CEQA Reform and Litigation – Reports on the Legislature and the Supreme Court

Thursday, September 19, 2013; 1:00 – 2:30 p.m.

Christian L. Marsh, Downey Brand

CEQA REFORM AND LITIGATION

–

REPORTS ON THE LEGISLATURE AND THE CALIFORNIA SUPREME COURT

Christian L. Marsh
Downey Brand LLP
333 Bush Street, Suite 1400
San Francisco, California 94104
(415) 848-4830
http://www.DowneyBrand.com

Thursday, September 19, 2013

General Session: 1:00 – 2:30 pm

League of California Cities

Annual Conference · September 2013

CEQA LITIGATION: A REPORT ON THE CALIFORNIA SUPREME COURT'S RENEWED PENCHANT FOR CEQA CASES[1]

Prepared by

Christian Marsh and Arielle Harris, Downey Brand LLP[2]

September 19, 2013

The California Environmental Quality Act (CEQA),[3] with its mandate on public agencies to lessen or avoid the unwelcome environmental effects of proposed projects, has generated hundreds of lawsuits in the state's trial courts and intermediate appeals courts over the statute's 43-year history. While the supply of CEQA cases in the lower courts appears inexhaustible, historically only a minute fraction of those cases have been accepted for review by the California Supreme Court. The relatively few CEQA cases taken by the Supreme Court each year is not surprising given the Court's discretion to grant review and the narrow circumstances under which it does so.

In CEQA cases, like almost all civil cases,[4] the California Supreme Court's review is discretionary and typically granted in limited circumstances when necessary to settle an important question of law or resolve a conflict in decisions among the state's six appellate districts.[5] Indeed, of the roughly 7,000 petitions received by the Court each year, only one to two percent are accepted for review.[6] The Court has decided about 42 CEQA and CEQA-related cases since the statute was approved by the California Legislature in 1970—an average of one

---

[1] This paper is an update to an article that appeared in the January 2011 issue of Los Angeles Lawyer Magazine entitled "The California Supreme Court's Recent Flood of CEQA Decisions."

[2] **Christian Marsh** is a partner in the San Francisco office of Downey Brand LLP. He advises public and private clients on natural resource, energy, and land use matters involving water, endangered species, wetlands, California planning and zoning law, and NEPA and CEQA review. Christian conducts trial and appellate-level litigation and represented the prevailing parties in two of the more recent CEQA cases decided by the California Supreme Court, *Save the Plastic Bag Coalition v. City of Manhattan Beach* and *Stockton Citizens for Sensible Planning v. City of Stockton*. **Arielle Harris** is also an attorney with the San Francisco Office of Downey Brand LLP, and provides both advisory and litigation services to public and private entities in a wide range of land use, energy, and natural resource matters including California planning and zoning law, CEQA and NEPA review, the Surface Mining and Reclamation Act, and endangered species.

[3] The California Environmental Quality Act (CEQA), Pub. Res. Code §§21000-21178.

[4] The California Supreme Court has original jurisdiction over selected civil cases, including CEQA actions filed against the California Energy Commission and California Public Utilities Commission. Pub. Res. Code §21168.6. Even in those circumstances, the court's review is discretionary.

[5] Cal. R. Ct. 8.500(b)(1).

[6] Justice Kathryn M. Werdegar, Remarks at the State Bar of California 2010 Environmental Law Conference (Oct. 23, 2010) [hereinafter Justice Werdegar's Remarks]. The Supreme Court's Web site states that it grants review in less than 5 percent of the 5,500 petitions it receives each year. *See* http://www.courtinfo.ca.gov/courts/supreme/

per year.[7] Almost half of those have been published in the past ten years, and over a quarter have been decided in the last five years.

According to Justice Kathryn Werdegar, when a conflict emerges among the appellate districts, the court "almost always grants review" unless 1) the case at issue involves a "maverick opinion" that is nonetheless heading in the right direction, 2) the case is not a good vehicle due to unusual facts or procedural difficulties, 3) recent legislation may solve the problem, or 4) the court wants the issue to "percolate" further among the lower courts.[8]

Enacted to inform decision makers and the public about the potentially significant environmental effects of proposed projects before those projects are approved, CEQA requires lead agencies to prepare an Environmental Impact Report (EIR) whenever the agency finds that a project may have a significant impact on the environment.[9] The EIR, in turn, must evaluate ways to avoid or reduce the environmental effects of the project through changes to the project or the use of feasible alternatives or mitigation measures.[10]

When the lead agency finds that the project will have a less than-significant effect on the environment, the agency may adopt a negative declaration instead of preparing an EIR.[11] CEQA and its implementing guidelines also provide a series of exceptions or exemptions from CEQA's environmental review requirements.[12] If any apply, the lead agency need not prepare a negative declaration or an EIR. Once the agency approves the project, it may issue a notice that triggers a short 30- or 35-day statute of limitations period.[13]

The California Supreme Court first grappled with CEQA just two years after its enactment. Referring to the statute as "EQA" at the time, Justice Stanley Mosk authored the decision in *Friends of Mammoth v. Board of Supervisors* that answered a simple but fateful question: Does CEQA apply to private activities for which a government permit or other entitlement is needed?[14] The court's answer is apparent to anyone familiar with the endless stream of litigation involving private projects since that time. In *Friends of Mammoth*, the Court first articulated the oft-cited rule of statutory construction that "the Legislature intended CEQA to be interpreted in such manner as to afford the fullest possible protection to the environment…."[15]

Following *Friends of Mammoth*, the Court has had occasion to resolve a number of seminal questions under CEQA. For example, in *Laurel Heights Improvement Association v. Regents of University of California* (*Laurel Heights I*) the court first held that the "rule of reason" governs

---

[7] A few of the cases did not directly address CEQA or its regulatory guidelines but nonetheless referenced and interpreted principles of law under CEQA. Those cases are counted here as CEQA-related cases.
[8] Justice Werdegar's Remarks, supra note 5.
[9] Pub. Res. Code §21080(d).
[10] Pub. Res. Code §21100(b)(3)-(4).
[11] Pub. Res. Code §21080(c).
[12] See, e.g., Pub. Res. Code §21080(b); 14 Cal. Code Reg. §§15300-15333
[13] Pub. Res. Code §21167(a)-(e).
[14] *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247.
[15] *Id*. at 259.

the range of project alternatives that the agency must consider in an EIR, as well as the level of detail and analysis that the EIR must include concerning those alternatives.[16]

In *Western States Petroleum Association v. Superior Court*, the court considered the evidentiary standards that apply in CEQA cases. It set considerable limits on the admissibility of extra-record evidence—that is, evidence that was not before the agency when it made its decision.[17] While the court did not entirely "foreclose" the admissibility of extra-record evidence under "unusual circumstances or for very limited purposes," the court emphasized that extra-record evidence "can never be admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision."[18]

In balancing the earlier rule that CEQA be interpreted in a manner that affords the "fullest possible protection to the environment," the court held in *Napa Valley Wine Train, Inc. v. Public Utilities Commission* that this general rule of construction does not apply when "the Legislature has, for reasons of policy, expressly exempted several categories of projects from environmental review."[19] In those circumstances, the court "does not sit in review of the Legislature's wisdom in balancing these policies against the goal of environmental protection because, no matter how important its original purpose, CEQA remains a legislative act, subject to legislative limitation and legislative amendment."[20]

The 2013 CEQA Docket

After what appeared to be an increasing trend in CEQA cases before the Court in 2010—the Court decided four CEQA cases in four months—the Court decided only two CEQA cases in 2011 and 2012, an average of just one case per year.[21] *Tomlinson v. County of Alameda*, decided in 2012, addressed the extent to which a would-be opponent must "exhaust" his or her administrative remedies before filing suit to challenge a categorically-exempt approval.[22] In *Tomlinson*, the Supreme Court held that where a lead agency holds a hearing on an otherwise exempt project, the exhaustion requirement still applies "so long as the public agency gives notice of the ground for its exemption determination, and that determination is preceded by public hearings at which members of the public had the opportunity to raise any concerns or objections to the proposed project."[23] *Save the Plastic Bag Coalition* v. *City of Manhattan Beach*, decided a year earlier, applied the fair argument standard and upheld the use of a negative declaration for the approval of an ordinance banning plastic bag distribution.[24]

---

[16] *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal*. (1988) 47 Cal. 3d 376, 407 (*Laurel Heights I*).
[17] *Western States Petroleum Ass'n v. Superior Court* (1995) 9 Cal. 4th 559.
[18] *Id*. at 578-79.
[19] *Napa Valley Wine Train, Inc. v. Public Util. Comm'n* (1990) 50 Cal. 3d 370, 376.
[20] *Id*.
[21] While the Court made several references to CEQA in both *Voices of the Wetlands v. State Water Resources Control Bd*. (2011) 52 Cal.4th 499, and *American Coatings Assn., Inc. v. South Coast Air Quality Dist.* (2012) 54 Cal.4th 446, those cases did not actually involve challenges under CEQA.
[22] (2012) 54 Cal.4th 281.
[23] *Id*.
[24] (2011) 52 Cal.4th 155, 175.

In 2013, however, the Court is poised again to make it a banner year, granting petitions for review in a total of five cases, four of which are still pending before the court. These five cases deal with a broad array of issues including categorical exemptions, baseline conditions, the feasibility of mitigation measures, and the necessity for CEQA review for initiative petitions adopted by public agencies, as more fully described below.

Two New Justices Join the California Supreme Court

Chief Justice Cantil-Sakauye and Justice Goodwin Liu joined the Supreme Court in 2011. Justice Cantil-Sakauye is a 20-year veteran of the California courts and has served on the Third Appellate District since 2005. No stranger to CEQA, the justice authored five CEQA decisions between 2006 and 2011—three published and two unpublished—and has concurred in numerous others. Each of those decisions has been unanimous, which evinces her willingness and ability to work with fellow justices rather than assert her independence. Prior to joining the bench, Justice Liu was a Professor of Law at the U.C. Berkeley School of Law (Boalt Hall). Justice Liu's primary areas of expertise are constitutional law and education law and policy.

The Court has reviewed three CEQA cases since Justice Cantil-Sakauye joined the Court: *Save the Plastic Bag Coalition v. City of Manhattan Beach*, *Tomlinson v. County of Alameda*, and *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority*. Justice Liu joined the bench after the Court's review of *Save the Plastic Bag*. Justice Cantil-Sakauye concurred in the majority opinion in *Tomlinson* and *Save the Plastic Bag Coalition*, but she joined the partial concurring and partial dissenting opinion written by Justice Baxter in *Neighbors for Smart Rail*. Justice Liu also concurred with the majority opinion in *Tomlinson*, and both concurred and dissented from the majority opinion in *Neighbors for Smart Rail*.

In Justice Baxter's dissent from the majority's holding in *Neighbors for Smart Rail* that the agency abused its discretion by using a future conditions baseline, Justice Baxter instead concluded an agency retains discretion to forego an existing conditions baseline so long as the future conditions baseline is supported by substantial evidence, results in a realistic analysis, and provides informed decision-making and public participation. Justice Baxter characterized the majority's decision as a "categorical rule" of using an existing conditions baseline that has no support in the CEQA statute or regulations and does not allow for a future conditions baseline when doing so would provide a realistic assessment of a project's impacts.

Justice Liu authored his own opinion, in which he concurred with the majority opinion except for the conclusion that the error of relying on the future conditions baseline was non-prejudicial. Justice Liu argued that using only the future conditions baseline impaired informed decision-making by masking earlier effects resulting from the project, such as the project's acceleration of already projected increases in congestion at certain intersections in the short-term. It is clear, based on his opinion in *Neighbors for Smart Rail*, that Justice Liu is comfortable straying from the majority, as he was the only Justice that did not agree the EIR should be upheld.

A complete discussion of the decision in *Neighbors for Smart Rail* is provided on pages 6-7.

The Court has already issued its decision in ***Neighbors for Smart Rail***,[25] which involves a CEQA challenge to the Exposition Metro Line Construction Authority's (Expo Authority) approval of the second phase of a light-rail transit line running from Culver City to Santa Monica.[26] The superior court denied Neighbors for Smart Rail's (Neighbors) petition in full, and the Court of Appeal for the Second Appellate District affirmed. The Supreme Court granted Neighbors' petition for review which raised two issues. The first, and most central issue, is whether the Expo Authority's *exclusive* use of a future conditions baseline for assessment of the project impacts on traffic and air quality violated CEQA. The second issue raised is whether the mitigation measure the Expo Authority adopted for possible impacts to parking near planned transit stations was adequate.

As to the first issue, the Court held that "[w]hile an agency has the discretion under some circumstances to omit environmental analysis of impacts on existing conditions and instead use only a baseline of projected future conditions," a lead agency must, however, demonstrate the existence of "substantial evidence that an analysis based on existing conditions would tend to be misleading or without informational value to EIR users."[27] In addition, the agency must demonstrate that the sole use of a future conditions baseline "is justified by unusual aspects of the project or the surrounding conditions."[28] Use of future conditions would not be warranted just because it would be informative.[29] In this regard, the Court expressly overturned the 2010 decision in *Sunnyvale West Neighborhood Association v. City of Sunnyvale City Council,*[30] and in *Madera Oversight Coalition Inc. v. County of Madera,*[31] to the extent those cases hold that lead agencies may never use predicted future conditions as the sole baseline.[32]

The Court held that the administrative record did not provide substantial evidence supporting the Expo Authority's decision to limit its analysis of project impacts on traffic congestion and air quality to predicted impacts in 2030 to the exclusion of likely impacts on existing conditions. However, a plurality[33] of the Court found that the agency's abuse of discretion was non-prejudicial in this instance because "the agency's examination of certain environmental impacts only on projected 2030 year conditions, and not on existing environmental conditions, did not deprive the agency or the public of substantial relevant information on those impacts."[34] While this decision supports the use of a baseline other than existing conditions as the sole measure of a project's impacts, it also requires lead agencies to meet a strict standard before making such a

---

[25] (2013) 57 Cal.4th 439; 160 Cal.Rptr.3d 1 (Westlaw pin cites currently only available for Cal.Rptr. citation).
[26] *Id.* at 7.
[27] 160 Cal.Rptr.3d at 7.
[28] *Id.* at 12.
[29] *Id.*
[30] (2010) 190 Cal.App.4th 1351, 1383.
[31] (2011) 199 Cal.App.4th 48.
[32] 160 Cal.Rptr.3d at 11-12, 17.
[33] The Court issued one lead opinion, written by Justice Werdegar and joined by Justices Kennard and Corrigan, as well as two concurring and dissenting opinions. Justice Baxter, joined by Chief Justice Cantil-Sakauye and Justice Chin, wrote a concurrence and dissent that differed from the lead opinion on the baseline issue. Justice Liu wrote a separate concurrence and dissent finding that the EIR's failure to use existing conditions as the baseline was in fact prejudicial. Nonetheless, there was a majority of four justices on every issue except the prejudice question, and six justices agreed the EIR should be upheld.
[34] 160 Cal.Rptr.3d at 8.

determination. The implications of the Court's resolution of the baseline issue are far reaching. After *Neighbors for Smart Rail*, lead agencies have the discretion to use a baseline consisting solely of predicted conditions so long as the agency demonstrates the use of existing conditions would be misleading or uninformative.

Regarding the second issue, the adequacy of mitigation for spillover parking, the Court held that the mitigation measure adopted by the Expo Authority satisfied CEQA's requirements for including enforceable mandates for actions by the Metropolitan Transportation Commission (MTA) and the Expo Authority, as well as planned actions to be implemented by the municipalities responsible for parking regulations on streets near the planned trail stations.[35] The Expo Authority's adopted mitigation measure required MTA to monitor parking in the potentially affected neighborhoods, to pay for a residential permit parking program where transit station spillover causes a shortage in street parking, and to assist in developing other measures where a residential permit program is inappropriate.[36] While the Expo Authority and MTA could not guarantee local governments would cooperate to implement permit parking programs or other parking restrictions, the Court found that the record supported the conclusion that these municipalities "can and should" adopt such programs and restrictions under Public Resources Section 21081(a)(1).[37]

* * *

On May 23, 2012, the court voted unanimously to review a case from the First District Court of Appeal—***Berkeley Hillside Preservation v. City of Berkeley*.**[38] The case involves the City of Berkeley's approval of a use permit to construct an approximately 6,500 square foot single-family home with a 10-car attached garage on a lot in the Berkeley Hills with an approximately 50% slope. The City determined that the project was categorically exempt from CEQA under exemptions for new construction or conversion of small structures[39] and infill development[40] – exemptions commonly invoked for construction of single residences. A local citizen's group filed suit, challenging the City's reliance on categorical exemptions and seeking to compel the City to prepare an EIR. The trial court upheld the City's decision, but the First District sided with the citizen's group and set aside the use permit.

The case now pending before the Supreme Court raises three important issues. The first, and perhaps most important issue, concerns the application of an exception to categorical exemptions, commonly referred to as the "unusual circumstances exception." Categorical exemptions are set forth in the CEQA Guidelines for thirty-three classes of projects deemed not to have significant effects on the environment, and therefore exempt from the requirements of CEQA.[41] The unusual circumstances exception precludes reliance on categorical exemptions

---

[35] 160 Cal.Rptr.3d at 8.
[36] *Id.* at 24.
[37] *Id*.
[38] *Berkeley Hillside Preservation v. City of Berkeley* (2012) 137 Cal.Rptr.3d 500; previously published at 203 Cal.App.4th 656. The case pending before the Supreme Court is *Berkeley Hillside Preservation v. City of Berkeley*, S201116.
[39] 14 Cal. Code Reg. § 15303.
[40] 14 Cal. Code Reg. § 15332.
[41] 14 Cal. Code Reg. §§ 15301–15333.

where there is a "reasonable possibility that the activity will have a significant effect on the environment *due to unusual circumstances*."[42] In reviewing whether the exception applies, California courts of appeal traditionally applied a two-part test. First, courts determine whether any unusual circumstances exist. Second, courts ask whether there will be a significant environmental effect *due to* the unusual circumstances. The exception to the categorical exemption does not apply unless both questions are answered in the affirmative.[43]

The First District, however, essentially collapsed the two-step inquiry and held that categorical exemptions are precluded whenever significant environmental impacts are credibly alleged, regardless of whether those impacts are related to circumstances which are "unusual" for the exempted category. According to the First District's analysis, evidence that an otherwise exempt project may have an effect on the environment "is *itself* an unusual circumstance" which destroys the exemption.[44]

The proper analysis for categorical exemptions and the unusual circumstances exception is important not only to the project applicants who want to build their house in the Berkeley Hills, but also to numerous public agencies that rely heavily on categorical exemptions to implement countless routine projects throughout the state each year. Representatives of several such entities have submitted *amicus curiae* briefs to the Supreme Court, arguing that the First District's analysis—removing the need for challengers to establish both unusual circumstances and significant effects due to those unusual circumstances—will make projects that rely on categorical exemptions substantially more vulnerable to attack.[45]

The second issue the court will likely address concerns the appropriate standard of review for a lead agency's findings as to whether an exception (such as the unusual circumstances exception) precludes reliance on categorical exemptions. The First District applied the less deferential "fair argument" standard (enabling project opponents to defeat categorical exemptions by raising a fair argument that the project may have significant environmental effects due to unusual circumstances)[46], while other California courts of appeal have applied a more deferential "substantial evidence" standard (deferring to the agency's finding so long as it is supported by substantial evidence).[47] The Supreme Court now has the opportunity to resolve this long-standing division among the courts of appeal.[48]

The final issue concerns whether project opponents can defeat categorical exemptions by raising environmental effects not associated with the project as proposed, but with the project as re-envisioned by the opponents' expert witness. In *Berkeley Hillside Preservation*, the project

---

[42] 14 Cal. Code Reg. § 15300.2(c) (emphasis added).
[43] For examples of cases applying the traditional two-part test, see *Voices for Rural Living v. El Dorado Irrigation Dist*. (2012) 209 Cal.App.4th 1096; *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249.
[44] *Berkeley Hillside Preservation*, 137 Cal.Rptr.3d at pp. 511-512.
[45] Examples of such *amicus* briefs include those filed by the California School Boards Association's Education Legal Alliance and the Regents of the University of California, the League of California Cities and California State Association of Counties, and the Association of California Water Agencies.
[46] See, e.g., *Voices for Rural Living*, 209 Cal.App.4th at 1108.
[47] See, e.g., *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1251.
[48] See also, *Hines v. Coastal Commission* (2010) 186 Cal.App.4th 830, 855-856 (noting the split in authority).

opponents offered evidence from a geotechnical engineer who opined that the project could not be built pursuant to the approved project plans. According to the engineer, the project would require additional construction, and this additional construction would have significant environmental effects. In Supreme Court briefing, the project proponents insist the First District erred by considering the potential effects associated with the project as defined by the engineer rather than the project as approved by the City. According to the proponents' arguments, the only relevant effects are those associated with the project as approved.

Berkeley Hillside Preservation v. City of Berkeley is now fully briefed, and some twenty *amicus curiae* briefs have weighed in on both sides of the issues. Given the issues discussed above relating to the use of categorical exemptions, the court's decision will undoubtedly have significant ramifications far beyond the residential project at issue.

* * *

This term the Supreme Court will also consider whether a local agency can avoid CEQA review when it adopts an ordinance enacting a voter-sponsored initiative, which is at issue in ***Tuolumne Jobs & Small Business Alliance v. Superior Court*** [49](*"Tuolumne Jobs*"), thus eliminating the current split in authority in the Courts of Appeal. The Fifth District Court of Appeal in *Tuolumne Jobs* held that when a lead agency is presented with a voter-sponsored initiative petition and chooses to forgo putting the initiative on the ballot and instead adopts the initiative directly as an ordinance under Elections Code section 9214, the decision is *discretionary* and therefore subject to CEQA.[50] The holding in *Tuolumne* is directly at odds with the holding of the Fourth District Court of Appeal in *Native American Sacred Site & Environmental Protection Association v. City of San Juan Capistrano* (*"Native American Sacred Site*").[51]

Tuolumne Jobs involved the application for the expansion of an existing Wal-Mart store in the city of Sonora. After Wal-Mart submitted its application to the city, the city prepared an EIR on the proposed project and circulated it for public review. The city planning commission held a hearing on the application and voted to recommend approval. Prior to the city council vote on whether to certify the EIR and approve the project, the real party in interest served the city with a notice of intent to circulate an initiative petition, and thereafter the city postponed the city council meeting to consider the EIR and the project. The initiative petition was signed by more than 15 percent of the registered voters. Under Elections Code section 9214, when an initiative petition is signed by 15 percent or more of the voters of the city, and contains a request that the ordinance be submitted immediately to a vote of the people at a special election, the legislative body of the city must decide to take one of three actions: (1) adopt the ordinance, without alteration, (2) immediately order a special election at which the ordinance, without alteration, shall be submitted to the voters; or (3) order a report at a regular meeting and either adopt the ordinance or order an election within 10 days after the report is presented to the legislative body. After holding a public hearing, but without certifying the EIR or completing the CEQA review

[49] (2013) 210 Cal.App.4th 1006. The case pending before the Supreme Court is *Tuolumne Jobs & Small Business Alliance v. Superior Court*, Case No. S207173.
[50] *Id.* at 1013.
[51] (2004) 120 Cal.App.4th 961.

for the project, the Sonora city council voted to adopt the initiative as an ordinance and forgo the special election.

It is settled law that when a city council chooses to order a special election and submit the ordinance to the voters, CEQA does not apply. (14 Cal. Code Reg. § 15378(b)(3).) It is likewise settled that when a public agency sponsors an initiative and the electorate adopts it, CEQA still applies.[52] The court in *Tuolumne Jobs* began its analysis with a review of the California Supreme Court's holding in *Friends of Sierra Madre v. City of Sierra Madre* ("*Sierra Madre*"),[53] which held that "placing a voter-sponsored measure on the ballot is a ministerial act" and that imposing CEQA requirements on voter-generated initiatives "might well be an impermissible burden on the electors' constitutional power to legislate."[54] The Court in *Sierra Madre* thus concluded that there is "a clear distinction between voter-sponsored and city-council generated initiatives," whereby the former are exempt from CEQA and the latter are not.[55]

Based on the analysis in *Sierra Madre*, the Court in *Tuolumne Jobs* concluded that if "CEQA review is still required if it was the city council that chose to put the initiative on the ballot" then "[i]t is *even clearer* that CEQA applies when a mere 15 percent of the voters has expressed support of the initiative and the city council chooses to approve the project without an election."[56]

In *Native American Sacred Site*, the Fourth District concluded that a city council's decision whether to adopt an initiative or place it on the ballot is a ministerial and mandatory act.[57] The Court in *Tuolumne Jobs* disagreed. The term "ministerial" is defined in Guidelines section 15369 as a "governmental decision involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project . . . involv[ing] only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out." The Court concluded that under this definition, while a city council's duty to either adopt the initiative or hold an election is mandatory under Elections Code section 9214—a city council's *choice* to adopt the initiative and thereby approve a development project is entirely discretionary and not ministerial.[58] Therefore, the decision is subject to CEQA.[59] In this regard, the court's opinion directly conflicts with the holding in *Native American Sacred Site*.

The Court noted the practical limitations of its holding when viewed in conjunction with the time limitations under Elections Code 9214, which provides a maximum of 40 days for the council to decide whether to hold an election or adopt the initiative directly.[60] While the city of Sonora in *Tuolumne Jobs* had already completed an EIR and was prepared to vote on it before the voters'

---

[52] 14 Cal. Code Reg. § 15378(b)(3); *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165.
[53] (2001) 25 Cal.4th 165.
[54] *Id*. at 189.
[55] *Id*. at 189, 190-191.
[56] 210 Cal.App.4th at 1021 (emphasis added).
[57] 120 Cal.App.4th at 966.
[58] 210 Cal.App.4th at 1024.
[59] *Id.*
[60] The period is 10 days, but this period expands to 40 days if the council opts to order a report. (Elec. Code §§ 9212(b); 9214(c).)

petition was certified, the Court acknowledged that in most situations no EIR has been prepared and "it would be impossible to comply with CEQA before the time for making a decision expire[s]."[61] Therefore, "[i]n effect, this means that a city council will be compelled to hold an election in all cases in which environmental review has not begun when the voters' petition is presented."[62] The Court explained that this result, however, is better than "allowing a small fraction of a local electorate, combined with a majority of a city council, to nullify state law under conditions in which the local electorate as a whole has not been given a voice."[63]

* * *

In ***City of San Diego v. Board of Trustees of California State University*** ("*San Diego*"),[64] the Supreme Court will consider whether a state agency obligated to make "fair-share" payments to mitigate off-site project impacts may make a finding that such mitigation is infeasible when the agency seeks funding from the Legislature but the Legislature does not approve the request.

In *San Diego*, the Board of Trustees for California State University ("CSU") certified an EIR and revised its master plan to expand a university.[65] For potentially significant off-site impacts, the EIR recommended that CSU contribute its "fair-share" to the City of San Diego to implement specific mitigation measures.[66] However, CSU concluded that these mitigation measures were infeasible, in part, because, CSU had to request funds from the Legislature, but CSU could not guarantee approval of its request.[67] To support this finding CSU relied on the recent Supreme Court decision in *Marina v. Board of Trustees of CSU*.[68]. On this basis, CSU found the off-site impacts significant and unavoidable and adopted a statement of overriding considerations.[69] The trial court denied the City's writ, finding that CSU complied with CEQA and *Marina*.[70]

The Fourth District reversed, stating that, under *Marina*, CSU does not avoid the duty to mitigate simply because it has no legal power to actually construct off-site improvements.[71] The court concluded that the language in *Marina* upon which CSU relied—that "if the Legislature does not appropriate the money [for voluntary payments of off-site mitigation], the power [to mitigate] does not exist"—was merely dictum.[72] The court reasoned that, because CEQA imposes a duty to adopt feasible mitigation or avoidance measures, CSU should not deem other potential sources of funding "infeasible" without discussion.[73]

* * *

---

[61] 210 Cal.App.4th at 1031.
[62] *Id*.
[63] 210 Cal.App.4th at 1032.
[64] 135 Cal.Rptr.3d 495, previously published at 201 Cal.App.4th 1134. The case pending before the Supreme Court is *City of San Diego v. Board of Trustees of California State University,* Case No. S199557.
[65] 135 Cal.Rptr.3d at 502.
[66] *Id*. at 508.
[67] *Id*. at 508.
[68] *Marina v. Bd. of Trustees of CSU* (2006) 39 Cal.4th 341.
[69] 135 Cal.Rptr.3d at 508.
[70] *Id*. at 512.
[71] *Id*. at 518.
[72] *Id*.
[73] *Id*. at 519-20.

The Supreme Court also granted review in ***City of Hayward v. Board of Trustees of California State University*** ("*Hayward*"),[74] but due to the similarity of the issues involved in *Hayward* with those in *San Diego*, the Court put this case on hold pending a decision in *San Diego*. In *Hayward*, CSU certified an EIR and approved a master plan for the expansion of a university.[75] The City of Hayward argued, and the trial court agreed, that the resulting population increase would result in a significant impact on fire protection services and that CSU was required to mitigate by funding additional services.[76] The First District reversed, rejecting the City's argument that *Marina* requires CSU to pay for the additional services, stating instead that, under *Marina*, voluntary payment for off-site mitigation is not prohibited by law.[77] In contrast, because the Hayward EIR validly determined that the expansion would not result in significant off-site impacts, the court stated that Marina did not support the City's argument that CSU must fund the required additional services.[78] The First District also held that CSU's request for legislative funding to be sufficient mitigation, but declined to publish this part of the opinion.[79]

The decisions in *Hayward* and *San Diego* interpret the decision in *Marina* for related, but distinct, holdings. The published portion of *Hayward* did not rely on *Marina* because there the court declined to require CSU to pay for off-site mitigation as the EIR had determined there would be no significant off-site impacts. In contrast, it was undisputed in *San Diego* that off-site impacts were significant, thus the adequacy of CSU's "fair-share" payment to mitigate such impacts remained at issue and the Court required CSU to consider other feasible funding sources beyond the Legislature.

---

[74] 143 Cal.Rptr.3d 265, previously published at 207 Cal.App.4th 446. The case pending before the Supreme Court is *City of Hayward v. Trustees of the California State University*, Case No. S203939.
[75] 143 Cal.Rptr.3d 265, 269.
[76] *Id*. at 274.
[77] *Id.*
[78] *Id*.
[79] 2012 WL 4006266 at *4.