

# ALSTON & BIRD

## LAND USE MATTERS

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*Land Use Matters* provides information and insights into legal and regulatory developments, primarily at the Los Angeles City and County levels, affecting land use matters and new CEQA appellate decisions.

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### California Environmental Quality Act (CEQA)

#### [Save Our Access v. City of San Diego \(4th. App. Dist., June 2023\)](#)

This case involved a challenge to the City of San Diego's approval of a ballot measure to remove a community plan area from the 30-foot building height limit governing development in the city's Coastal Zone. In 2018, the city approved an update to the applicable community plan and certified a program environmental impact report (PEIR) to provide CEQA clearance. The city argued that removal of the Coastal Zone height limit had already been evaluated in the PEIR, so that the ballot amendment was a "later activity" fitting within the scope of the PEIR.

The court of appeal affirmed the trial court's order directing the city to set aside its approval of the ballot measure. The court held that there was no substantial evidence in the administrative record supporting the city's argument that the PEIR had evaluated the impacts of removing the height limit. To the contrary, the record included internal city email communications acknowledging that the PEIR had not evaluated this issue. Therefore, the ballot measure qualified as a "new" project, and the court applied the less deferential "fair argument" test to determine whether the project could cause potentially significant impacts. Because the administrative record supported a fair argument that removing the height limit could cause significant environmental impacts, further environmental review was required to comply with CEQA.

#### [Lafayette Bollinger Development LLC v. Town of Moraga \(1st App. Dist., July 2023\)](#)

In this case, the petitioners challenged a town's denial of their application to develop housing and successfully argued that the town needed to amend its land use designation for their property. Though the petitioners sought a writ of mandate directing the town to reconsider their land use application after the land use designation was updated, the trial and appellate courts agreed that the lack of a legally compliant land use designation did not mean that the town abused its discretion in denying the petitioners' land use application on other unrelated grounds, including public safety and environmental concerns.

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The appellate court therefore affirmed the trial court's writ directing the town to update the property's land use designation. The court of appeal also affirmed the trial court's decision to provide no further relief to the petitioners. While admitting its general plan's land use designation was invalid, the town had argued on appeal that the trial court erred in granting any writ relief, asserting the town never violated a mandatory duty or prejudicially abused its discretion. Both the trial and appellate courts, however, agreed that the town had a duty to adopt a legally compliant land use designation, which supported issuance of a writ directing the town to do so.

The petitioners' writ of mandate cause of action was accompanied by causes of action for inverse condemnation, violations of federal due process and equal protection, and declaratory relief. Assessing each of these claims in turn, the appellate court affirmed the trial court's determinations that (1) no taking had occurred; (2) the town did not violate the petitioners' due process or equal protection rights; and (3) no declaratory relief was appropriate. The trial court's ruling denying the petitioners' costs was also affirmed. The trial and appellate courts both reasoned that the petitioners were not a prevailing party because they had not achieved their main litigation objective of obtaining project approval. Finally, the appellate court also affirmed the trial court's decision not to award attorneys' fees to the petitioners, explaining that, because the petitioners had a clear financial stake in the case sufficient to justify bringing the suit, there was no need to award attorneys' fees to offset the burden of bringing the action.

#### ***Olen Properties Corp. v. City of Newport Beach* (4th App. Dist., July 2023)**

In this case, the court of appeal affirmed the trial court's decision that the City of Newport Beach acted within its discretion in approving a residential housing project. The plaintiff challenged the approval on two grounds, asserting: (1) the city's approval of the project violated the city's land use policies; and (2) substantial changes or new information required the city to prepare a new EIR under CEQA.

First, the court noted that the city's land use policies were part of the city's general plan, and the approval of the project was valid only if the project was consistent with those policies. One applicable land use policy, 6.15.6, required a "residential village" to contain at least 10 acres and be centered on a "neighborhood park," and another land use policy required the neighborhood park to have a "minimum dimension" of 150 feet. The court determined that the city acted within its discretion in relying on the planning commission's findings that the project encompassed the entire adjacent center, including office buildings and parking, to meet the 10-acre requirement. The court also upheld the city's determination that the park met the 150-foot minimum dimension requirement because it exceeded 150 feet in length in two of its dimensions.

Second, the plaintiff argued that the city violated CEQA by relying on an addendum to a 2006 EIR in approving the project, because substantial changes or new information had occurred that required the preparation of a new EIR. Section 21166 of CEQA requires the preparation of a new EIR if substantial changes to a project or its circumstances have occurred or new information becomes available. The court rejected the plaintiff's argument that the "reverse substantial evidence" test in *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, applied, noting that test applies only when (1) the initial EIR is a "program EIR," i.e., an EIR for a broad program or plan as opposed to a specific project; and (2) a subsequent project is proposed that is not the same or within the scope of the project as a whole. Here, the 2006 EIR was a program EIR (and so prong one was met); however, the project was within the scope of the 2006 EIR (and so prong two was not met). The court therefore applied a more deferential standard of review and considered whether substantial evidence supported the city's determination that a new EIR was not necessary because the project fit within the scope of the prior EIR.

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The court considered four substantial changes or new information that the plaintiff asserted warranted the preparation of a new EIR. First, the court found that the city did not need a new EIR to measure transportation impacts using “vehicle miles traveled,” despite updated regulations requiring this metric, because subsequent regulations are not new information triggering the preparation of a new EIR. Second, the city’s reliance on its expert’s opinion that certain hazardous waste near the project did not pose environmental problems for the project was substantial evidence to support the city’s approval of the project, despite the plaintiff’s presentation of an expert opinion otherwise. Third, the court rejected the plaintiff’s argument that the project violated existing covenants, conditions, and restrictions, noting that the 2006 EIR and addendum appropriately considered these as environmental issues and no further environmental impact analysis was necessary. Fourth, the court rejected the plaintiff’s arguments that geological or soil-related issues required the preparation of a new EIR, finding that geotechnical reports and recommendations regarding construction did not constitute substantial changes to the project or its circumstances or new information under Section 21166.

The court affirmed the lower court’s ruling upholding the city’s approval of the project.

### ***United Neighborhoods for Los Angeles v. City of Los Angeles* (2nd App. Dist., July 2023)**

The United Neighborhoods for Los Angeles opposed a Hollywood project to replace 40 apartments subject to the city’s rent stabilization ordinance (RSO) with a 156-room hotel. The city determined that the project was not subject to CEQA pursuant to the categorical exemption for “infill” development projects set forth in CEQA Guidelines Section 15332. Opponents of the project argued that the infill exemption should not apply because the project is not consistent with the city’s General Plan, as required under the exemption. The trial court granted the opponents’ writ of mandate, and the city appealed.

The appellate court affirmed the trial court’s decision, finding first that the advocacy group had met its burden to raise the issue during the administrative process. However, at the heart of the appeal was whether the city was required to have considered certain parts of the Housing Element of the General Plan – with the court noting that the General Plan is structured so that if a project is inconsistent with the Housing Element goals, it “will necessarily conflict with more concrete Housing Element policies.” The city argued that the Housing Element policies relating to the preservation of affordable housing did not apply to the project because: (1) a hotel is not a “housing” project; and (2) RSO housing is not “affordable” housing within the meaning of the Housing Element. But the court determined that even though a hotel would not *create* housing, the Housing Element also applied to the *preservation* of affordable housing. In addition, based on the plain meaning of RSO housing and the terms used within the Housing Element, the existing 40-unit building qualified as affordable housing and the policies of the Housing Element applied.

The court determined that while deference should be given to a city’s finding of consistency with its own general plan, no such deference was owed to a city’s determination of which policies apply to a project. “The principle that the city is uniquely positioned to weigh the priority of competing policies does not extend to the question of which policies are to be placed on the scales.” In affirming the trial court’s judgment against the city, the appellate court noted that it was not suggesting that the city was required to make specific formal findings; however, the court could not defer to the city’s “weighing and balancing of the General Plan’s policies’ where there is no indication the city weighed and balanced all applicable policies.”



### ***Anderson v. County of Santa Barbara* (2nd App. Dist., August 2023)**

This case involved a challenge to the County of Santa Barbara's right-of-way restoration project to remove unpermitted encroachments (e.g., landscaping, boulders, and a "No Parking" sign) along a public road near a popular hiking trail, which blocked what would otherwise be public parking spaces. The plaintiffs alleged that the county violated CEQA by failing to consider the project's impacts on parking. They contended that removal of the encroachments would have a significant impact on the environment because it would create additional parking spaces, which would lead to more hikers using the trail and would make evacuation during a wildfire more difficult. The trial court agreed with the plaintiffs and entered a preliminary injunction prohibiting the county's road commissioner from removing the encroachments pending trial on the merits of the CEQA claims, and the county appealed.

The court of appeal reversed on two grounds. First, the county's right-of-way restoration project was categorically exempt from CEQA because it involved the maintenance or repair of an existing road and the enforcement of statutes and ordinances prohibiting unpermitted encroachments in the public right-of-way. The court also rejected the plaintiffs' argument that the county engaged in improper piecemealing in which the larger project was encouraging more hikers to use the trail, finding that the right-of-way restoration project had independent utility to bring properties in compliance with laws prohibiting encroachments. Second, the court found that the plaintiffs would not suffer irreparable harm if the encroachments were removed. The balance of harms instead favored the county. The county and the public had a legitimate interest in enforcing encroachment laws, which was supported by substantial evidence of fire safety and public safety risks, and the plaintiffs had an obligation to obey the law.

### ***Santa Rita Union School District v. City of Salinas* (6th App. Dist., August 2023)**

This case involved a challenge brought by two school districts against the City of Salinas's approval of a specific plan that provided for the development of 13 parcels in the northern portion of the city, including the construction of five new schools to address projected increases in student population resulting from new residential housing development. The petitioners asserted that due to insufficient funding for school facilities, which they assumed would persist over the 20–30-year buildout of the plan, the new schools contemplated by the plan to accommodate increased enrollment would likely never be built. Therefore, the EIR violated CEQA because it failed to discuss indirect, off-site environmental impacts related to the petitioners' alternative accommodations of new students. The trial court agreed with the petitioners, determining that the EIR was insufficient because it failed to include discussion of potential off-site environmental impacts resulting from the plan and because it failed to adequately respond to the petitioners' comments on those potential impacts.

The court of appeal reversed, finding that the EIR and its accompanying analysis of environmental impacts properly assumed that the contemplated new schools would be built as part of the plan. The city had imposed developer impact fees as complete mitigation for impacts of the plan on school facilities and provided mitigation measures for potentially significant off-site impacts related to the development of the new schools. The court noted that the city was not required to analyze any potentially significant off-site impacts of "ill-defined, uncertain, generalized, and speculative alternatives to new-school construction, as offered by the [petitioners]." The petitioners were responsible for identifying a more specific alternative plan to address the assumption that there would be insufficient school-facilities funding for the next several decades, but they were unable to do so. Therefore, no further environmental review or response from the city was required in the EIR.



### ***McCann v. City of San Diego*** (4th App. Dist., August 2023)

This case involves the ultimate resolution of prior litigation that had challenged City of San Diego projects to convert overhead utility lines to underground lines. The projects, approved through mitigated negative declarations (MNDs), were challenged by a local resident on numerous grounds, and the court ultimately found the city's environmental analysis lacked substantial evidence to support the city's findings for potential greenhouse gas (GHG) impacts. The appellate court directed the trial court to issue a peremptory writ of mandate ordering the city to set aside the project approvals and suspend project activity until compliance with CEQA was demonstrated to the trial court.

In response, the city rescinded those approvals and requested that the trial court discharge the writ. The petitioner objected to the discharge, asserting that the city did not conduct further environmental analysis or affirmatively abandon the projects. The trial court declined to discharge the writ and the city appealed. The appellate court held that, in rescinding the project approvals, the city complied with the writ and CEQA, which removed the trial court's jurisdiction, and thus the trial court should have discharged the writ.

The appellate court noted that the city's attempt to comply with the writ and CEQA is subject to an abuse of discretion standard of review, where an abuse of discretion may be found if the agency has not proceeded in a manner required by law or if its determination or decision is not supported by substantial evidence. The court found that the city had complied with the order to "set aside" the project approvals and halt further project activity; the writ contained no further directive. The court further opined that voiding a project approval is a remedial mandate authorized by CEQA Section 21168.9(a)(1) and that the city had complied with this section by rescinding the project approvals. Once an agency has fully satisfied a writ, the trial court no longer has jurisdiction over the matter, and the trial court here should have discharged the writ. The court emphasized that subdivision (b) of CEQA Section 21168.9 "clearly and unambiguously states that the trial court retains jurisdiction to enforce a peremptory writ of mandate 'until the court has determined that the public agency has *complied with this division*,'" and the city complied by rescinding the approvals.

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