

## California Court Upholds San Diego On Discretion on Greenhouse Gas Issues

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Two recent decisions in the Fourth District of the California Court of Appeals, *Citizens for Responsible Equitable Environmental Development (CREED) v. City of San Diego* (June 10, 2011, D057524) and *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (July 8, 2011, D057779) highlight the Fourth District's willingness to side with a municipality when it comes to discretion regarding whether or how to analyze greenhouse gas issues. While the Fourth District's decisions tend generally to be more sympathetic to developers and municipalities than other appellate districts, these cases support meaningful analysis of climate change instead of a knee jerk reaction to require climate change analysis for every project.

### City of San Diego

The City of San Diego certified a Final Environmental Impact Report (EIR) in 1994 for a 664.8-acre, mixed-use development comprising of approximately 4,000 dwelling units and non-residential development. In 2008, Pardee Homes applied for approval of 1,578 homes and three recreational buildings. Pardee's development was one of the last to be built within the precise plan area. The City determined that only an Addendum was needed for Pardee's development; a supplemental EIR was unwarranted because "no new significant environmental impacts not considered in the previous EIR," "[n]o substantial changes have occurred with respect to the circumstances under which the project is undertaken," and "[t]here is no new information of substantial importance to the project."

The Fourth District upheld the trial court's finding that Plaintiffs did not exhaust their administrative remedies and that a Supplemental EIR was not required. In support of its position, CREED argued that a Supplemental EIR was required because new information and changed circumstances occurred, yet they presented no evidence to support such claims.

CREED did, however, submit a series of cursory letters along with a DVD with more than 4,000 pages of documents and data. However, it did not include any table of contents, organization, summary of the information or explanation of how it applied to the particular project, a deficiency the court found to fatal to its claims. Moreover, CREED failed to appear at any hearing to explain how the information pertained to the proposed project. Both the trial court and the appellate court found that without any explanation or elaboration as to how the massive amounts of information required a supplemental EIR, CREED failed to exhaust its administrative remedies.

The most interesting part of the decision relates to the greenhouse gas challenge, though it may or may not be applicable in different fact patterns. Relying on the 2008 California Air Pollution Control Officers Association (CAPCOA) report and other similar documents, CREED also argued that a supplemental EIR was required because there was significant new information about greenhouse gas emissions for the proposed project. The court found that CREED did not exhaust its administrative remedies, but even so, it would still hold against CREED on the merits.

Citing *Massachusetts v. EPA* and *City of LA v. National Highway Traffic Safety Administration*, the court found that information on the effect of greenhouse gas emissions on climate was know well before the City approved the first EIR in 1994. The aforementioned decisions cite knowledge of such impacts as far back as the 1970s. As such, the court found that "the effect of greenhouse gas emissions on climate could have been raised in the 1994 when the City considered the first EIR." The court then reasoned that no supplemental EIR was required because no new information had become available and that any challenge to the greenhouse gas analysis should have been brought in 1994.

*Continued.*



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### City of Chula Vista Case

In the Chula Vista case, the developer proposed to demolish an existing shopping center on a 9.9-acre site and redevelop the site with a Target store. The redevelopment would result in a net size increase of 9,844 square feet of commercial development, an increase in green space from 3.17% to 10.6% and provide drainage facility improvements. After completing an initial study, the City determined that the project would have potentially significant impacts in the areas of air quality, geology and soils, hazards and hazardous material, hydrology and water quality, and traffic/transportation, but concluded that they could be mitigated through a series of measures set forth and an associated mitigation monitoring and reporting program. CREED objected to the project and the program at the hearing, but the City approved the project with the program.

CREED filed a writ of mandate, claiming that the record contained substantial evidence of a fair argument that significant effects would occur that would not be mitigated to a level of insignificance. While the Fourth District did find that there was a fair argument that the mitigation measures were not sufficient to address soil and groundwater contamination (due to unclear mitigation measures) the Fourth District did uphold the air quality and greenhouse gas analyses.

More importantly, was the Court's finding regarding greenhouse gas thresholds. At the time of the project, no greenhouse gas threshold existed, so the City opted to use AB 32, the California Global Warming Solutions Act as the threshold. The act says:

"AB 32 sets a target of reducing greenhouse gas emissions to 2000 levels by 2010 and 1990 levels by 2020. The Air Quality Assessment conducted for the project estimated that to reach 2000 levels by 2010 required 11% below business as usual emissions; and to reach 1990

levels by 2020 required 25% below business as usual emissions."

CREED claimed that that the threshold was arbitrarily chosen, but the Court rejected that claim, finding that the City had discretion to choose its thresholds and standards.

### Analysis

The Fourth District's decisions support rational analysis of climate change issues. In *City of San Diego*, the court certainly could have ended its discussion with the finding that CREED failed to exhaust its administrative remedies. But instead, it took the opportunity to comment on the climate change issues. One could argue that the court could have found otherwise if CREED has made specific allegations about greenhouse gases as related to the project.

But, on the other hand, the decision is fairly sweeping. If the court's holding is adopted by other courts, then it would have a large impact on any project with a certified EIR where further development is anticipated. This would mean that failure to analyze greenhouse gases in the certified EIR would not necessarily give rise to a requirement for a supplemental EIR for a later project. While this holding would not carry over to new EIRs, given the economy and potential number of projects that have been entitled and not built, this decision could impact many projects.

*City of Chula Vista* strengthens existing case law allowing lead agencies to choose appropriate thresholds pursuant to California Environmental Quality Act Guidelines section 15064(b). The thresholds for greenhouse gases and climate change are fairly recent, and municipalities are finding that they are not one size fits all. However, some caution is warranted in citing to the decision by the fact that it notes that the reduction achieved by the project was 29%. Thus, the argument that the 25% reduction should have been used rather than the 20% reduction as a standard was really mooted. Nonetheless, a lead

agency's discretion to choose its own threshold is very important as these climate change analysis evolves.

In addition to the case law related to climate change, *City of San Diego* is very favorable for local governments and developers because it requires opponents to articulate their specific challenges to a project. It is not enough for an opponent to simply dump extensive information and documents on a lead agency during the process, an unfortunately too-common practice. This is important, because some opponents have tried to exhaust their administrative remedies by simply plying the record with excessive amounts of information and expecting the local government to respond in a substantive and meaningful manner. Local governments and developers should not be expected to respond to every conceivable challenge in a document dump; doing so does not further the intent of CEQA to inform the public about the impacts of a particular project.

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