No. A164987

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

SAVE LIVERMORE DOWNTOWN,
Plaintiff and Appellant,

v.

CITY OF LIVERMORE; LIVERMORE CITY COUNCIL,
Defendants and Respondents;

EDEN HOUSING, INC.,
Real Party in Interest.

Alameda County Superior Court, Case No. RG21102761
Honorable Frank Roesch, Judge

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF CALIFORNIA IN SUPPORT OF RESPONDENTS

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INTRODUCTION

The project at issue in this California Environmental Quality Act (CEQA) case is an affordable-housing development—among the most acutely needed types of projects in California, given the State's serious housing shortage. Timing is a critical issue for affordable-housing projects, which often rely, as is the case here, on subsidies, tax credits, bond funding, or other time-sensitive financing sources. While CEQA unquestionably serves important purposes, the Legislature has recognized that CEQA litigation also poses a risk of unduly delaying or blocking valuable projects, and accordingly has enacted a variety of provisions designed to ensure expedited judicial review of CEQA claims.

This case underscores the importance of those mechanisms in the context of affordable-housing development. Six months ago, the trial court determined the appellant's CEQA claims to be "almost utterly without merit," yet this litigation has already put the Project's financing, and potentially its entire viability, at risk. (6 CT 1560-61.) Indeed, the trial court required appellant to post a $500,000 undertaking—the maximum amount authorized by statute—in light of the court's finding that "the action has been brought for the purpose of delaying the provision of affordable housing." (4 CT 1087.) Notwithstanding that undertaking, now that this appeal has been filed, additional project financing will be at risk.

That result is especially unwarranted in this case because the City of Livermore carefully followed a planning process that

comports with both the letter and spirit of state law, which encourage a comprehensive environmental review at the land use planning stage to limit or avoid unnecessary or repetitious analysis at the project level.

The City planned for the affordable housing project at issue in this case since 2009, when it adopted an amended Downtown Specific Plan that identified the site for approximately 295 units of multi-family housing. At that time, the City prepared an subsequent environmental impact report (2009 SEIR) considering the environmental impacts of development in accordance with its plan, including those related to past land uses that may have caused contamination. Crucially, the City evaluated the impacts at a level of detail sufficient to permit future project-specific development and committed to mitigation of the identified impacts, which it is now undertaking, working with the relevant agencies.

In 2019, the City amended its Downtown Specific Plan and identified the site for a much-needed 130-unit affordable housing project. Consistent with its continued CEQA obligations, it prepared an addendum to its 2009 SEIR. The City did not postpone environmental review to the future project proposal; rather, it consistently initiated review and mitigation at the planning stage. By completing a thorough EIR of the Downtown Specific Plan and updating that analysis with an addendum, the City was able to streamline its later review of this development project, rather than require a full project-specific EIR.

The mere filing of an appeal in a CEQA case must not be permitted to thwart the construction of necessary affordable housing or the statutory processes intended to streamline these projects. The Attorney General files this amicus brief to support the City's request that this Court expedite the appeal to the fullest extent possible.

ARGUMENT

I. EXPEDITED JUDICIAL REVIEW IS ESSENTIAL TO ENSURING THAT CEQA LAWSUITS DO NOT UNDULY DELAY PROJECTS

As a practical matter, CEQA lawsuits have the capacity to delay and even stop projects entirely, including much-needed affordable housing construction such as the project at issue here. Accordingly, CEQA includes a number of provisions to expedite judicial review. These measures underscore the Legislature's intent to ensure speedy review of CEQA matters, so that CEQA lawsuits that are ultimately determined to lack merit do not thwart important projects.

To reduce project delays and litigation brought for the purpose of delay, CEQA directs courts to expedite and give calendar preference to CEQA cases. (Pub. Resources Code, § 21167.1 ["all courts in which the action or proceeding is pending shall give the action or proceeding preference over all other civil actions . . . so that the action or proceeding shall be quickly heard and determined"].) Specifically, absent good cause, briefing is to be completed within 90 days and a hearing 30 days thereafter. (*Id.* § 21167.4, subd. (c).)

At the appellate stage, CEQA requires the superior court clerk to certify the clerk's transcript within 60 days of the notice

designating the record on appeal. (Pub. Resources Code, § 21167.6, subd. (g).) CEQA then limits any extension to the briefing schedule and requires the Court to "set the appeal for hearing on the first available calendar date." (*Id.* § 21167.6, subds. (h), (*i*).) Ultimately, CEQA directs the appellate court to "regulate the briefing schedule so that, to the extent feasible, the court shall commence hearings on an appeal within one year of the date of the filing of the appeal." (*Id.* § 21167.1.) One year—which is nonetheless a lengthy period of time when financing is at risk—is therefore generally the outer limit of a CEQA hearing on appeal.

Affordable housing projects are especially vulnerable to litigation delay, including delay that can result from protracted CEQA litigation. These projects are often dependent on funding commitments that expire, such as yearly tax credit allocations, bond funding, or low-cost loan commitments. Even where the affordable-housing developer may re-apply for funding, the delay may put the application into a different application pool or into a fiscal year lacking in adequate funding. In addition, the longer the delay, the more expensive the project becomes. This is due to both general inflation as well as the holding costs of a development—such as property taxes and interest—that must be absorbed by the developer even while a project is the subject of pending litigation. (See generally Declaration of Andrea Osgood in support of Motion to Expedite or Dismiss Appeal.) Thus, even a meritless CEQA action can succeed in stopping an affordable housing project simply by virtue of delay.

The Legislature has attempted to address these issues through Code of Civil Procedure section 529.2, which seeks to partially offset the costs of delay to affordable housing. This provision allows a court to order a CEQA plaintiff to post an undertaking up to $500,000 "as security for costs and any damages that be incurred ... as a result of a delay" if the court finds that "the action was brought in bad faith, vexatiously, for the purpose of delay, or to thwart the low- or moderate- income nature of the housing development project" and "the plaintiff will not suffer an undue economic hardship by filing the undertaking." (Code Civ. Proc., § 529.2.)

Section 529.2 is an important tool to discourage lawsuits that target the provision of affordable housing, and to help offset the financial risk of delay. Here, the court below required appellant to post the undertaking at the maximum amount of $500,000 after finding that this action was brought for the purpose of delay. (4 CT 1087.) As discussed below, the circumstances of this case illustrate the importance of measures—like section 529.2 and CEQA's provisions regarding expedited judicial review—designed to ensure that meritless CEQA claims do not stand in the way of important projects that will help alleviate California's housing shortage.

II. THE CITY APPROPRIATELY INTEGRATED CEQA REVIEW INTO ITS PLANNING TO ALLOW FOR EXPEDITED REVIEW OF THIS INFILL HOUSING PROJECT

In rejecting appellant's CEQA claims, the trial court observed: "This is not a close case." (6 CT 1560.) The court explained that appellant's "CEQA arguments are almost utterly

without merit. I just don't see any way that any of the CEQA arguments have any possible merit[.]" (6 CT 1560-61.) Nevertheless, the project is at risk of losing financing due to the length of the trial court litigation and now this appeal, potentially thwarting the construction of affordable housing and undermining the City's thoughtful planning.

That outcome would be especially unfortunate because the City appropriately undertook comprehensive review of environmental impacts of building in its Downtown Specific Plan, including the anticipated project at issue here, in its 2009 SEIR. This approach—known as "streamlining"—enabled the City to later expedite review of the housing project under CEQA. These streamlining tools under CEQA are important to facilitate the development of housing in areas that are already developed, known as "infill projects."

A. CEQA review and infill housing

CEQA is a landmark statute that embodies the important principle that projects should not be approved until the relevant public agencies have considered a project's environmental effects and, where feasible, adopted mitigation measures. But a thorough CEQA review of an individual project need not be a lengthy or tedious process. In fact, CEQA encourages local agencies to integrate their environmental review process with the local planning and zoning process "so that all those procedures, to the maximum extent feasible, run concurrently, rather than consecutively." (Pub. Resources Code, §§ 21003, subd. (a), 21093.)

Therefore, planning and zoning law and CEQA direct agencies to adopt comprehensive specific plans for development and, when adopting those plans, prepare a plan-level program EIR that analyzes the environmental impacts of the future development. (Gov. Code, §§ 65450, 65457; Cal. Code Regs., tit. 14, §§ 15168 [preparation of a program EIR for land use plans to eliminate or limit the scope of EIRs for individual projects], 15175–15179.5 [preparation of a master EIR to eliminate or limit the scope of later CEQA reviews for covered projects].)

Once an agency has prepared a program EIR for a comprehensive land use plan, various provisions of CEQA seek to streamline, reduce, or eliminate further environmental review at the project level. (See, e.g., Cal. Code Regs., tit. 14, §§ 15152 [using an initial, broader EIR to eliminate or limit the scope of later CEQA reviews for narrower projects], 15182, subd. (c) [exemption for residential projects consistent with a specific plan for which an EIR was certified], 15183 [exemption for projects covered by a prior EIR for a community plan or zoning], 15183.3 [streamlined CEQA review for infill projects consistent with the standards of a sustainable communities strategy or alternative planning strategy], 15332 [categorical exemption for infill projects consistent with a city's general plan and zoning].)

This streamlined approach implements the Legislature's mandate to avoid "repetitive discussions of the same issues in successive environmental impact reports" and to "exclude duplicative analysis of environmental effects examined in previous environmental impact reports." (Pub. Resources Code,

§ 21093, subd. (a).) It is especially useful in the housing context, because it encourages the preparation of plans that allow for approval of much-needed housing projects without additional CEQA review.

Housing developments are expressly exempt from CEQA review if they are consistent with a specific plan for which an EIR has already been certified, provided that there are not substantial changes or new information that could not have been known previously that would require a subsequent EIR. (Gov. Code, § 65457; Cal. Code Regs., tit. 14, § 15182, subd. (c).) Under these circumstances, the "residential development project … is statutorily exempt from further CEQA review regardless of possible environmental impacts of the project." (*Concerned Dublin Citizens v. City of Dublin* (2013) 214 Cal.App.4th 1301, 1312; see also *Citizens' Committee to Complete the Refuge v. City of Newark* (2021) 74 Cal.App.5th 460, 465 [housing development project was exempt from CEQA review "because it implemented and was consistent with the specific plan"].) In addition, CEQA does not apply to infill housing development projects that meet certain size and location requirements. (Cal. Code Regs., tit. 14, § 15195.)

This CEQA streamlining process both facilitates good planning and furthers CEQA's overarching purpose. A detailed, comprehensive plan for development allows the city to assess the needs of a neighborhood and designate land uses, establish development standards, and plan for infrastructure that creates strong, sustainable communities. Conducting a comprehensive

environmental review at the planning stage allows for a "more exhaustive consideration of effects and alternatives than would be practical in an EIR on an individual action." (Cal. Code Regs., tit. 14, § 15168, subd. (b)(1).) It requires cities to analyze the environmental impacts of the plan as a whole, establish mitigation measures to address area impacts across land uses, and to consider a wide range of alternative locations for land uses.

Future project proponents then understand the allowances, requirements, costs, and measures associated with a project proposal. (Governor's Office of Planning and Research, *General Plan Guidelines*, Chs. 2 [A Vision for Long-Range Planning], 9 [Implementation], 2017, available at https://opr.ca.gov/docs/OPR_COMPLETE_7.31.17.pdf.) This is consistent with a key legislative goal of the State's housing laws to create more certainty that housing that local agencies identify in their planning documents actually can and will be permitted. (See, e.g., Gov. Code, § 65589.5 [providing streamlined review of housing permit applications that are consistent with planning and zoning].)

Critically, area planning and the preparation of program EIRs also encourage the development of infill housing with existing and planned-for development, infrastructure, and community amenities. At the regional and state level, incentives for infill housing projects are critical—both for the environment and the people of California. The State has a housing crisis that demands more housing construction. (See Gov. Code, § 65589.5, subd. (a).) Housing built in infill areas obviates the need to

expand development into wildlands and limits exurban sprawl, where impacts to climate change and biological resources, as well as wildfire risk and other impacts, are likely to be greater. Housing developments in developed, infill areas reduce vehicle miles by virtue of their closer proximity to jobs, community amenities, and retail. They also avoid impacts to biological habitats and species migration routes by virtue of being located within existing development where, by definition, contiguous habitats are not present. (See generally, Decker et al., *Right Type Right Place: Assessing the Environmental and Economic Impacts of Infill Residential Development through 2030* (2017 UC Berkeley), available at https://ternercenter.berkeley.edu/wp-content/uploads/2020/08/right_type_right_place.pdf.)

B. The City's comprehensive planning implemented CEQA and the State's housing laws

Here, the City's comprehensive planning for the downtown area through the specific plan and program EIR reflects an appropriate use of the CEQA streamlining process.

In 2009, the City acquired the project site and adopted an amended Downtown Specific Plan that, like the City's General Plan Housing Element, identified the site as appropriate for affordable housing. (AR 10209, 10287; see also AR 08987–92.) At the same time, the City prepared a subsequent Environmental Impact Report (2009 SEIR) that analyzed the environmental impacts of development within the specific plan and imposed mitigation measures to address, before construction, the potential for soil and groundwater contaminants from past land uses. (AR 01952–55.) The 2009 SEIR assumed development of

approximately 295 residential units. (AR 01754.) By 2020, and before Project approval, the City had begun implementing these mitigation measures with the regulatory oversight of the San Francisco Bay Regional Water Quality Control Board. (AR 10000, 10003.)

In 2019 and 2020, the City approved three amendments to the Downtown Specific Plan along with addenda to the 2009 SEIR. The 2019 amendment and addendum identified the site for a 130-unit multi-family housing project and determined that this change would not result in additional environmental impacts.

In 2021, the City approved the specific 130-unit affordable housing project at issue here, finding it consistent with the General Plan and its Downtown Specific Plan. (AR 00541–48, 00549-62.) Accordingly, the City determined that the project was statutorily exempt under CEQA because it was previously analyzed in the 2009 SEIR with the 2019 Addendum. The City also found that the Project qualified for CEQA's infill exemption. (AR 00531–40.)

The planning process here worked as CEQA and planning law anticipate and encourage. The City analyzed and mitigated the impacts of new housing development—including this project—as part of its downtown planning process. This triggered CEQA's streamlining process to approve the project as consistent with downtown plans. Comprehensive planning under CEQA's streamlining process implements appropriate environmental review, allows for thoughtful local development, considers broader impacts and neighborhood needs, and expedites

individual housing projects. And it demonstrates how CEQA and State housing laws are meant to complement each other. By implementing the earlier environmental analysis, the City allowed the project to be permitted more quickly, thus avoiding undue delay and duplicative environmental review of a much-needed affordable housing project.

Nonetheless, the financing for this affordable-housing project is now in jeopardy as a result of this ongoing litigation—even though the trial court found that appellant's claims lack merit, and even though the City proceeded in accordance with state laws designed to facilitate the responsible construction of much-needed housing in a manner that comports with CEQA. That stark reality underscores the importance of resolving this appeal as promptly as possible, as the City requests.

CONCLUSION

The Court should grant the City's motion and expedite this appeal to the fullest extent possible.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached uses a 13-point Century Schoolbook font and contains 2776 words.

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DECLARATION OF ELECTRONIC SERVICE

Case Name: ***Save Livermore Downtown v. City of Livermore, et al***
Case No.: **A164987**

I declare:
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On August 9, 2022, I electronically served the attached **AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF CALIFORNIA IN SUPPORT OF RESPONDENTS** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on **August 9, 2022**, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on August 9, 2022, at San Diego, California.

Celia Valdivia
Declarant

Celia Valdivia
Signature

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