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## LAW ALERT

### COURT OF APPEAL APPLIES *SAN MATEO GARDENS* AND CLARIFIES SUBSEQUENT ENVIRONMENTAL REVIEW STANDARD FOR NEGATIVE DECLARATIONS

In September 2016, the California Supreme Court decided *Friends of the College of San Mateo Gardens v. San Mateo Community College District* (2016) 1 Cal.5th 937, which addressed standards for subsequent environmental review under the California Environmental Quality Act (CEQA).<sup>1</sup> In that case, the Supreme Court held that CEQA's subsequent review provisions were directed to whether changes in a project required a new environmental document, rather than to whether the changes constituted a new project. The Supreme Court remanded the case to the Court of Appeal to review under the correct standard.

On remand, the Court of Appeal concluded that the project changes in this case required additional environmental review because there was substantial evidence supporting a fair argument that the project changes might have a significant aesthetic effect on the environment. The Court directed the District to review the potential impact of the changes and then to prepare either a Mitigated Negative Declaration (MND) (if the new impacts could be mitigated) or an Environmental Impact Report (EIR). The Court's decision makes it clear that it is more difficult to rely on a previous negative declaration than a previous environmental impact report (EIR) when changes are made in a project.

#### BACKGROUND

In 2006, the San Mateo Community College District (District) adopted a facilities master plan that proposed a combination of demolition, new construction, and renovation

of existing facilities. The District published an initial study and adopted an MND that concluded that implementing the master plan with certain mitigation measures would not result in significant environmental effects.

The District then proposed modifications to the master plan that involved demolition of a building previously proposed for renovation and renovation of two building previously proposed for demolition. In 2011, the District published an addendum to the 2006 MND, concluding that the proposed changes would not result in new or substantially more severe impacts than had been disclosed by the earlier MND, and additional environmental review was not required.

The Court of Appeal, however, held that the changes were so significant that they constituted a new project, and a new environmental review would be required. The Supreme Court reversed and remanded, concluding that once an agency adopts a negative declaration or an EIR, it must start the CEQA process from the beginning only if the proposed project changes "render the previous environmental document wholly irrelevant." If the project was approved with an EIR, the agency's decision should be upheld if substantial evidence supports the decision to rely on the previous EIR. However, if the project was approved with a negative declaration, if there is substantial evidence in the record that proposed project modifications *may* have a significant environmental effect, a "major revision" to a previous negative declaration would be necessary, requiring a subsequent

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environmental document. The Court remanded the case to the Court of Appeal to consider under the correct standard.

### **THE COURT OF APPEAL'S DECISION**

On remand, the Court of Appeal first decided that the original MND retained some informational value, and therefore CEQA's subsequent review provisions applied. The Court then explained that once it is determined that subsequent review provisions apply to a project approved through a negative declaration, the standard of review becomes less deferential to the agency. The Court of Appeal relied upon the Supreme Court's statement that the standard is less deferential because "a negative declaration requires a major revision—i.e., a subsequent EIR or mitigated negative declaration—whenever there is substantial evidence to support a fair argument that proposed changes might have a significant environmental impact not previously considered in connection with the project as originally approved."

Applying that standard, the Court of Appeal held that there was substantial evidence that the planned modification—removal of a portion of gardens surrounding an on-campus building—might have a significant aesthetic impact on the college campus. The Court based that conclusion upon testimony by several professors and students that the gardens were "the only place left on campus where students, faculty, and staff can go to get away from the concrete and rigid plots of monoculture plantings that have taken over campus." The significance of an environmental impact, the Court explained, is not based on its size but is instead "measured in light of the context where it occurs." In this context, there was substantial evidence supporting a fair argument that removing a significant portion of the gardens might have a significant environmental effect due to the aesthetic impact on the College campus. The Court directed the District to undertake a new

environmental review of the project changes to determine if an EIR was needed, or if the impacts could be mitigated, in which case a MND could be prepared.

### **LESS DEFERENCE REGARDING SUBSEQUENT ENVIRONMENTAL REVIEW IN NEGATIVE DECLARATION CONTEXT**

The Court of Appeal's decision makes it clear that less deference will be given to an agency's decision regarding subsequent environmental review when a negative declaration was the original environmental document rather than an EIR. An agency's determination that a major revision to a negative declaration is not required will lack substantial evidence whenever a fair argument exists that the project *may* have a previously unstudied environmental impact.

In a concurring opinion, Justice Dondero stated that an addendum to a negative declaration is not an appropriate document where major changes are proposed in a project and must be limited to "minor technical changes or alterations."

Moving forward, it is clearer that agencies wishing to adopt a modified project that was originally approved with a negative declaration should only do so if there is no substantial evidence of a fair argument that the proposed modifications may have a significant environmental impact. If substantial evidence of this type exists, a subsequent EIR or Mitigated Negative Declaration will be required. Agencies should be cautious in using an addendum to a Negative Declaration when substantial changes are made in a project.

For more information, please contact Barbara Kautz, Daniel Maroon, or any other attorney at Goldfarb & Lipman at (510) 836-6336.

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<sup>i</sup> A full summary of the Supreme Court's opinion can be found [here](#).