

GHG EMISSIONS AND EIS ADEQUACY IN THE NEWHALL CASE – CALIFORNIA REAL ESTATE LAW DEVELOPMENTS

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On July 11, 2016, in a partially published opinion, the Second Appellate District Court of Appeal in *Center for Biological Diversity v. Department of Fish and Wildlife (The Newhall Land and Farming Company, Real Party in Interest)* – on remand from the Supreme Court’s earlier decision – reversed in part and affirmed in part the trial court’s judgment finding that Newhall’s real estate project environmental impact statement (EIS) was inadequate and setting aside approvals.

The *Newhall* case represents a significant shift in how courts will address future California real estate developments and their greenhouse gas (GHG) emissions in the context of project EIS and reports.

Background of the Case and Present Court of Appeal Decision

The litigation and subsequent appeal arise from the December 2010 decision of the California Department of Fish and Wildlife certifying the final EIS of real party in interest, Newhall Land and Farming Company (Newhall), approving Newhall’s resource management and development plan, adopting a conservation plan and streambed alteration agreed, and issuing two incidental take permits.

On October 15, 2012, the trial court entered judgment in favor of plaintiffs, granting a mandate petition. Defendants appealed, and the Court of Appeal reversed the trial court’s judgment. Thereafter, the Supreme Court granted review.

In their opinion, the Supreme Court reached several conclusions relating to the greenhouse gas omission analysis in Newhall’s final EIS/EIR.

EIS significance criterion.

The Supreme Court determined that the greenhouse gas emissions reduction goals referenced by Health and Safety Code section 38850 constitute a legally permissible significance criterion for the EIS/EIR.

Following the Supreme Court’s approval of the use of section 38850 GHG reduction goals as a significance criterion, the trial court’s judgment earlier ruling that such use was inappropriate as a significance criterion has been reversed by the Court of Appeal.

Ecological impact finding unsupported by evidence.

The Supreme Court found that California Department of Fish and Wildlife’s (the Department) abused its discretion in determining that Newhall’s project emissions would not be significant under the section 38850 GHG reduction goal criteria, as the determination was unsubstantiated by available evidence.

Specifically, the Supreme Court noted that the deficiency of the EIS/EIR was in measuring the GHG reduction effort required to meet statewide criteria and assuming that the same measures – unchanged – would suffice for a specific land use development for a specific

location.

As a result, the Court of appeal affirmed the trial court's judgment ruling that no substantial evidence existed to inform the determination that the project's GHG emissions would have no significant environmental impact. The trial court is to issue a writ of mandate confirming the Department's abuse of discretion in making such determination.

Baseline assessment vs. Business-as-usual.

The Supreme Court concluded that comparing Newhall's project emissions to a hypothetical business-as-usual case was permissible and appropriate given the circumstances. The Court found that the trial court's insistence on the use of a baseline assessment (for comparing the project's emissions impact on the existing environment) was inconsistent with statutory law.

The project's EIS/EIR emissions comparison with a business-as-usual scenario rather than a baseline (no business) scenario was deemed an attempt to ensure consistency with the statewide section 38850 GHG reduction goal, which the Court decided was a permissible significance criterion.

On remand, the Court of Appeal reversed the trial court's judgment ruling that the comparison of the project's expected emissions to a hypothetical business-as-usual scenario is impermissible.

Effect on Future Real Estate Development

The decision in *Newhall* will likely have a significant impact on real estate developers in California.

Health and Safety Code section 38850 GHG reduction goals constitute a legally permissible significance criterion for EIS/EIR. This minimizes uncertainty for real estate developers, allowing them to meet standardized, statewide GHG reduction goals for their projects.

Despite this, however, developers should be careful not to make EIS/EIR claims of no substantial ecological impact based on efforts taken to meet the statewide GHG reduction goals. The ecological impact must be measured based on whether the GHG efforts suffice for a specific land use development for a specific location.

Perhaps most importantly, in the EIS/EIR, a project's emissions may be compared to a hypothetical business-as-usual scenario, rather than a baseline no-business scenario. This is likely to benefit developers, as their percent reduction in GHG emissions will be higher when compared to a business-as-usual scenario.

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