



In *Save Our Access v. City of San Diego*, 92 Cal. App. 5th 819 (2023), the court of appeal ruled that the City of San Diego improperly relied upon an earlier Program EIR for a community plan to support its subsequent decision to exclude the community plan area from a building height limit, because the community plan presumed the height limit would apply and there was no evidence that the Program EIR considered the environmental impacts of removing the height limit.

The San Diego City Council approved the Midway-Pacific Highway Community Plan Update and corresponding general plan amendments in 2018. The city prepared and certified a Program EIR for the community plan update. At that time, the area covered by the community plan was subject to a 1972 voter-approved ordinance that imposed a 30-foot height limit on new buildings in the coastal zone.

In 2020, the city council approved an ordinance to submit to voters a proposition that would amend the 1972 ordinance to exclude the community plan area from the 30-foot height limit. In support of the city council's action, a city staff report asserted that the ordinance and ballot measure were adequately addressed in the community plan Program EIR and were part of a series of subsequent discretionary actions and not a separate project for purposes of CEQA review. The staff report also asserted that subsequent environmental review was not required because it would not result in new or more severe significant effects than those evaluated in the Program EIR. City voters approved the ballot measure in November 2020.

The court of appeal ruled that there was no substantial evidence to support the city's determination that the ballot measure was a later activity within the scope of the Program EIR. The Program EIR analyzed full build-out under the community plan, referencing land use designations and allowable residential densities but not building heights. The court pointed out that (1) the community plan presumed the 30-foot height limit would apply and the Program EIR did not consider the environmental impacts of removing the height limit; (2) the scoping statement for the Program EIR stated that the 30-foot height limit applied to the entire community plan area; and (3) the Program EIR explained that development would take place "within the constraints of the existing urban framework and development pattern." The court held that evidence cited by the city—including statements in an appendix to the Program EIR, references in the community plan to base zoning designations that allowed for buildings higher than 30 feet, and 2020 emails among city planning department staff—did not support the city's "strained argument" that the Program EIR considered the environmental impacts of removing the height limit and, in any event, this evidence could not have adequately informed the public that removal of the height limit was a possibility.

The court further held that substantial evidence supported a fair argument that removing the height limit could result in significant environmental effects that were not analyzed in the Program EIR. The court noted that the Program EIR's analysis of visual impacts was limited "*precisely because it did not* consider the impacts of buildings above the 30-foot height limit." The court cited public comments raising a host of concerns about removing the height limit, including impacts on views, light and glare, air quality, traffic, human health, water quality, urban heat islands, greenhouse gases, and bird flight paths. Because none of these impacts were analyzed in the Program EIR, the court ruled that further analysis was required under CEQA.

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