

**CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT,
DIVISION ONE**

McCann v. City of San Diego

McCann v. City of San Diego · No. D077568 · Decided October 8, 2021

SUMMARY

The California Court of Appeal reviewed Margaret McCann’s challenge to the City of San Diego’s CEQA review of utility-undergrounding projects. The court held that McCann’s claims concerning projects deemed exempt from CEQA were barred because she failed to exhaust the City’s administrative appeal procedure, and it rejected most challenges to the mitigated negative declaration for the remaining projects. The court nevertheless reversed in part because the City’s finding that the projects would not significantly affect greenhouse-gas emissions was unsupported by substantial evidence, requiring further review for consistency with the City’s Climate Action Plan.

CASE DETAILS

COURT	California Court of Appeal, Fourth Appellate District, Division One
WRITING FOR THE COURT	Judith D. Haller; Judith F. McConnell; Abigail M. Dato
JURISDICTION	California
DECIDED	October 8, 2021
DOCKET	D077568
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Appeal from a San Diego County Superior Court judgment denying a petition for writ of mandate challenging the City of San Diego's CEQA determinations and denying a request for a preliminary injunction.
STANDARD OF REVIEW	CEQA compliance is reviewed for prejudicial abuse of discretion. The appellate court independently reviews the agency's action, applying de novo review to legal issues and determining whether the agency proceeded as required by law and whether its factual determinations are supported by substantial evidence. The exhaustion issue was reviewed de novo. Denial of a preliminary injunction is reviewed for abuse of discretion.
PRECEDENTIAL VALUE	published and precedential

PARTIES

Margaret McCann v. City of San Diego, City of San Diego et al.

TOPICS

environmental law

exhaustion of remedies

judicial review of agency action

standard of review

municipal law

PRACTICE AREAS

environmental law

administrative law

municipal law

appellate procedure

remedies

QUESTIONS PRESENTED

1. Whether McCann's CEQA challenge to the projects found categorically exempt was barred because she failed to exhaust the City's administrative appeal procedure.
2. Whether the City's notice of the right to appeal the exemption determination satisfied due process and CEQA requirements.
3. Whether the City improperly bifurcated the exemption determination from project approval.
4. Whether the City improperly segmented the MND projects from the broader utility-undergrounding program.
5. Whether the project description was inadequate because the precise locations of transformer boxes had not yet been determined.
6. Whether substantial evidence supported a fair argument that the MND projects would cause a significant aesthetic impact requiring an EIR.
7. Whether substantial evidence supported the City's finding that the MND projects would have no significant impact from greenhouse-gas emissions.
8. Whether the superior court abused its discretion in denying a preliminary injunction.

HOLDINGS

1. McCann's challenge to the City's determination that the Exempt Projects were exempt from CEQA was barred because she failed to use the City's available administrative appeal procedure.
2. The City's notice of the right to appeal the exemption determination was adequate for due process and CEQA purposes.
3. The City lawfully delegated the CEQA exemption determination to staff while reserving project approval for the City Council.
4. The City did not improperly segment the MND projects from the broader utility-undergrounding program.
5. The project description was adequate even though the precise locations of individual transformer boxes had not yet been selected.

6. McCann failed to identify substantial evidence supporting a fair argument that the MND projects would cause a significant aesthetic impact requiring preparation of an EIR.
7. The City abused its discretion by finding that the MND projects would have no significant greenhouse-gas impact without analyzing whether the projects were consistent with the City's Climate Action Plan and identifying applicable reduction measures.
8. The superior court properly denied the preliminary injunction because McCann could not demonstrate a probability of prevailing on the merits of her challenge to the Exempt Projects.

KEY QUOTATIONS

“In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act.” (18)

“There is no dispute that CEQA forbids “piecemeal” review of the significant environmental impacts of a project.” (31)

“Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal’s benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal (i.e., the “no project” alternative) and weigh other alternatives in the balance.” (32)

“Without conducting the required analysis to determine consistency with the Climate Action Plan and identifying any applicable requirements, the City’s determination that the projects would not have a significant impact as it relates to greenhouse gas emissions is not supported by substantial evidence.” (50)

FACTUAL BACKGROUND

The City of San Diego's long-running Utilities Undergrounding Program converts overhead utility lines to underground systems in neighborhood blocks and high-traffic corridors. The projects require trenching, underground conduit and cable, above-ground transformer boxes, removal of utility poles and wires, and related street and landscaping work. The City determined that one group of projects was categorically exempt from CEQA and adopted a mitigated negative declaration for another group. McCann challenged the environmental review, particularly the transformer boxes, aesthetics, tree removal, project segmentation, and greenhouse-gas emissions.

PROCEDURAL HISTORY

McCann challenged two sets of utility-undergrounding projects. The superior court held that her challenge to the projects determined exempt from CEQA was barred by failure to exhaust administrative remedies and rejected her challenges to the mitigated negative declaration for the other projects. It also denied her request for a preliminary injunction. The Court of Appeal affirmed the rulings concerning the exempt projects and injunction, but reversed as to the MND projects because the City's greenhouse-gas analysis was incomplete.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The superior court was directed to enter a new judgment granting the petition as to the second cause of action challenging the MND Projects and to issue a peremptory writ of mandate directing the City to set aside its March 5 and March 7, 2019 resolutions adopting the MND, the mitigation monitoring and reporting program, and establishing the relevant utility-undergrounding districts. The City must conduct the required Climate Action Plan consistency analysis and identify applicable greenhouse-gas reduction measures before determining whether the MND may be certified or an EIR is required. The judgment was affirmed in all other respects, including the denial of the preliminary injunction.

CASES CITED

- California Oak Foundation v. Regents of University of California, 188 Cal.App.4th 227, 240 fn. 3 (2010)
- California Building Industry Assn. v. Bay Area Air Quality Management Dist., 62 Cal.4th 369, 382-383 (2015)
- Union of Medical Marijuana Patients, Inc. v. City of San Diego, 7 Cal.5th 1171, 1186 (2019)
- Protecting Our Water & Environmental Resources v. County of Stanislaus, 10 Cal.5th 479, 489, 495 (2020)
- Clews Land & Livestock, LLC v. City of San Diego, 19 Cal.App.5th 161, 187, 192-193 (2018)
- Muzzy Ranch Co. v. Solano County Airport Land Use Commission, 41 Cal.4th 372, 379-381 (2007)
- Citizens for Open Government v. City of Lodi, 144 Cal.App.4th 865, 873-874 (2006)
- Schmid v. City and County of San Francisco, 60 Cal.App.5th 470, 490, 492-493 (2021)
- Stop Syar Expansion v. County of Napa, 63 Cal.App.5th 444, 456-457 (2021)
- Tahoe Vista Concerned Citizens v. County of Placer, 81 Cal.App.4th 577, 592 fn. 6 (2000)
- California Clean Energy Committee v. City of San Jose, 220 Cal.App.4th 1325, 1340-1341, 1345 (2013)
- Tomlinson v. County of Alameda, 54 Cal.4th 281, 291 (2012)
- Horn v. County of Ventura, 24 Cal.3d 605, 612, 615-618 (1979)
- Robinson v. City and County of San Francisco, 208 Cal.App.4th 950, 963 (2012)
- Taxpayers for Accountable School Bond Spending v. San Diego Unified School District, 215 Cal.App.4th 1013, 1042, 1058-1059 (2013)
- Bockover v. Perko, 28 Cal.App.4th 479, 486 (1994)
- Committee for Green Foothills v. Santa Clara County Board of Supervisors, 48 Cal.4th 32, 53 (2010)
- Lee v. Lost Hills Water District, 78 Cal.App.3d 630, 634 (1978)
- Jay v. Mahaffey, 218 Cal.App.4th 1522, 1542 (2013)
- Communities for a Better Environment v. City of Richmond, 184 Cal.App.4th 70, 98-99 (2010)
- Banning Ranch Conservancy v. City of Newport Beach, 211 Cal.App.4th 1209, 1223 (2012)
- Save Round Valley Alliance v. County of Inyo, 157 Cal.App.4th 1437, 1448 (2007)
- Georgetown Preservation Society v. County of El Dorado, 30 Cal.App.5th 358, 363, 374-375 (2018)
- Preserve Poway v. City of Poway, 245 Cal.App.4th 560, 578-579 (2016)
- Porterville Citizens for Responsible Hillside Development v. City of Porterville, 157 Cal.App.4th 885, 903 (2007)

- Ocean View Estates Homeowners Assn., Inc. v. Montecito Water District, 116 Cal.App.4th 396, 398, 402-403 (2004)
- San Francisco Beautiful v. City and County of San Francisco, 226 Cal.App.4th 1012, 1027-1028 (2014)
- Pocket Protectors v. City of Sacramento, 124 Cal.App.4th 903, 908-910, 937-939 (2004)
- Bowman v. City of Berkeley, 122 Cal.App.4th 572, 592 (2004)
- Golden Door Properties, LLC v. County of San Diego, 50 Cal.App.5th 467, 484, 488-489, 504 (2020)
- Center for Biological Diversity v. Department of Fish & Wildlife, 62 Cal.4th 204, 217, 219-222, 230 (2015)
- Sahlolbei v. Providence Healthcare, Inc., 112 Cal.App.4th 1137, 1145 (2003)
- SB Liberty, LLC v. Isla Verde Assn., Inc., 217 Cal.App.4th 272, 280 (2013)
- MaJor v. Miraverde Homeowners Assn., 7 Cal.App.4th 618, 623 (1992)

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