



A “Capitol” Offense: Third District Holds State Capitol Building Annex/Visitor Center Project EIR Violated CEQA Due To Inadequate Project Description And Analyses Of Historical Cultural Impacts, Aesthetics, And Project Alternatives

By [Arthur F. Coon](#) on January 2, 2023

In a published opinion filed December 6, 2022, the Third District Court of Appeal reversed in part and affirmed in part the trial court’s judgment denying writ petitions in consolidated actions challenging the EIR for a major state government project affecting the Historic State Capitol Building and Annex in Sacramento. *Save Our Capitol! v. Department of General Services (Joint Committee On Rules of the California State Senate and Assembly, Real Party in Interest)/Save the Capitol, Save the Trees v. Department of General Services, et al.* (2022) __ Cal.App.5th __. In the project’s final iteration, Defendant/Respondent Department of General Services and Real Party/Respondent Joint Committee, etc. (collectively, “DGS”) proposed to demolish the Historic Capitol’s 325,000 square-foot Annex, replace it with a larger 525,000 square-foot Annex building, construct a 40,000 square-foot underground visitor center attached to the Historic Capitol’s west side, and construct a 150-space underground parking garage east of the new Annex. While rejecting many of plaintiffs’ CEQA challenges to the project’s final EIR (FEIR), the Court of Appeal found merit in claims that the EIR’s project description, analyses of impacts to historical resources and aesthetics, and alternatives analysis were deficient. Accordingly, it directed issuance of a writ vacating the EIR certification and project approval and directing DGS to revise and recirculate the EIR’s deficient sections before again considering project approval.

Background

The project originated with the State Capitol Building Annex Act of 2016 (Gov. Code, § 9112 et seq), which legislatively authorized the Joint Rules Committee to pursue the project under any delivery method deemed appropriate. While the Legislature did not exempt the project from CEQA, it required the Judicial Council to adopt a rule of court mandating expedited judicial review of any CEQA actions challenging it,

which were to be resolved to the extent feasible within 270 days of record certification (Gov. Code, § 9112(c); Pub. Resources Code, § § 21189.51, 21189.57; Cal. Rules of Ct., rules 3.2220 et seq, 8.700 et seq).

The draft EIR's (DEIR) stated project objectives included providing modern, sustainable and energy-efficient facilities meeting current construction codes and standards that would provide sufficient space for the efficient performance of State business with modern technology, while continuing to provide Capitol-adjacent Annex facilities and integrating the new development with the existing surroundings.

DGS chose a "construction manager at risk" (CMAR) delivery method, as opposed to a more traditional design-bid-build or design-build method, which choice entailed a process in which an initial conceptual project design became more detailed and refined over time. (As discussed further below, this approach ultimately proved fatal to the adequacy of the EIR's project description under CEQA.)

The DEIR was circulated September 9, 2019. DGS later revised the visitor center's entrance from an above-ground elevator and stairway to two looping open air ramps leading to an open-air "lower plaza" leading to a security checkpoint and the visitor center, with the ground above the visitor center landscaped as an "upper plaza" with a raised surface elevation and large glass skylight providing light to and views from the underground visitor center. This new design required a revised DEIR to evaluate its impacts, which was recirculated on January 17, 2020 (the "RDEIR").

Further and more detailed project design modifications were made after the RDEIR and analyzed in the final EIR (FEIR), and these changes included the new Annex's exterior design, a "Double-T" configuration with a mostly-glass exterior with a partial ceramic coating, described as a "white frit" pattern, to control heat gain and glare and integrate more closely in color to the Historic Capitol. The underground parking lot location was also changed in the FEIR, from south of the Historic Capitol to east of the new Annex, and the spaces were reduced from 200 to 150. Impacts to trees and landscaping were also clarified, and the FEIR determined that the project's modifications would not result in new or substantially more severe significant impacts than were addressed in the DEIR and RDEIR; that no new or different mitigation measures were required; and that no "significant new information" required recirculation. DSG certified the FEIR, issued findings, and adopted a statement of overriding considerations on July 30, 2021.

The Court of Appeal's Opinion

The EIR's Project Description Was Inadequate

The Court first held, as a matter of law exercising de novo review, that the EIR failed to contain the "accurate, stable, and finite project description" required by CEQA and necessary for an intelligent evaluation of a project's impacts. (Citing, inter alia, *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193, 199; *South of Market Community Action Network v. City and County of San Francisco* (2019) 33 Cal.App.5th 321, 332.) Acknowledging that CEQA isn't designed to "freeze the ultimate proposal in the precise mode of the initial project" (*County of Inyo*, 71 Cal.App.3d at 199) and that the project may change during environmental review, the Court noted that the issue before it was "how much... a project [may] develop or change after the draft EIR is circulated before the project description is no longer accurate, stable, and finite." Observing that CEQA doesn't answer that question, the Court stated the governing principle as "whether the project description may have thwarted the public's ability to participate in the process and comment meaningfully on the EIR." It held that while relocation of the underground parking garage did not thwart meaningful public or agency review, the failure to disclose material details of the new Annex's exterior design – primarily its largely glass exterior – until the FEIR "may have misled the public about the nature of the Annex's design and adversely affected their ability to comment on it" and its compatibility with and aesthetic impacts on the "treasured historical

resource” of the Historic Capitol building. The DEIR and RDEIR indicated that the new Annex’s design and materials would be “consistent” with the Historic Capitol and create a “one-building” feel, but the FEIR’s disclosure for the first time of a “glass curtain” design that would achieve only an *interior* space “one-building” feel created conflicting descriptions that prevented meaningful public comment on the project’s most controversial impact, i.e., its aesthetic impact to the historic resource. Per the Court, DGS’s selection of the CMAR delivery method “does not drive CEQA” and does not cure the flaw of preempting meaningful public review of and comment on the Annex’s design and resulting impacts. (The Court rejected plaintiffs’ other project description challenges concerning allegedly vague staging area descriptions and the accuracy of the EIR’s statement that the project would not increase the number of Capitol employees.)

The EIR’s Analysis of Impacts to Historical Resources Was Inadequate

The Court reviewed in detail CEQA’s standards for assessing the significance of a project’s impacts on historical resources and mitigation for the same (CEQA Guidelines, § 15064.5(a), (b)), and the EIR’s analyses of the project’s visitor center, annex, and parking garage components. Noting that plaintiffs bore the burden of establishing the inadequacy of the EIR’s impacts analysis, the Court rejected most of plaintiffs’ arguments, but agreed that the historical resources impacts analysis was deficient because it failed to account for public comment on the new Annex’s exterior design. It reasoned that public comment was precluded by the deficient project description of the Annex exterior discussed above and that an FEIR’s responses to comments are an “integral part” of the “EIR’s substantive analysis of environmental issues.” (Citing *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 516-517.)

The EIR’s Biological Resources Impact Analysis Was Adequate

The Court rejected plaintiffs’ challenges to the EIR’s analysis of impacts on trees and birds, and in the course of doing so offered helpful guidance on CEQA compliance with respect to some frequently litigated issues.

First, the Court helpfully clarified that, contrary to plaintiffs’ argument, no CEQA “statute, Guideline, or reported case law... requires an EIR to inventory or identify every plant and tree a project may affect.” (Citing *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 229-230, 232, as contra to plaintiffs’ position.) The EIR collectively disclosed the removal of trees and proposed mitigation to protect retained trees, and the number and types of trees affected, and it provided a map of transplanted or removed and replaced trees within Capitol Park, and that information was sufficient to understand the project’s tree impacts.

Second, the EIR’s commitment to a future tree protection plan implementing compliance with the City’s tree protection ordinance and specific ANSI standards for protecting retained stated-owned trees obligated DGS to meet certain performance standards and satisfied CEQA’s requirements for future mitigation plans. The future landscape plan required as mitigation to protect commemorative trees and landscape features from construction impacts in compliance with relevant national and Secretary of the Interior (SOI) standards was also sufficient as CEQA mitigation, since compliance with regulatory standards is proper mitigation. Plaintiffs failed to point to evidence to support their claim that compliance with regulatory standards for transplanting commemorative trees would not produce successful results.

Third, and finally, the Court rejected plaintiffs’ arguments that the increase in the Annex’s glass surface area resulted in an unmitigated risk of bird strikes. The EIR noted that the EIR cited evidence that the glass exterior’s frit-pattern coating would reduce bird strikes dramatically by increasing the glass surface’s

visibility to birds. It further noted that special status bird species that may occur in the project's vicinity – such as Swainson's hawk or white-tailed kite – have high visual acuity and do not hunt small birds, and thus do not have a high risk of mortality from striking the glass exterior. Plaintiffs' arguments that EIR's conclusions lacked substantial evidence support because the Annex's substantial expanse of *non-fritted* glass could still threaten birds, were rejected due to plaintiffs' failure to support them with citations to the record or supporting evidence.

**The EIR's Analyses of the Project's Aesthetic Impacts On Scenic Views of the
Historic Capitol's West Side From Capitol Mall And From Light Generated
By The New Glass Annex Were Inadequate**

Observing that “the historic value of the State Capitol Complex, the importance of the view of the west façade of the Historic Capitol, and the importance of considering the impact of aesthetic changes on both cannot be overstated[,]” the Court next found fault with the EIR's analyses in these areas. On the only point of disagreement with the concurring and dissenting opinion, the majority opinion held that the EIR's failure to contain a grade-view representation of the Capitol as viewed from Capitol Mall after construction of the visitor center was a fatal flaw, despite the fact that CEQA contains no express requirement for such view simulations. The majority reasoned that an EIR must contain a sufficient degree of detail and analysis to enable those who did not participate in the EIR's preparation to understand and meaningfully consider the proposed project's issues and permit full assessment of its significant impacts by reviewing agencies and the public, and that the level of specificity required is determined by the nature of the project and the rule of reason. In light of this project's “significant [aesthetic] impacts on the Historic Capitol, the seat of State government [.]” the Court held that “CEQA required the EIR to include a representation or rendering that would allow the public and decision-makers to understand and consider the view of the Historic Capitol's west side from Capitol Mall once the visitor center is completed.” Given that the visitor center's above-ground entrance ramps, open-air lower plaza, higher upper plaza, skylight and railings, and historic West Lawn landscape modifications would alter the scenic view from Capitol Mall, the majority held a visual simulated depiction of the resulting view was necessary to the EIR's adequacy because “the project's impacts on aesthetics cannot be understood unless the project is seen.” (The dissent on this point was of the opinion that such an additional rendering was unnecessary, because “[t]he recirculated draft EIR's description and cross-sections of the proposed visitor center gave sufficient notice of the effects of the project on the scenic vista of the Historic Capitol so as to adequately inform and foster public participation and official decision making”; it also cautioned that courts “should be mindful that CEQA requires public agencies to carry out the EIR process in an efficient and expeditious manner... and that it prohibits courts from imposing additional requirements beyond CEQA and the Guidelines...” (Citing Pub. Resources Code, §§ 21003, 21083.1; footnote omitted).)

The Court rejected plaintiffs' argument that the EIR's finding the project would not visually degrade the site's existing character was subjective interpretation and lacked substantial evidence support because the aesthetic analysis was not performed by an architectural historian or the equivalent; it held that CEQA has no such requirement and aesthetics analysis is inherently subjective.

The Court did accept plaintiffs' argument that the EIR's analysis and disclosure of light impacts from the new glass-exterior Annex was inadequate under CEQA for failing to discuss “how the light generated by the new glass Annex will compare to the light generated by the current Annex and how much that light may detract from the focus on the Historic Capitol or alter the aesthetics within the existing State Capitol Complex.”

The EIR's Analysis of Traffic And Utility Impacts Was Adequate And Supported By Substantial Evidence

Curiously without mentioning CEQA's current VMT-based traffic impact framework, the Court rejected plaintiffs' challenge to the EIR's traffic impacts analysis, at least some of which was based on meeting acceptable LOS thresholds. Plaintiffs failed to fairly present the evidence supporting the EIR's conclusion that the project's 62% increase in square footage would not increase occupancy and would thus not result in new vehicle trips and traffic, and thus forfeited their substantial evidence challenge on that point; further, substantial evidence supported the EIR's conclusions that the number of employees and visitors would not change as a result of the additional space.

Plaintiffs' remaining challenges to the EIR's traffic analysis and conclusion of less-than-significant impacts after mitigation were also meritless; "[b]ecause the project requires DGS to develop [a traffic management] plan [consistent with the City's traffic management plan ordinance] and have it approved by the City's traffic engineer, the EIR has identified alternative circulation routes, and the impacts will be temporary, substantial evidence supports the EIR's conclusion that construction-related traffic impacts will be less than significant."

Plaintiffs' challenges to the EIR's analysis of utility-related impacts and related conclusion of less-than-significant impact also fell with their unsupported premise that occupancy and visitors would increase.

The EIR's Alternatives Analysis Was Inadequate

The EIR considered 11 potentially feasible alternatives that might avoid or lessen the project's adverse impacts, but rejected 8 of them as infeasible for not meeting project objectives and/or not avoiding significant impacts, and studied only 3 alternatives in detail: no project; fully renovating existing Annex; and constructing the new Annex and parking garage with two underground levels.

The Court held the alternatives analysis was inadequate because the EIR did not consider an alternative that would feasibly attain most of the project's objectives while lessening its significant impacts on the West Lawn. When DGS modified the visitor center's design after circulation of the DEIR in a way that materially altered the West Lawn's historical character-defining physical characteristics and topography, the RDEIR should have considered an additional alternative addressing those impacts, yet did not. DGS's alternatives selection method thwarted informed decision making and public participation by considering alternatives with respect to only one of the project's components – the Annex – and not a reasonable range of alternatives addressing the impacts of the project as a whole, including the visitor center's significant impacts on the West Lawn's character as a historical resource. These significant impacts included recontouring the West Lawn's slope to accommodate ramps and plazas, reducing the existing lawn panels and vegetation, and removing or damaging memorial trees, all of which are physical characteristics that contribute to the West Lawn's historic character and convey its historic significance. Specifically, the Court found that the EIR should have considered an alternative of moving the visitor center to the Historic Capitol's south side, which would have lessened project impacts on the West Lawn as a historical resource while still meeting project objectives of not affecting the Historic Capitol's historic architecture or the ability to have a modern Annex and parking garage.

Recirculation Was Not Required Based On Disclosure of the Evolving Project's Greater Impact On Trees And Enlarged Boundaries

Having already determined that a new environmental document would have to be prepared on remand to address the CEQA deficiencies it found in the EIR's project description, historical resource and aesthetics

analysis, and alternatives analysis, the Court concluded its opinion by rejecting two of plaintiffs' other arguments that recirculation of the EIR was required.

First, the Court held that recirculation was not required based on the FEIR's disclosure that the project will require removal of 56 trees and will affect 133 trees, as compared to the draft EIRs' statements that 20-30 trees would be removed. Substantial evidence supported DGS's determination not to recirculate the EIR based on additional analysis of the project's impacts on trees. It was reasonable for DGS to conclude that removal of 57 of Capitol Park's existing 850 trees was not a substantially more severe significant adverse impact than the originally estimated removal of 30 of the park's trees.

Further, a cultural landscape evaluation of Capitol Park relied on by the FEIR (but not publicly released) did not constitute significant new information requiring recirculation because it did not identify any new or substantially more significant effects, or alter the EIR's conclusion that the project would have a significant and unavoidable impact on historic resources or its consideration of feasible alternatives or mitigation measures. The Court also noted that plaintiffs cited no authority holding the landscape evaluation was required to be publicly released, and it held the FEIR met CEQA's standard of providing a citation, summary and analysis of the data relied on, and a determination of the potential impact's significance. (Citing CEQA Guidelines, § 15148.)

The Court also rejected plaintiff's claims that DGS's extension of the project's boundaries to allow accommodate parking garage entry and exit ramps and some minor landscaping modifications constituted significant new information of substantially more severe impacts requiring recirculation. Per the Court: "Recirculation is not triggered simply by worsening impacts. It is required when a final EIR includes[s] significant new information of a substantial increase in the severity of an environmental impact unless mitigation measures are adopted that reduce the impact to a level of insignificance." (Citing CEQA Guidelines, § 15088.5(a)(2).) Here, plaintiffs pointed to no evidence showing the boundary extensions substantially increased the severity of any impacts or that they were not adequately analyzed in the FEIR.

Conclusions and Implications

While the media's take on this case seems to be a combination of "power to the people" and "the Legislature got hoist with its own petard" sentiments, my own view is that the Third District mostly got it right and the result is just from "CEQA being CEQA." The most obvious exception to this is pointed out by the concurring and dissenting opinion: the majority imposed a new substantive requirement beyond those mandated by CEQA when it held the FEIR needed to contain a particular visual simulation of the project's west side as viewed from Capitol Mall facing east.

The opinion teaches some helpful lessons, most of which fall into the category of "Duh!" First, if you're the Legislature, consider exempting your project entirely from CEQA – because you can (although there would probably be political hell to pay)! Second, if you don't do that, then at least don't choose an unusual CMAR delivery method for a large complex project impacting historical resources and then admit in your DEIR that your description of a major project component is not firm enough to meaningfully evaluate the impact on historical resources. Third, recirculate the EIR when your project description changes in material ways to reveal impacts the public never had a chance to comment on. Fourth, carefully evaluate feasible alternatives addressing not just some, but all, components of the project that will significantly impact historical resources. Fifth, don't blow off a full analysis of light and glare impacts when you are replacing a large traditional Annex structure with a much larger one with a mostly glass exterior.



Apart from these lessons, and its extensive analysis of the historical resources impact analysis required by CEQA, the opinion contained a few other CEQA nuggets – e.g., its discussions of biological resources inventories (not required) and special status species bird strike analysis – that CEQA practitioners may find interesting and useful.

So what's next for the treasured historic and cultural resource that serves as our seat of government? That's hard to say, but it appears that the ever-evolving Historic Capitol project will continue to do so and it will be interesting to see what is – and isn't – ultimately built as a result of the additional CEQA review ordered by the Court.

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.

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