goldfarb lipman attorneys

1300 Clay Street, Eleventh Floor
Oakland, California 94612
510 836-6336

SEPTEMBER 29, 2016

LAW ALERT

CALIFORNIA SUPREME COURT SETS RECORD STRAIGHT REGARDING SUBSEQUENT ENVIRONMENTAL REVIEW

After a project is approved with an Environmental Impact Report (EIR) under the California Environmental Quality Act (CEQA), Public Resources Code section 21166 provides that later project changes require a subsequent EIR only in limited circumstances, including if "substantial changes" are proposed that would require major revisions to the EIR. Section 15162 of the CEQA Guidelines extends this rule, stating that additional environmental review is only required after adopting *either* a negative declaration or an EIR for a project when the substantial changes result in new or increased significant environmental effects.

Lower courts were divided as to whether courts should determine if proposed changes to a project constitute a new project requiring new environmental review, as opposed to a revision to an existing project requiring more limited review. In *Friends of the College of San Mateo Gardens v. San Mateo County Community College District* (filed 9/19/16), the California Supreme Court resolved the split, finding that courts should not invalidate an agency's action based solely on whether a project is "new" or "old," but rather should focus on whether the previous environmental document "retains any relevance in light of the proposed changes" and if the changes result in new significant environmental effects.

BACKGROUND FACTS

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 also published an initial study and adopted a mitigated negative declaration (MND) that concluded that the implementation of the master plan, along with specified mitigation measures, would not result in significant environmental effects.

As funding availability changed, the District proposed modifications to its master plan that would demolish a building previously proposed for renovation and would renovate two buildings 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 2006 MND, and, therefore, subsequent environmental review was not required.

Project opponents argued that the District was required to prepare an EIR because the 2011 proposal was a new project inconsistent with the 2006 proposal and would result in impacts that were not addressed in the 2006 MND. The Court of Appeal agreed that, as a matter of law, the 2011 proposal was a new project, not a project modification, relying on *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288 (*Lishman*). Accordingly, the District was required to prepare a new initial study and prepare an EIR if substantial evidence in the record supported a fair argument that the project could result in significant environmental effects (the "fair argument" standard).

San Francisco
415 788-6336
Los Angeles
213 627-6336
San Diego
619 239-6336
Goldfarb & Lipman LLP

THE SUPREME COURT'S HOLDING

The Supreme Court reversed and remanded the decision to the Court of Appeal, effectively disapproving *Lishman*. Instead, the Supreme Court agreed with the holding of *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, which stated that asking if a proposal "constitutes a new project in the abstract does not provide an objective or useful framework." The Court concluded that once an agency adopts a negative declaration or an EIR, it is required to start the CEQA process from scratch only if proposed changes to a project "render the previous environmental document *wholly irrelevant*" (emphasis added).

SUBSEQUENT EIRS V. SUBSEQUENT NEGATIVE DECLARATIONS

Under the Supreme Court's decision, an agency will receive the most deference from a reviewing court when it modifies a project that had previously been subject to an EIR. For projects originally approved with an EIR, as long as there is substantial evidence to support an agency's decision to prepare (or not to prepare) subsequent environmental documentation, a court should not reverse the agency's determination, even if contrary evidence exists in the record (the "substantial evidence" standard).

Although the Supreme Court says that the substantial evidence standard also applies when a negative declaration was the original form of environmental review, the manner in which the Court applies the standard suggests that negative declarations may not receive the same level of deference shown to EIRs. Negative declarations are only permitted when there is no substantial evidence that the project *may* have a significant effect on the environment. The Court stated that if there is substantial evidence in the record that proposed project modifications may have a significant environmental effect, a "major revision" to the previous negative declaration would be needed and a subsequent EIR would be required. In such cases, the agency would not be permitted to rely on an addendum to a previously-approved negative declaration or a subsequent negative declaration.

For projects approved without an EIR, the Court seems to say that the fair argument standard applies to subsequent approvals made in reliance on the original negative declaration. Therefore, if an agency intends to adopt a modified project that had originally been subject to a negative declaration, it should only do so if there is no substantial evidence that the proposed modifications may have a significant environmental effect. Otherwise, a subsequent EIR may be required.

The language in the case regarding negative declarations is not entirely clear. The Court remanded the case to the Court of Appeal to consider after rejecting *Lishman*. As lower courts apply the Court's new standard, we may receive clarification regarding how an addendum to a negative declaration will be reviewed by future courts.

For more information on this case or CEQA, please contact Barbara E. Kautz, Caroline Nasella, Eric S. Phillips, Justin D. Bigelow, or any other attorney at Goldfarb & Lipman LLP at 510-836-6336.

To receive Law Alerts by e-mail, please visit:
Goldfarb & Lipman News and Blog