



LAND USE & CEQA UPDATE:

CEQA REVIEW --- “ONCE MAY BE ENOUGH”

APPELLATE COURT AFFIRMS CITY’S RELIANCE ON “SPECIFIC PLAN EXEMPTION” FROM CEQA FOR APPROVAL OF RESIDENTIAL DEVELOPMENT PROJECT -- REJECTS DEMAND FOR SUPPLEMENTAL EIR

**Citizens’ Committee to Complete the Refuge v. City of Newark
(Case No. A162045) decided 12/29/2021; 2021 Cal.App. LEXIS 1120)**

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In a newly-published, decision illuminating the interplay between California’s efforts to address a critical housing shortage and the requirements of the California Environmental Quality Act (“CEQA”), the California Court of Appeal recently upheld the City of Newark’s determination that a proposed 469-home subdivision was “statutorily exempt” from further review under CEQA based on the “Specific Plan Exemption” of Government Code §65457 for residential projects deemed consistent with a previously-approved Specific Plan. The appellate decision was certified for publication on January 25, 2022.

The decision upheld the City’s 2019 determination that no new or supplemental environmental impact report (“EIR”) was required in connection with the City’s approval of a tentative subdivision map for the residential project located near the San Francisco Bay wetlands and Don Edwards National Wildlife Refuge. The City found (i) the project implemented and was consistent with the Specific Plan for the area, for which an EIR had been certified in 2016, and (ii) substantial evidence supported the City’s conclusion that no substantial changes in the project or changed circumstances or significant new information required major revisions to the 2016 EIR.

The Court’s decision is significant for several reasons, including its validation of the City’s reliance on the statutory “Specific Plan Exemption” from CEQA, which is embodied in Government Code § 65457. Although this exemption was enacted by the Legislature back in 1984, there had been only two published appellate decisions prior to this case applying this exemption to preclude supplemental CEQA review of housing developments. (*See, May v. City of Milpitas* (2013) 217 Cal.App.4th 1307, and *Concerned Dublin Citizens v. City of Dublin* (2013) 214 Cal.App.4th 1301.)

The Specific Plan Exemption, part of the State Planning & Zoning Law, states: “Any residential development project, including any subdivision, or any zoning change that is undertaken to implement

and is consistent with a specific plan for which an EIR has been certified after January 1, 1980, is **exempt** from the requirements of [CEQA]” – unless any of the changes described in Public Resources Code Section 21166 [*i.e.*, substantial changes in the project, or the circumstances, or new information necessitating major revisions to the EIR] occur after the specific plan is adopted.

The Court of Appeal here affirmed Alameda County Superior Court Judge Frank Roesch’s denial of a petition for writ of mandate brought by the Citizens’ Committee to Complete the Refuge and the Center for Biological Diversity, seeking to set aside the City’s approval and to require the preparation of a supplemental EIR. Both the trial court and the Court of Appeal rejected the petitioners’ arguments that “changes in the project” since the Specific Plan EIR was certified were so substantial as to require major revisions in the EIR.

The Court acknowledged that the 2019 proposal included a “new” description of riprap placement along some sloped edges of upland areas to prevent erosion, which had not been included in the 2016 EIR, although other uses and impacts of riprap were addressed. The Court emphasized, however, that a supplemental EIR can be required “only when *substantial* changes are proposed in the project which will require *major* revisions to the EIR” The Court carefully discussed the newly-proposed use of riprap in the context of the overall project, and concluded that it not meet the narrow statutory criteria warranting a supplemental EIR.

The Court also stressed the pro-housing policies underlying the Specific Plan Exemption:

The [Government Code] section 65457 exemption, like other statutory exemptions, reflects the Legislature’s determination that the interest promoted is important enough to justify forgoing the benefits of environmental review. The interest animating Government Code section 65457 is to increase the supply of housing. Thus, **Government Code section 65457 is intended to permit housing developments like the one at issue here that are consistent with a specific plan that has already undergone environmental review, regardless of possible environmental impacts of the project.**

In addition, the Court of Appeal approved the City’s approach in addressing the potential impacts of anticipated sea level rise, including more recent projections of an accelerated rate of sea level rise. The Court noted that “sea level rise is not an impact on the environment caused by the project,” so was outside the scope of CEQA. (*Cf. California Building Industry Assn. v. Bay Area Air Quality Mgt. Dist.* (2015) 62 Cal.4th 369.) Even so, the City had prepared an extensive 180-plus page checklist (plus technical appendices) in 2019 in connection with its evaluation of whether the subdivision proposal might require a supplemental EIR, and concluded that the City would take an “adaptive approach” to managing possible effects on the project from a range of sea level rise estimates toward the end of the century. The Court deemed this appropriate.

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