

## Fair Argument Test Applies To Agency Determination Whether Subsequent CEQA Review Is Required Once A Negative Declaration Has Been Adopted

This court of appeal decision was issued upon remand for further proceedings after a California Supreme Court decision in which the court considered the standard of review that applies when an agency makes significant changes to a project that was originally approved based on a negative declaration and determines that no further environmental review is required. This decision applies the Supreme Court's ruling that the question of whether further environmental review is required for modifications to a project approved based on a negative declaration is not subject to the deferential substantial evidence test but is instead governed by the more searching "fair argument" standard. [\*Friends of College of San Mateo Gardens v San Mateo County Community College District\*](#), First Dist. No A135897, May 5, 2017.

**Regulatory Background** CEQA provides that when changes are proposed to a project for which an EIR has already been prepared, a subsequent or supplemental EIR is required only if the changes are substantial and require major revisions of the previous EIR. The CEQA Guidelines extend this subsequent review framework to projects for which a negative declaration was initially adopted and provide for agencies to determine whether a subsequent EIR, a supplemental EIR, a negative declaration, or an addendum should be used for later project approvals.

**Factual Background** The case before the court involved a master plan approved by a community college district in 2006. The plan contemplated nearly \$1 billion in new construction and building renovations at the District's three campuses. At the College of San Mateo, the District planned to demolish certain buildings and renovate others. The district approved the master plan after adopting a mitigated negative declaration, finding that implementation of the plan would have no significant unmitigated environmental effects. Five years later, the district decided to demolish one building complex it previously had planned to renovate and to renovate some buildings it previously had planned to demolish. The district prepared an addendum to the prior mitigated negative declaration to document its analysis finding the project changes did not trigger the need for further CEQA review. The plaintiff challenged the district's approvals and claimed the changes to the master plan amounted to a "new project" that required its own independent review under CEQA, starting with an initial study of the project. Both the trial court and the court of appeal agreed, finding the newly proposed building demolition was a new project, which required restarting the CEQA process.

**The Supreme Court's Decision** The California Supreme Court rejected the "new project" test applied by the trial and appellate courts. It held that whether prior environment review can be relied for later approvals turns on whether the prior document retains relevance—that at least some of the environmental impacts of the new proposal were considered in the original document. In discussing the standard of review that should be applied under CEQA's subsequent review provisions, the court held that the standard differs depending on whether the initial environmental document was an EIR or negative declaration. It concluded that the CEQA Guidelines require agencies to prepare an EIR rather than a negative declaration "whenever there is substantial evidence that the changes to a project for which a negative declaration was previously approved might have a significant environmental impact not previously considered."

**The Court of Appeal Decision on Remand** In implementing the Supreme Court's decision on remand, the court of appeal used a "two-step" inquiry to determine the validity of the District's use of an addendum for the modified project. *Step 1: Whether the subsequent review provisions are applicable* The first step requires a court to determine whether the agency's resort to CEQA's subsequent review provisions is appropriate. Under the Supreme Court's decision, this determination depends on whether the original environmental document "retains some informational value." As this is a "predominantly factual question," the agency's decision on this issue will be upheld if it is supported by substantial evidence. Here the

court had no trouble finding substantial evidence to support the District's decision. The revised plan did not affect most of the original demolition plans, nor did it remove the measures adopted to mitigate those plans' environmental effects, so the prior mitigated negative declaration was still relevant. *Step 2: Whether the use of an addendum was consistent with CEQA's subsequent review provisions* Once a court determines an agency properly proceeded under CEQA's subsequent review provisions, the next step is to determine whether the agency has correctly determined how to comply with its obligations under those provisions. Following the Supreme Court's guidance, the court of appeal applied a less deferential standard in reviewing the District's decision to use an addendum because the project was originally approved based upon a negative declaration: an EIR or mitigated negative declaration would be required if substantial evidence supported a fair argument that the proposed changes to the project might have a significant impact not previously considered when the project was originally approved. The court found substantial evidence in the record that the revised plan would have an impact that was not evaluated in the prior negative declaration: removal of a portion of a garden, which evidence from faculty and students showed might have a significant aesthetic impact. Consequently, the court ruled that the agency's use of an addendum was inappropriate. The court, however, refrained from ordering the district to prepare an EIR on remand, noting that the District could adopt a subsequent mitigated negative declaration if it determined that project's potentially significant impacts could be fully mitigated.

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