

## Historical Level Of Use May Serve As CEQA Baseline For Replacement Of Vacant Building

The California Court of Appeal's Fourth Appellate District's recent decision, *North County Advocates v. City of Carlsbad* is a potentially major decision on the issue of using historical levels of operations as the baseline for gauging the environmental impacts of a proposed project under CEQA. In this case, which concerned renovation of a large Westfield shopping center in Carlsbad, the court upheld the city's use of a traffic baseline that assumed an existing department store building was fully occupied, even though the store had been vacant for almost six years at the time the draft EIR was released. [North County Advocates v. City of Carlsbad, Fourth Dist., First Div., Oct 9, 2015](#).

**Background** The shopping center Westfield sought to renovate was built in 1969, with five anchor department store buildings and numerous smaller retail shops, including a now-vacant Robinsons-May department store. Under the terms of an existing precise plan for the shopping center, Westfield was entitled to renovate the interior of the former Robinsons-May store and fully occupy it without obtaining discretionary approvals from the city. The development plan the city approved for renovation of the center, however, included the demolition and reconstruction of the former Robinsons-May store.

**City's Analysis** In its analysis of traffic impacts, the city's EIR, completed in 2012, assumed full-occupancy of the former Robinsons-May store, which had been vacant since 2006, three years before the city began work on the EIR. The EIR and supporting documents explained this baseline was appropriate because the "nature of a shopping center is that tenants change and the amount of occupied space constantly fluctuates" and that portions of the space are periodically occupied with temporary uses. The EIR also noted that the new building would not increase the square footage allowed under the precise plan and that the vacant space could be reoccupied at any time without further discretionary action. It also pointed out that the full occupancy assumption comports with SANDAG's regional traffic modeling methodology, which assumes full occupancy of all entitled square footage.

**Court's Analysis** The project opponents contended that the EIR's baseline was "incorrect and misleading" because it did not follow the normally applicable rule that conditions as they exist when environmental review begins be used as the baseline for measuring a proposed project's changes to the environment. They argued the city had "falsely inflated" existing traffic conditions by imputing over 5,000 daily trips from the vacant space to the baseline, resulting in a defective analysis of the project's true traffic impacts. . The court responded that while existing conditions should ordinarily be used as the baseline, and that a "hypothetical" baseline based on nothing more than maximum permitted operations is impermissible, CEQA does not impose a uniform, inflexible rule. Agencies may exercise discretion to account for a temporary lull or spike in operations that occurs over time. "As long as that exercise of discretion is supported by substantial evidence, the court will not disturb it." The court held the city's use of the full occupancy traffic baseline was reasonable and supported by the evidence. Full occupancy was not a hypothetical condition. It was based on the actual historical operation of the space for more than 30 years, up until 2006. Fluctuations in occupancy are expected of a shopping center, and the city had discretion to take account of temporary swings in occupancy in selecting an appropriate baseline.

**Conclusion** When a project involves replacement of a building that has been vacant, questions frequently arise about whether prior operations can be considered in setting the baseline for the environmental analysis. This case provides important guidance about when prior occupancy can be used as the baseline. While the court here based its decision on expected "fluctuations" in shopping center occupancy, the store had operated at such a low level for several years, that operations there had virtually stopped. The court nevertheless said "historical" operational levels could be used as the baseline, referring to the time during which fully occupied operations occurred. It is that this case involves such a significant gap in operational conditions that makes it stand out. Most broadly, *North County Advocates* might be read to mean that historical operational levels can be treated as the baseline

whenever a facility is being replaced or reoccupied. More narrowly, it might be read to mean that historical operational levels can be treated as the baseline when a vacant facility is being replaced, and the property owner has the right to continue operating at historical levels in the existing facility if the replacement project is not approved.

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