CEQA Remedies Go Both Ways: Fourth District Reverses Judgment Upholding San Diego County Board's Decision Granting Project Opponents' Administrative Appeal, Holds Board Erred In Finding CEQA Guidelines Section 15183 Statutory Exemption Inapplicable And Ordering EIR Prepared for Exempt Industrial Project

By Arthur F. Coon on February 26, 2024

In an important published opinion filed February 16, 2024, the Fourth District Court of Appeal (Div. 1) held the San Diego County Board of Supervisors committed a prejudicial abuse of discretion in granting project opponents' appeals of the Planning Commission's decision upholding County's use of the CEQA Guidelines section 15183 exemption for a construction debris and inert materials recycling facility project. *Hilltop Group, Inc., et al v. County of San Diego, et al.* (2024) ___ Cal.App.5th ___. The decision is noteworthy not just as the newest in a series of recent published decisions explicating the application of this important CEQA exemption, but because it sides with and grants a writ remedy to a *project developer* plaintiff that ultimately prevailed in litigation alleging a lead agency overstepped its legal authority by ordering preparation of an unnecessary EIR for an exempt project.

Factual and Procedural Background

The General Plan Update and Certified Program EIR

The County designated the project property for industrial use in its 2011 General Plan Update (GPU), the environmental impacts of which were reviewed under CEQA pursuant to a certified program environmental impact report (PEIR). The PEIR reviewed impacts at a programmatic level, contemplating subsequent project-specific analyses would occur to determine the need for and nature of further CEQA review, including whether subsequent projects were exempt from further CEQA review as within the PEIR's scope or otherwise, and whether CEQA tiering or streamlining review of such projects would be appropriate. The PEIR determined development under the GPU's land use designations may cause

significant environmental impacts requiring mitigation, analyzed and adopted feasible mitigation measures, and found that even with such mitigation there would be significant and unavoidable impacts in a number of areas, including aesthetics, air quality, noise, and traffic.

The Site-Specific Industrial Development Project

In 2012, developer Hilltop Group, Inc. ("Hilltop Group") proposed the North County Environmental Resources Project ("NCER Project" or "Project"), a recycling facility that would process and recycle trees, logs, wood, construction debris, asphalt, and other inert material from construction projects, at levels of 20 tons of processed material and 48 tons of exported repurposed material per day. The GPU designation of the 140-acre Project site (18 acres of which would be used by the recycling facility and 44 acres of which would be preserved as habitat by a conservation easement) is "High Impact Industrial" with a zoning classification of "General Impact Industrial," which allows recycling facilities such as the NCER Project. Located in a steep valley directly west of Interstate 15, the Project site is also located adjacent to parcels of land zoned "semi-rural residential" and in proximity to a number of residential communities, which resulted in strong public opposition to the Project ultimately leading to litigation.

County's CEQA Review and Administrative Proceedings

In 2014, County conducted an initial study and issued a Notice of Preparation (NOP), apparently incorrectly believing an EIR was required due to the neighboring property owner concerns about environmental impacts and community character; however, after Hilltop Group submitted a draft EIR in 2015, and later submitted numerous technical studies and asked the County to apply the CEQA Guidelines § 15183 exemption, the County ultimately reconsidered its position, and its staff concluded the Project qualified for the exemption "because the project was consistent with the development permitted by the GPU and analyzed in the PEIR." County then prepared a section 15183 checklist summarizing staff's findings and recommended – subject to conditions of approval requiring enclosure of processing operations and limiting such operations to the hours of 7 am to 7 pm – that the Zoning Administrator issue the exemption.

After a June 2020 public hearing, at which several community groups and HOAs expressed their opposition, the Zoning Administrator approved the exemption, finding the "Project was consistent with the GPU, would not result in any peculiar environmental impacts, and that feasible mitigation measures identified in the PEIR would be undertaken." County's Planning and Development Services (PDS) thereafter approved the Project's site plan with 65 conditions of approval, including that processing operations would occur in an enclosed building.

Four neighborhood groups and the City of Escondido appealed the exemption and Project approvals to the County's Planning Commission, which held a public hearing, unanimously denied the appeals, and upheld the approvals on condition that onsite operations would not start before 7 am.

Several community groups and HOAs and the City of Escondido then appealed the Planning Commission's decision to County's Board of Supervisors, which held a public hearing focused on the Project's eligibility for the Guidelines § 15183 exemption. The Project opponents/administrative appellants raised numerous issues, including claims that additional environmental review was required due to potentially significant aesthetic, GHG emissions, biological resources, noise, and traffic impacts; inadequate PEIR mitigation measures; substantial new information showing impacts would be more significant than anticipated by the PEIR; incompatibility with the surrounding residential land use; inadequacy of County's technical reports; and County's unrescinded prior NOP nominally requiring a full EIR.

Despite County staff's detailed written recommendation to deny the appeals and uphold the CEQA exemption based on the prior findings, supported by technical reports, that the "Project did present any significant or peculiar impacts that were not previously analyzed in the PEIR[,]" the Board granted the appeals after a public hearing where it received 150 "e-comments" and heard presentations from the parties and comments from 24 members of the public. Board members expressed *generalized* concerns with the Project's potential "project-specific peculiar" air quality, noise, traffic, and GHG emissions impacts – without identifying what specific aspects of the Project might result in such effects – and found an "EIR is warranted," remanding the matter to the Zoning Administrator with direction to order preparation of an EIR.

The Developer's Litigation

Rather than resigning itself to the Board's decision requiring an EIR, Hilltop Group took the issue to court, filing a petition for writ of mandate seeking to set aside the Board's decision and to compel the Board to affirm the Zoning Administrator's approval of the section 15183 exemption. While the trial court found the Board's decision inconsistent with the record (including County staff's findings and recommendations), it nonetheless denied the petition, concluding there was a "fair argument" that the Project may have "significant non-mitigable [environmental] affects… peculiar to the subject project" that were not addressed as significant in the PEIR "and for which new information shows will be more significant than described in the [PEIR]."

Hilltop Group appealed. The Court of Appeal reversed.

The Court of Appeal's Decision

The Standard of Review

After describing CEQA's basic purposes and multi-tiered review process, including screening CEQA "projects" for applicable exemptions at the second tier of review, the Court of Appeal discussed the applicable standard of judicial review in detail. In rejecting County's argument that the low threshold "fair argument" standard applied to its Board's decision, the Court instead followed published decisions holding that the substantial evidence standard of review applies to findings concerning the use of a statutory exemption, including the *statutory* exemption effectuated by CEQA Guidelines section 15183. (Citing *Concerned Dublin Citizens v. City of Dublin* (2013) 214 Cal.App.4th 1301, 1311 (my 4/10/13 post on which can be found *here*); *Lucas v. City of Pomona* (2023) 92 Cal.App.5th 508, 538 (my 6/27/23 post on which can be found *here*); see Pub. Resources Code, § 21083.3.) The Court explained that a project's eligibility for the section 15183 exemption does *not* solely depend on whether a project will have significant impacts, but also on whether its "effects were analyzed as significant impacts in a prior EIR on a general plan or zoning action with which the project is consistent[.]" (Quoting *Lucas,* at 538 [rejecting fair argument standard of review for agency's determination "that a project consistent with a prior program EIR presents no significant, unstudied adverse effect."].)

Quite significantly, the Court also squarely *rejected* the County's argument that the fair argument test should apply to decisions determining the section 15183 exemption to be *inapplicable* even if the substantial evidence standard applies to decisions *upholding* its application. Per the Court: "We find no meaningful distinction between an agency decision approving a CEQA exemption, and a decision denying an exemption, that would warrant a differing standard of review." The Court did "note, however, that the substantial evidence standard requires us to resolve all conflicts in the evidence in support of the Board of Supervisors' action and indulge all reasonable inferences in favor of their findings."

Noting that there was no dispute that the NCER Project was a CEQA "project" and was consistent with the GPU and zoning, the Court went on to hold the Project is eligible for Guidelines section 15183's streamlined environmental review process (which County's staff had elected to utilize) and thus County's environmental review of it was required to be "limited to the circumstances enumerated in Guidelines section 15183, subdivision (b)(1) through (4)." Because the Board did not so limit County's further environmental review in its decision ordering an EIR, it failed to proceed in a manner required by law, and the Court found no substantial evidence in the record supporting the Board's findings that the Project would result in "peculiar" aesthetics, noise, traffic, GHG emissions, or air quality impacts.

Key Legal Principles and Holdings

Key takeaways from the Court's 48-page opinion include:

- Consistent with streamlining future environmental review for projects within the scope of a program EIR, section 15183 states that projects consistent with a general plan (or, more broadly and precisely, "consistent with the development density established by existing zoning, community plan, or general plan policies for which an EIR was certified") "*shall not* require additional environmental review, *except as might be necessary* to examine whether there are project-specific significant effects which are peculiar to the project or its site." (Citing CEQA Guidelines, § 15183(a), emph. Court's.) Thus, environmental review of a project, like the NCER Project, that is consistent with the land use designation of a general plan for which an EIR was certified *must* be limited by the lead agency to examination of significant effects it determines: "(1) Are peculiar to the project or the parcel on which the project would be located, (2) Were not analyzed as significant effects in a prior EIR on the zoning action, general plan or community plan with which the project is consistent, (3) Are potentially significant off-site impacts and cumulative impacts which were not discussed in the prior EIR prepared for the general plan, community plan or zoning action, or (4) Are previously identified significant effects which, as a result of substantial new information which was not known at the time the EIR was certified, are determined to have a more severe adverse effect than discussed in the prior EIR." (Quoting CEQA Guidelines, § 15183(b)(1)-(4).)

- CEQA Guidelines section 15183 may provide either a *complete* or a *partial* CEQA exemption depending on the relevant facts; accordingly, the Court *rejected* County's argument for a "narrow interpretation" of the section "in which the exemption is entirely inapplicable if there are *any* peculiar project-specific environmental impacts." Rather, the section "may require environmental review of aspects of a project not adequately covered by a program EIR, and exempt other aspects of the same project from further review because the environmental effects were previously and adequately addressed." In other words, the presence of some environmental effects that are "peculiar and project-specific" or which were "not addressed as significant in the prior [EIR]" does not "render the streamlined process wholly inapplicable."

- Because the NCER Project was consistent with County's GPU, section 15183 applied and the primary issue for the Court was "the *extent* to which the [review] process is streamlined and what further review is required based on substantial evidence of the project's peculiar environmental effects." (Emph. added.) In addressing this issue, the Court concluded, under the unique circumstances of the case before it, that County's prior initial study did not disqualify the Project from using the exemption as a matter of law because that study lacked sufficient information or analysis to determine the exemption could not apply despite County's later and more informed findings, and the existence of potential environmental impacts does not preclude use of the

exemption, which permits streamlined review where such effects were already taken into account and addressed in a PEIR.

- Because Section 15183 does not define the term "peculiar" except to state an effect is *not* "peculiar" to a project if uniformly applied development policies or standards will substantially mitigate it (citing § 15183(f)), the Court relied on case law citing a dictionary definition indicating the term refers to an impact "belong[ing] exclusively or especially to the project or… characteristic of only the project." (Citing *Wal-Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal.App.4th 273, 294 [analyzing whether City zoning ordinance was eligible for exemption].)

- Applying *Wal-Mart*'s definition to the context of determining to what extent individual development projects within a general plan and zoning ordinance designation can utilize the exemption, the Court concluded the NCER Project's specific construction and operational impacts to the surrounding environment were certainly "peculiar" in the sense of being unique to the Project and not anticipated at a level of site-specific detail by the PEIR, but also noted "this does not end our analysis." The exemption provides that effects of future projects that will be substantially mitigated by uniformly applied, previously adopted development policies or standards shall not be considered "peculiar" (§ 15183(f)), so, per the Court, "the issue is whether substantial evidence in the record supports the Board of Supervisors' findings that there are project-specific impacts that will not be substantially mitigated by previously adopted and uniformly applied policies and procedures."

- In this same vein, prior to analyzing the Board's findings for substantial evidence support, the Court noted that the Board's decision "failed to identify the specific nature of the NCER Project's "peculiar" impacts that required environmental review, except to point to broad environmental categories" and did not "address, with specificity, the effect of uniform policies and procedures on these purported impacts." The Board's brief and non-specific findings thus failed "to bridge the analytic gap between the raw evidence and ultimate decision or order." (Quoting *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.) This failure, i.e., the Board's ambiguous findings, and the fact that County's staff reports and technical environmental studies contradicted those findings, made review of the voluminous 48,000-page record for substantial evidence supporting the Board's decision a "challenging" and "daunting task" for both the Court and the parties. Further, while County attempted to bridge the analytic gap by pointing to various public comments in the record, these consisted largely of lay opinion and personal observations on technical subjects requiring expertise, and "altogether fail[ed] to address [the key issue of] whether the purported project-specific impacts will be substantially mitigated by uniform policies in the PEIR."

- Despite indulging all inferences in favor of the Board's decision as required by the substantial evidence standard, the Court could nonetheless identify no substantial evidence in the record supporting the decision to overturn the Zoning Administrator's and Planning Commission's evidence-supported decisions that the CEQA Guidelines § 15183 exemption applied. With respect to claimed *aesthetic* impacts, the public's "lay opinions and observations" opposing the Project failed to constitute substantial evidence that any impacts would not be substantially mitigated by the PEIR's uniform policies, and, to the extent they attacked Hilltop Group's technical view analysis studies, they lacked the requisite expertise to qualify as substantial evidence.

- The same was true of the lay public comments addressing the Project's potential *noise* impacts from construction and operation, i.e., they were speculative, lacked necessary expertise to

challenge the contrary technical studies, and failed to address the relevant issue whether uniform policies and procedures will substantially mitigate Project noise.

- The very same flaws were inherent in the public comments on *traffic* impacts; in addition, County's contention that Hilltop Group's traffic analysis was inadequate because it did not address VMT failed because CEQA's VMT analysis requirement operates prospectively and only became effective on July 1, 2020 – *after* the traffic analysis was conducted and the Zoning Administrator approved the exemption. (Citing CEQA Guidelines, § 15064.3(c); *IBC Business Owners for Sensible Development v. City of Irvine* (2023) 88 Cal.App.5th 100, 123-124 (my 2/21/23 post on which can be found *here*).)

- Finally, the technical studies addressing the Project's *GHG* and *pollutant emissions* showed they were below the CAPCOA screening threshold of significance used by the County; the record contained no expert evidence concluding such emissions would be significant and peculiar; the 2018 judicial invalidation of County's CAP did not affect this analysis; and the lay public commentary lacked the requisite expertise to challenge the technical reports. Per the Court: "[T]he parties have simply not pointed to substantial evidence in the record, by those qualified to provide such evidence, that the NCER Project poses peculiar impacts as defined by [the exemption]… in the areas of GHG emissions and air quality" and the Board's "broad statement that uniform policies will not substantially mitigate" the Project's effects in these areas "does not bridge the analytic gap between this finding and the scientific data and County reports that conclude the opposite."

Conclusion and Implications

Stating the obvious, without sugar-coating it, the County Board in this case ignored the uncontradicted scientific evidence and technical reports relevant to the issues before it, as well as its own staff's, Zoning Administrator's and Planning Commission's evidence-supported findings and decisions, and simply bowed to raw political pressure – i.e., the roar of the NIMBY mob of project opponents – in making the erroneous decision the Court of Appeal correctly set aside here. The Board was no doubt counting votes at the next election, and, in any event, was not undertaking the factual and legal analysis required of a lead agency by CEQA. This scenario is, unfortunately, all too common with California's local agencies, whose largely lay decision making bodies often fail to appreciate and respect the distinction between their roles as quasi-adjudicative body versus legislative policy-making body; indeed, it seems to me this problem is a big part of the challenge faced by the Legislature in reforming CEQA and solving California's housing crisis and other economic woes. (See, e.g., Elmendorf & Duncheon, "Does the HAA (or anything else) Provide Remedy [for] CEQA-Laundered Project Denials?" (Part 3 of 4), posted 12/1/21 on SLoG Law Blog (noting agency leaders, such as a city council, "are elected officials who inevitably pay attention to politics even when acting in a quasi-judicial capacity (hearing a CEQA appeal)".)

As indicated at the beginning of this post, this case is particularly significant for at least two reasons beyond its interpretation and application of the CEQA Guidelines § 15183 exemption. First, it represents the rare instance where a project developer does not simply "roll over" and accept an agency's patently unreasonable demand to conduct further onerous, expensive, time-consuming and unnecessary CEQA review; here, the developer fought back, said "enough," took the agency to Court – and won!

Second, and relatedly, the Court pointedly rejected the County's legal argument that "merely" subjecting a project to further CEQA review cannot constitute prejudicial error because the Project may yet be approved after that review occurs. The opinion's penultimate paragraph squarely addressed and found this argument meritless, and is worth quoting in full here:

> "We also find no merit to the County's argument that Hilltop Group cannot demonstrate prejudice because the NCER Project application was not denied, but merely subjected to further environmental review. The County cites to no authority that would support such an interpretation of the term "prejudice," and under their interpretation Hilltop Group could be subject to an indefinite review process without judicial recourse so long as the project application is not formally denied. For purposes of CEQA compliance, a "prejudicial" abuse of discretion "is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." ([Pub. Resources Code,] § 21168.5.) Such a prejudicial abuse of discretion has been demonstrated here."

As hard as it may be for some elected officials and members of the public to believe, developers and project proponent landowners have legal rights, too, and it is a salutary development when courts recognize that and provide a remedy, as the Court of Appeal did in this case. Let's hope this decision signals a growing judicial trend not tolerating CEQA abuse in the form of agencies requiring endless and dilatory pre-approval environmental review – a bad-faith tactic Professor Elmendorf has referred to as "CEQA laundering" – since it is well known that such delay can be the deadliest form of project denial. A good next step for courts to take in combatting this all-too-common bad faith agency tactic would be to recognize the developer's claim for monetary damages against the agency for violation of its procedural and substantive due process rights.

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