studies; therefore, according to petitioners, the EIR's discussion of baseline conditions lacks substantial evidence support and is insufficient to provide a basis for adequate analysis of the project's special species impacts.

The Court rejected this argument on a number of grounds, noting that the EIR's information on special status species was drawn from a variety of reports, sources and site visits dating from several years before and continuing up to 10 years after the 2007 NOP date. Per the Court: "Petitioners insist that a study conducted at the time of the [NOP] is indispensable for setting the appropriate special status species baseline. But they cite no authority suggesting that CEQA is violated where, as here, the EIR's analysis on the topic was drawn from site visits, studies, and habitat evaluations that were undertaken both before and after the [NOP]. Petitioners do not contend the EIR's description of existing conditions and habitats on the undeveloped project site was incomplete or otherwise flawed for purposes of assessing the presence of special status species." The Court further noted – citing numerous case authorities – that CEQA does not mandate any uniform or inflexible rule for determination of the existing conditions baseline; that agencies have discretion to decide in the first instance how to realistically measure existing, pre-project physical conditions; and that an agency's selected baseline will be upheld if supported by substantial evidence. It held that "the record here demonstrates that substantial evidence supports the EIR's analysis of the special status species that were subject to the project's impact."

The Court went on to observe that petitioners pointed to no evidence showing that baseline biological conditions on the site in 2007 differed from conditions that existed when initial studies were made in 2004, or from those existing in later years after 2007 when updated databases were consulted and further studies performed. Moreover, when experts and regulatory agencies brought new information to the real

party's and City's attention, the EIR was revised to address such matters, including information regarding special status species not mentioned in earlier reports such as the 2004 WRA Report.

In rejecting petitioners' argument, the Court stated: "Despite a professed concern that the EIR inadequately addressed the Project's impact on plants and wildlife, petitioners suggest that the foregoing information is irrelevant because, among other things, no additional special status species studies were conducted and because studies post-dating 2007 have no bearing on the site conditions existing in 2007. But again, petitioners do not challenge the accuracy or completeness of the EIR's description of the Project site's existing biological and habitat conditions, nor do they point to anything indicating that such conditions were materially different in 2007 for purposes of a special status species analysis. ... And, if anything, the EIR's inclusion of the post-2007 information indicates that the EIR was prepared with an eye toward "completeness" and "a good faith effort at full disclosure. (Guidelines, § 15151.)"

The Court distinguished, and rejected petitioners' attempted reliance on, a number of case authorities. Unlike in those cases, the EIR did not omit or inaccurately describe material aspects of biological conditions on or near the project site, and did not purport to measure impacts based on conditions that did not actually exist on the project site or conditions that were forecasted to exist in the distant future.

The Court also rejected petitioners' argument that the EIR's references to studies and site visits did not constitute substantial evidence supporting its analysis because they were not included in the record or adequately documented. The EIR itself is evidence and need not have included all reports used in its preparation. Here, "the EIR's analysis incorporated the information gleaned from the site visits and data bases and generally identified the source and date of such information." And while the City provided an extended, more than two-and-one-half month DEIR review period, "affording petitioners an ample opportunity to request the background details of the identified site visits[,] petitioners did not avail themselves of that opportunity and instead "first raised their complaint just hours before the City Council's [FEIR] hearing...., which did not allow the City to respond [by directing petitioners to the technical reports]."

In sum, the EIR was not legally inadequate simply because no special status species analysis was conducted in the 2007 "baseline" year, and the EIR properly drew its information from site visits, studies, and habitat evaluations occurring before and after the baseline year, with no indication of materially changed conditions over the time period in issue.

Public Safety/Emergency Evacuation Issues

In framing its analysis of petitioners' second EIR challenge, the Court stated: "In accordance with CEQA, CEQA Guidelines, the City's plans and policies, and agency and professional standards, the EIR acknowledged the Project's impact would be considered significant if the Project would, as indicated in Appendix G of the Guidelines, "[i]mpair implementation of or physically interfere with an *adopted* emergency response plan or emergency evacuation plan.'" (Footnote omitted; Court's ital.)

The FEIR analyzed and determined the Project met applicable 2013 California Fire Code requirements, including for emergency vehicle access (EVA) routes, which were reviewed and found acceptable by the Petaluma Fire Department. This evidence amply supported the EIR's conclusion that the project would not impair implementation of or physically interfere with an *adopted* emergency response or evacuation plan, and petitioners failed to identify any other such plans requiring CEQA analysis.

Petitioner next pointed to Guidelines § 15126.2(a), providing EIRs should evaluate environmental impacts of locating development in areas susceptible to identified or mapped hazardous conditions, and claimed

the EIR was deficient because it omitted an analysis of egress and evacuation safety notwithstanding neighbors' comments expressing concerns about flooding and grass fires in the area, and an evacuation expert's one-page letter calling for further study. "Even assuming, generously, that the [public and expert] submissions ... provided evidence of a potential public safety impact as contemplated in section 15126.2...", the Court noted it could not reweigh conflicting evidence and found "no basis for setting aside the City's certification of the EIR." The City was entitled to rely on its staff's expertise in determining that the project would have no significant impact, and here a staff memo corroborated the EIR's public safety analysis to that effect. Public concerns that floodwaters in a 100-year flood could impede evacuation were addressed by documentation that the project's development area, including access roads and infrastructure, is located outside the 100-year floodplain, and by confirmation from City's Assistant Fire Chief/Emergency Operations Manager that the Fire Department does not have significant flood or fire access/egress concerns with site development above that floodplain. Per the emergency operations manager, tall/heavy vehicles and boats would also be available if needed for rescue/evacuation, and the project was located outside the City's High Fire Severity Zone in a flat, low-fuel area posing limited risk of fire spread and evacuation, and adequate emergency access existed.

In rejecting petitioners' arguments, the Court concluded "the EIR identified the relevant provisions in the City's emergency response plan and took into account specific information about the Project site and the actual threat of flood or fire at the site" and, drawing from such information, adequately considered the issues and concluded the project would not "[i]mpair implementation of or physically interfere with an *adopted* emergency response plan or emergency evacuation plan." This analysis was sufficient to demonstrate the EIR's analytic route from specific underlying evidence to ultimate conclusion, and even though the City had not adopted an emergency evacuation plan, the City staff memo acknowledged and considered the relevant concerns and issues and provided additional evidence supporting EIR certification. Per the Court: "[P]etitioners have not met their burden of proving any inadequacy of the EIR with regard to its analysis of public safety impacts relating to emergencies."

Conclusion and Implications

The First District's opinion addresses and provides valuable guidance on two topics that seem to be asserted with increasing frequency in CEQA litigation challenges to housing projects: special status species and public safety/emergency evacuation. In rejecting petitioners' proposal of a rigid "baseline" rule not required by CEQA or even supported by logic in this context, the opinion helpfully clarifies and applies CEQA's usual rules governing the lead agency's setting of the environmental conditions "baseline" in the special status species context; in doing so, it confirms that substantial evidence relating to the actual or potential presence of special status species on a site gathered on dates both before and after the baseline year (here, the year of NOP issuance) can support the EIR's description and analysis of project changes to baseline conditions.

The opinion also helpfully focuses on the CEQA Guidelines' required analysis of a project's impact on *adopted* emergency response or evacuation plans. It upholds an EIR's analysis of emergency response and evacuation impacts, notably in the absence of any adopted emergency evacuation plan, as based on consideration of the relevant factors and supported by facts and fact-supported opinions of emergency response experts (e.g., fire department, emergency operations manager) and as adequately disclosing the analytic route between the evidence and conclusions.

As a final observation, and while fully recognizing that development of the project site in this case presented numerous challenges, it is disheartening that this housing project took 17 years to get approved – shedding 132 units in the process – and has now been delayed an additional three years (and counting) by meritless CEQA litigation through the Court of Appeal level (with the NIMBY opponents'



**MILLER STARR
REGALIA**

inevitable petition for review in the Supreme Court yet to come). The Legislature clearly needs to continue its path of strengthening the Housing Accountability Act, but also needs to make a serious effort to reform CEQA to curb litigation abuses that can delay or kill needed housing (and other) projects.

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.mslegal.com.

www.ceqadevelopments.com