First District Upholds Use of Government Code Section 65457 CEQA Exemption For Downtown Livermore Affordable Housing Project, Roundly Rejects Meritless Arguments of NIMBY Opposition

By Arthur F. Coon & Arielle Harris on February 7, 2023

In an opinion in a much-publicized case, filed December 28, 2022, and later ordered published on January 26, 2023, the First District Court of Appeal (Div. 3), upheld the City of Livermore's ("City") approval of a 130-unit affordable housing project on a downtown infill site and its accompanying determination that the project was CEQA-exempt under Government Code section 65457 ("Section 65457"). (*Save Livermore Downtown v. City of Livermore* (2023) __ Cal.App.5th__ ("*SLD*").) The important opinion was ordered published based on requests submitted by City, Attorney General Rob Bonta, YIMBY, and the California Building Industry Association.

Section 65457 provides a CEQA exemption for residential development projects that are consistent with a specific plan for which an EIR has been certified after January 1, 1980, so long as none of the factors triggering supplemental environmental review under Public Resources Section 21166 have occurred. (While not relevant to this decision, it is worth noting that Section 65457 includes a shorter statute of limitations period than that applicable to challenges to other types of CEQA exemptions, and requires actions to be filed 30 days from the date of decision rather than 35 days from the posting of a notice of exemption, as confirmed in *May v. City of Milpitas* (2013) 217 Cal.App.4th 1307, (see prior summary dated July 30, 2013, which can be found *here*).)

Although the exemption dates back to 1979, there have been very few judicial opinions interpreting and applying Section 65457 (Stats. 1979, ch. 1207, § 9, pp. 4746, 4747 [prior version]; Stats. 1984, ch. 1009, § 18, pp. 3491, 3493.) Yet, the First District Court of Appeal has had occasion to uphold the use of this exemption twice in just over a year, here in *SLD*, and earlier in *Citizens' Committee to Complete the Refuge v. City of Newark et al.* (2021) 74 Cal.App.5th 460 (*"Citizens' Committee"*), as summarized in a prior post dated February 8, 2022, which can be found *here*. The exemption in Section 65457 is another

tool to streamline environmental review for residential projects in California and, given these recent favorable opinions, use of this exemption may prove more popular in its fifth decade on the books.

The land use aspects of the *SLD* opinion addressing consistency with the City's general plan and application of the Housing Accountability Act, are summarized by our colleague Bryan Wenter on the Land Use Developments Blog in a post dated January 31, 2023, available *here*. This post covers the case's CEQA holdings and analysis.

Factual and Procedural Background

SLD involves the City's approval of a multifamily housing project proposed by Eden Housing, Inc. ("Eden Housing") in City's "Downtown Core" area. The project would be restricted entirely to units affordable to a combination of extremely low, very low, and low income households. It would redevelop a portion of the Downtown Core with two four-story buildings containing 130 affordable units and would also include a public park, private open space, and underground parking. The project site was previously developed as a grocery store and before that a railroad depot.

The project site is within City's Downtown Specific Plan area, with a land use designation allowing the development of affordable multifamily housing. The Downtown Specific Plan was adopted in 2004, and supported by a certified EIR; it was later amended in 2009 at which time the City evaluated those changes in a subsequent EIR (SEIR). In 2018, the City approved a plan for redeveloping City-owned sites in the Downtown Core, which included public park space, commercial retail buildings, cultural facilities, multifamily workforce housing, a public parking garage, and a hotel. The City selected Eden Housing as the developer for the multifamily housing component of the plan and prepared several addenda to the 2009 SEIR in 2019 and 2020.

In May 2021, City approved a vesting tentative map and design review for the project, finding the project was consistent with the General Plan and Downtown Specific Plan standards, and that no substantial changes were proposed that would require major revisions to the previous EIR, SEIR, or addenda. Thus, the City found the project before it exempt from CEQA under Section 65457.

A NIMBY ("Not in My Backyard") group known as "Save Livermore Downtown" ("Petitioner" or "SLD") filed a writ petition challenging approval of the project, alleging as relevant here that it was not exempt from CEQA, and that the City violated CEQA by failing to conduct further environmental review. Eden Housing successfully moved for a bond in the amount of $500,000 under Code of Civil Procedure section 529.2, which allows for imposition of a bond of not more than $500,000 in an action brought to challenge qualified low- or moderate-income housing projects to act as security for costs and damages the affordable housing developer would incur as a result of the litigation-related project delays. The trial court denied SLD's petition, stating the "CEQA arguments are almost utterly without merit." Petitioner appealed, and the First District, deciding the appeal on an accelerated schedule, upheld the trial court's determination and affirmed the judgment.

Application of Government Code Section 65457 CEQA Exemption

Petitioner argued that application of the exemption in Section 65457 was improper based on new information about soil and groundwater contamination at the project site that arose after the 2009 SEIR was certified. As discussed in the Opinion, the prior SEIR and subsequent addenda had detailed the somewhat extensive history regarding the potential for hazardous materials in the soil and groundwater within the Downtown Specific Plan area due to the prior land uses in the area, including railroad operations, service stations, dry cleaners, fuel storage, and machine shops. The project site was the site

of prior railroad operations that could have led to the presence of heavy metals, petroleum hydrocarbons, and pesticides in the soil and groundwater, as well as chlorinated solvents from adjacent dry cleaning operations. The 2009 SEIR evaluated the potential impacts to construction workers, future residents and patrons, and the environment associated with development and disruption of these hazardous materials, and imposed mitigation measures including the requirement of a soil management plan prior to grading, a sampling plan, worker protection measures, soil management and off-site disposal requirements. With this mitigation, the 2009 SEIR concluded these impacts would be less than significant. Three addenda to the 2009 SEIR each concluded that there were no new impacts related to hazardous materials and that the SEIR had adequately evaluated the impacts.

Several months prior to City's approval of the Project, the San Francisco Regional Water Quality Control Board (Board) informed City that sampling had been conducted at the project site going back to 2009. The Board also reported that selected metals in soil, petroleum hydrocarbons in soil and groundwater, and volatile organic compounds (VOCs) in groundwater and soil vapor were present on the site, that soil metals would require management during grading and use, and that further action focused on soil vapor and groundwater would be needed to assess, remediate and mitigate PCE contamination. Additional data and analysis in the form of a site assessment, summary report, and later workplan were prepared by City's consultant (PANGEA) and submitted to the Board. These reports included more detailed recommendations on how to address and mitigate impacts associated with metals in the soil and soil vapors, and explained that engineering controls such as ventilated parking and vapor barriers could safeguard future residents from potential vapor intrusion, and that on-going groundwater sampling would be warranted to monitor the movement of the PCE plume.

Petitioner asserted the information from the Board and PANGEA reports constituted new information that disqualified the project from invoking the exemption under Section 65457. The Court undertook an analysis under Public Resources Code section 21166, evaluating whether the information addressed by the Board and presented in the PANGEA reports was not known, and could have been known, at the time the 2009 SEIR was certified as complete, and whether it was of "substantial importance," i.e., whether it would require major revisions to the EIR due to new significant effects not discussed in the prior SEIR, or substantially more severe effects than previously evaluated. The Court noted that the deferential substantial evidence standard of review applied to City's determinations on these issues, stating "[w]e review for substantial evidence the City's determinations that a statutory exemption from CEQA applies and that none of the circumstances under section 21166 exist." (Citing ***Citizens' Committee***, 74 Cal.App.5th at 1170, and *North Coast Rivers Alliance v. Westlands Water Dist.* (2014) 227 Cal.App.4th 832, 850 (see prior summary dated July 11, 2014, which can be accessed *here*).)

The Court rejected Petitioner's contention that new information removed the project from the scope of the exemption because the prior SEIR specifically considered the possibility of soil and groundwater contamination from historical uses including contamination from dry cleaning chemicals, and proposed mitigation it concluded would reduce impacts to less than significant; City could reasonably conclude that the recent evidence of such contamination – as already contemplated in the 2009 SEIR – was not new information that was unknown or unknowable when the SEIR was certified.

SLD made two general arguments challenging City's CEQA compliance: (1) the analysis in the 2009 SEIR was only cursory and thus inadequate to analyze the effects of the contamination now that it has been found; and (2) the 2009 SEIR analyzed impacts "at a programmatic level" rather than a project level, and this alone meant additional review at a project-level was required. The Court rejected both contentions. As to the first argument, the Court held the SEIR considered the prior historic uses on the project site and the contaminants that might have resulted from those uses, and the SEIR took into account the effect of those contaminants on future occupants of buildings to be constructed there. As to

the second claim, the Court cited its previous opinion in *Citizens' Committee*, reiterating that Section 65457 "set[s] 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" and that this higher threshold "reflects the Legislature's determination that the interest promoted is "important enough to justify forgoing the benefits of environmental review."" (*Citizens' Committee*, 74 Cal.App.5th at p. 476.)

Because it upheld City's finding that the project fell within Section 65457's statutory CEQA exemption, the Court declined to consider whether the project was also exempt as an infill project, presumably under the CEQA Guidelines class 32 categorical exemption.

Significantly, since it appeared that the soil and groundwater contamination impacts petitioner complained of, and which were discussed in the prior SEIR and addenda, were generally limited to project construction workers and future site residents, patrons, and occupants, the Court also declined to "address whether… the contamination of which SLD complains constitutes an environmental impact for purposes of CEQA." (Citing *California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369 (see prior summary dated December 18, 2015, which can be found *here*).) (This issue was potentially relevant due to well-established CEQA principles that CEQA is generally concerned with the impacts of a proposed project on the existing environment, not vice versa, and that in order to be cognizable under CEQA a project's impacts must affect the environment of persons in general, not just particular persons.)

As relevant here, while the Court of Appeal's Opinion addressed and rejected all SLD's claims on their merits and held that its land use and "CEQA arguments lack merit, so much so that the inherent weakness of these claims further supports the trial court's finding [in connection with the bond] that SLD brought this action to delay the project[,]" the Opinion also intimated that the CEQA arguments were so fundamentally tenuous that they raised issues that may well have been *entirely outside the scope of CEQA*, as defined by our Supreme Court in a relatively recent opinion. This type of "bootstrapping" CEQA litigation abuse is certainly something worthy of consideration in future discussions of potential CEQA reforms. Given the utterly meritless nature of the claims asserted, as found by both the trial court and Court of Appeal, if and when the case finally terminates in favor of City and Eden Housing, then Petitioner SLD could even potentially find itself defending a malicious prosecution action, if Eden Housing was inclined to bring one. (See, *Charles Jenkins v. Susan Brandt-Hawley* (2022) 86 Cal.App.5th 1357 (see recent summary dated January 3, 2023, which can be found *here*).)

Conclusion and Implications

The Court of Appeal's opinions in *SLD*, and *Citizens' Committee* last year, strengthen support for use of the exemption under Section 65457, and provide further valuable guidance for application of the standards under Public Resources Code section 21166 governing the triggers for subsequent review. While Section 65457 appears historically to have been relatively under-utilized, given this recent judicial support for use of this exemption, we may see an increase in efforts to take advantage of this streamlining tool.

Regarding NIMBY groups' disturbing but frequent weaponization of CEQA in litigation to try to kill much-needed affordable housing projects – a weaponization that drew the Attorney General's attention in this case – the Opinion provides a helpful precedent, but additional legislative reform is also sorely needed if this state is serious about ever achieving its lofty housing production goals and solving its dire housing crisis.

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.

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