



Third District Adds Brief CEQA Severance Analysis After Rehearing In *Save Our Capitol!* Case, Limits Its Relief To Allow Capitol Annex Demolition To Go Forward

By [Arthur F. Coon](#) on January 23, 2023

In an opinion on rehearing filed January 18, 2023, the Third District Court of Appeal reissued its previous published opinion in the *Save Our Capitol!* case (my January 2, 2023 post on which can be found [here](#)) with the addition of a few pages of discussion addressing “Relief” inserted at the end of the majority opinion just before its “Disposition.”

The revised opinion was a response to Respondent Department of General Services’ (DGS) rehearing request to order only partial decertification of its EIR for the Capitol Annex/visitor center/parking garage project. DGS contended that project activities unrelated to the EIR deficiencies the Court found should be allowed to proceed, and contended these activities included “soft” (interior) and “hard” (exterior) demolition of the Annex, as well as excavation and foundation work for the new Annex and parking garage.

The Court of Appeal agreed in part. It observed that CEQA allows a court to leave project approvals in place and not void all project approvals (citing *Central Delta Water Agency v. Department of Water Resources* (2021) 69 Cal.App.5th 170, 205; Pub. Resources Code, § 21168.9(a); CEQA Guidelines, § 15234(a)), and that CEQA’s required writ of mandate order upon a finding of violation shall be limited to the portion of a determination, finding, or decision or specific project activity found to be CEQA-noncompliant, if (1) the portion or specific project activity or activities are severable, (2) severance will not prejudice the agency’s CEQA compliance, and (3) the rest of the project was not found noncompliant. (Citing Pub. Resources Code, § 21168.9(b); Guidelines, § 15234(b).) It also noted a court can exercise its equitable discretion to allow an agency to proceed with a project or individual project activities during the remand period. (CEQA Guidelines, § 15234(c).)

Based on the applicable law, the Court first concluded its opinion did not affect “soft demolition” (i.e., demolition of the Annex interior). It next framed the relevant issue on rehearing as “the extent to which



DGS can proceed without prejudicing its ability to address [on remand] the EIR’s deficiencies [found in its opinion] regarding the new Annex’s exterior design.” It concluded that it “must not allow any project activities to proceed that would prejudice DGS’s ability to alter the Annex’s exterior design should it decide to do so because of its new [required EIR] analysis.” It reasoned:

“Any exterior design for the new Annex will require demolishing the existing Annex, and the impacts of demolition alternatives were already analyzed in the EIR. Thus, the parts of the EIR found deficient are severable from hard demolition of the existing Annex, and that project activity may proceed during remand. However, all other project activities, including excavation for the new Annex and the parking garage and the beginning of work on the concrete foundations for those two structures, could prejudice DGS’s review of the new Annex’s exterior design. As a result those activities must be suspended during remand.”

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.

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