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Undisclosed Change in Building Height Requires Supplemental EIR

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Ventura Foothill Neighbors v. County of Ventura (12/15/14, 2d Civil No. B254120)

The Court of Appeal for the Second Appellate District of California has ruled that (i) a 20% increase in the actual height of a building over the stated height in the certified EIR required Ventura County to prepare a supplemental EIR rather than an addendum; and (ii) the County's failure to prepare a supplemental EIR including the taller height of the building made the County susceptible to a valid claim beyond the standard 30-day statute of limitations on CEQA claims. The court's conclusion highlights the need for EIRs and notices of decision ("NODs") to more completely describe a project, with all its details, to avoid potential claims.

In 1993, the County decided to construct an ambulatory care clinic (the "Clinic") at the Ventura County Medical Center. The original 1993 EIR included a proposed location and an "up to 75 feet in height" limit for the Clinic. The County certified the EIR in January 1994 and approved the project, filing an NOD (which did not mention the Clinic's height). The County delayed construction until May 2005, when it decided to relocate the project. While the updated plans for the Clinic mentioned the relocation and an "about 5 feet lower ... elevation due to the topography at the revised location," the plans failed to include the taller height. The County prepared an addendum to the EIR, which concluded that since the Clinic was "virtually the same size and configuration," no subsequent or supplemental EIR was required. On May 25, 2005, the Board approved the 1994 plans, and the County filed an NOD stating that the project would be changed by relocating the Clinic, but failing again to mention the Clinic's taller height. In 2007, the plans for the Clinic were modified to show the new height of 90 feet.

Upon being informed by someone passing by the construction site who had learned that the new Clinic building would be 90 feet high, the Ventura Foothill Neighbors filed a petition for a writ of mandate and motion for injunction to stop the construction and to require the County to refrain from further approvals "pending certification of an adequate supplemental EIR." The trial court denied the motion for a preliminary injunction, but granted a peremptory writ of mandate, stressing that the County acted improperly in not preparing a supplemental EIR. The appellate court affirmed.

Regarding the County's decision to file the addendum to the original EIR rather than a supplemental EIR, the appellate court found the County's reasoning "conclusory" and "insufficient" and held that the County had acted improperly. The court stated that no subsequent or supplemental EIR is required unless (1) substantial changes are proposed, which would require major revisions to the EIR, (2) substantial changes arise,

requiring major revisions to the EIR, or (3) new information is available, which was not known at the time of the EIR certification. The court concluded that the 20% increase in the building's height from 75 to 90 feet was a "material discrepancy" and a "violation of CEQA" that required "major revisions" to the EIR. In the court's opinion, these changes were material; the addendum to the original EIR was inadequate; and a supplemental EIR was the required.

The County argued that the Neighbors' claims were time-barred, having been brought well after the 30-day statute of limitations for CEQA claims. The Neighbors contended, and the court agreed, that the challenge was *not* to the 1993 EIR, but rather to the County's failure to prepare a supplemental EIR for the 90-foot Clinic. The court opined that since neither the EIR, the addendum, nor the NOD explicitly addressed the increase in height, this change was a "substantial change" to the project, which necessitated preparation of a supplemental EIR. Since no supplemental EIR had been prepared or circulated to the public before the Clinic was constructed, neither the Neighbors nor anyone else could have been on notice of the change until the construction cranes were already working. The proper time frame then was not the 30-day window for CEQA challenges "to the decision announced in the [NOD]" but rather 180 days from when the Neighbors "knew or reasonably should have known the project differed substantially from the one described in the EIR." Thus, the 180 days began when the passerby noticed the cranes. Therefore, the Neighbors' claim regarding the new height of the Clinic was timely.

The Neighbors had also challenged the decision to relocate the Clinic. However, the court concluded that this claim *was* barred because the May 24, 2005 NOD to the addendum expressly included "relocation of replacement Clinic." Because the NOD "announced" the relocation "decision," the court held that the Neighbors had been on notice and had not brought the relocation claim in a timely manner.

Significance of the Case

The court grounded its decision on the need for government to "turn square corners" and be fair to its citizens, "applaud[ing]" the trial court's finding for the Neighbors. The court held that the County's use of an addendum rather than a supplemental EIR and the omission of the new taller height of the building was an abuse of discretion and a failure to proceed in the manner required by law under CEQA. Because the court explicitly contrasts the relocation claim (which was described in the NOD, and time-barred) with the claim regarding the taller height of the Clinic (which was not described in the EIR or the NODs, and which was not time-barred), other courts following this precedent could potentially allow for late CEQA claims if the specific aspects of the projects in dispute are not explicitly spelled out in the EIR and/or NOD.

On the other hand, an approach arguably more consistent with prior precedent would be to rely on the text of CEQA Guidelines 15094 (b)(2) requiring the NOD to provide only a "brief description" of the project, and thus judicial exploration into the merits of the public agencies' decision is improper where an NOD or NOE has been filed and posted for the time period required by CEQA. This approach would seem to be more in keeping with the California Supreme Court's determination in *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481 rejecting the notion that "only if the agency has filed valid notices of determination and negative declarations will the 30-day statute apply." The Supreme Court confirmed that "[i]t seems rather obvious … that subdivision (a), the 180-day statute, applies where the agency proceeds *without any attempt at compliance*, while (b) and (e) apply where compliance is alleged to be defective. This interpretation also makes sense, in that, if an agency proceeds *without any effort to comply*, interested parties are less likely to receive early notice of the action than where there has been even an insufficient effort to comply." Id. quoting, California Manufacturers Assn. v. Industrial Welfare Com. (1980) 109 Cal.App.3d 95, 125.)

Courts could also distinguish this case on the grounds that the County (apparently) only disclosed the height increase in the 2007 project plans, after the NOD had been filed. If faced with similar facts, the court could

focus legal analysis on whether the changes in the plan were ministerial changes or discretionary changes that would trigger additional environmental review.

As of the date of this posting, no decision had been made on whether the County will appeal the decision to a Supreme Court that has previously affirmed that NODs need only impart constructive notice of a decision through a brief description of the project. In light of the uncertainty this case introduces into previously settled case law, until the courts provide further clarification, public agencies may want to include a detailed revised project descriptions in an EIR Addendum and explicitly incorporate by reference the revised project description into the NOD's brief project description section.
