

General Public Testimony About Impacts Insufficient to Meet “Fair Argument” CEQA Test

08.09.2021

Public testimony alleging impacts to resident safety and evacuation routes was not sufficient to meet the low threshold of the “fair argument” test. Pursuant to the California Environmental Quality Act (“CEQA”), the “fair argument” test requires a public agency to prepare an environmental impact report whenever substantial evidence supports a fair argument that a proposed project may have a significant impact on the environment. In *Newtown Preservation Society v. County of El Dorado*, a California appellate court upheld a mitigated negative declaration for a bridge replacement project, and expressed the minimum standards applicable for non-expert public testimony to be considered “substantial evidence.”

The Newtown Preservation Society (“NPS”) challenged El Dorado County’s mitigated negative declaration, which included one scenario of constructing a temporary emergency evacuation route and another scenario of relying on existing evacuation options. Citing testimony from local residents, two retired firefighters, and one attorney, NPS contended that the mitigation plan would place local residents at risk during bridge construction and claimed public testimony from the County proceedings was “substantial evidence” to meet the fair argument standard.

The court noted that “predictions” by non-experts regarding the consequences of a project based upon experiences with prior similar projects did not qualify as substantial evidence. It held that the non-expert public testimony (1) did not support a fair argument that the project may have a potentially significant impact on the environment, and (2) was broadly speculative and lacked factual foundation.

Ultimately, this case shows that a public agency can successfully defend a mitigated negative declaration even under the low threshold of the fair argument standard. When analyzing public testimony as evidence, practitioners should take a deeper look as to (1) whether there is adequate factual substance and foundation for the testimony alleging impacts; (2) whether technical expertise is required to identify the type of impacts alleged; and (3) whether the

ATTORNEYS

Ginetta L. Giovinco

David M. Snow

testimony relates to a project's potential impact on the environment, and not impacts of the environment on the project.

If you have any questions about how the "fair argument" standard may impact a project in your jurisdiction, please contact **David Snow, Ginetta Giovinco** or another RWG attorney. This e-alert was written by Carlee Roberts, a RWG summer associate from Tulane University Law School.