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### LIKELY MAJOR CHANGES IN CEQA PRACTICE IN RESPONSE TO SUPREME COURT'S 'CEQA IN REVERSE' DECISION

In *California Building Industry Association v. Bay Area Air Quality Management District*, the California Supreme Court unanimously held that the California Environmental Quality Act (CEQA) does not require a public agency to consider the impact of existing environmental conditions on future project users except in limited circumstances. Unless a project is subject to specific statutory requirements, or a project would exacerbate existing environmental hazards or conditions that already exist, the potential impact of existing hazards on future users is not a significant environmental impact for CEQA purposes.

This ruling represents a significant change from CEQA practice. Certain standard components of CEQA analysis – such as impacts related to existing air pollutants, geologic hazards, wildfire risk, flooding, and effects of climate change – are no longer CEQA impacts by the Court's ruling. However, public agencies are not prohibited from including these issues in their environmental review and may continue to review new developments to ensure that projects are safely designed given, say, the need to protect structures and residents from damage due to earthquakes or exposure to pollutants.

#### **Background**

The Bay Area Air Quality Management District (BAAQMD) adopted CEQA thresholds that would have required local agencies to consider the impact of existing toxic air pollutants on the future users of a proposed project. The California Building Industry Association (CBIA) challenged the

thresholds, arguing that CEQA does not require an analysis of the impacts that the existing environment might have on a new project's occupants.

The trial court found for CBIA and the Court of Appeal reversed. The Supreme Court granted CBIA's petition for review on one question: "Under what circumstances, if any, does CEQA require an analysis of how existing environmental conditions will impact future residents or users (receptors) of a proposed project?"

#### **Ruling**

The Court ruled that CEQA does not generally require an agency to consider the effects of existing environmental conditions on a proposed project's future users or residents. Accordingly, it rejected as "clearly erroneous" the portion of CEQA Guidelines Section 15126.2(a) that required analysis in all circumstances of how existing environmental conditions could affect a project.

Specifically, the Court upheld that the portion of the Guidelines that say, "The EIR shall also analyze any significant environmental effects the project might cause by bringing development and people into the area affected. . . ." The Court interpreted this to require analysis of a project's "potentially significant *exacerbating* effects on existing environmental hazards." However, the Court rejected the portion of the Guidelines that state, "an EIR on a subdivision astride an active fault line should identify as a significant effect the seismic hazard to future occupants of the subdivision. The subdivision would have

the effect of attracting people to the location and exposing them to the hazards found there."

In practice, this means that the impact of locating a subdivision near an active earthquake fault, thereby exposing future residents to risk associated with seismic activity, is not a CEQA impact. By contrast, a project with the potential to disturb otherwise-contained contaminated soils, thereby exacerbating the hazard associated with an existing risk, could be a significant environmental effect subject to analysis under CEQA.

Accordingly, the Court reversed the Court of Appeal decision and remanded to the lower court to address the CBIA's arguments in light of the limiting principles articulated in the opinion.

The Court did note that specific CEQA sections require analysis of the impact of the environment on the project, but considered these to be exceptions to the general rule. The particular sections are:

- Statutory exemptions for farmworker housing, low-income housing, and infill housing (Public Resources Code §§21159.22, 21159.23, 21159.24) and transit priority projects (Public Resources Code §§21155-21155.3).
- Projects located within an Airport Land Use Plan or within two miles of an airport. (Public Resources Code §21096.)
- Public school construction projects. (Public Resources Code §21151.8.)

**Future Review of Existing Conditions' Effect on a Project**

Under the Court's decision, agencies may simply eliminate from their CEQA review any consideration of the effect of the existing conditions on a project and rely on established codes and standards to protect the public. For instance, the Alquist-Priolo Act establishes standards for construction on existing faults, the state Building Code establishes interior noise standards, and many local plans and ordinances contain safety standards and requirements.

However, the Court noted that CEQA does not *prohibit* an agency from considering – as part of environmental review – how existing conditions might impact a project's future users. It observed that this analysis has been widely understood to be an integral part of CEQA review for three decades. For agencies that desire to continue this review, it could be contained within an environmental document but identified as a non-CEQA issue or prepared as a separate accompanying document.

There is some anticipation that there will be legislative efforts to modify CEQA to require consideration of the effects of existing conditions on a project. Stay tuned!

If you have any questions, please contact Barbara Kautz, Lynn Hutchins, Eric Phillips, Justin Bigelow, or any other attorney at Goldfarb & Lipman.