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Christopher Calfee, Senior Counsel  
Office of Planning and Research  
via email [CEQA.Guidelines@resources.ca.gov](mailto:CEQA.Guidelines@resources.ca.gov)

Subject: Discussion Draft  
Proposed Updates to the CEQA Guidelines

Dear Chris:

As an attorney whose law practice has focused on representation of public-interest petitioners in CEQA cases for over 25 years, advocating on behalf of reasonable protection of California's unique cultural, historic, and aesthetic resources, I write specifically in regard to the proposed amendment of the Appendix G visual impacts section.

The proposed amendment exceeds OPR's statutory authority. The Legislature declares "the policy of the state" to "take all action necessary to provide the people of this state with clean air and water, enjoyment of *aesthetic*, scenic, and historic environmental qualities, and freedom from excessive noise." (Pub. Resources Code, § 21001, subd.(b).) Appendix G of the Guidelines appropriately queries whether a project would "substantially degrade the existing visual character or quality of the site or its surroundings."

I represented the public-interest petitioners in the trial and appellate courts in *Bowman v. City of Berkeley* (2004) 122 Cal.App.4<sup>th</sup> 572, *The Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4<sup>th</sup> 903, and *Ventura Foothill Neighbors v. County of Ventura* (2014) 232 Cal.App.4<sup>th</sup> 429. Those cases each addressed the significant aesthetic impacts of projects proposed in urban environments — where most Californians live. OPR's reliance on the *Bowman* analysis, and *Bowman's* invocation of a federal case applying NEPA rather than CEQA, rather than the number of published CEQA cases addressing visual impacts, is both surprising and wrong. Unequivocal statutory authority recited above protects the visual character of our cities and unincorporated areas just as it protects clean air and water and other natural resources. The heritage of our built environment is significant in establishing California culture and sense of place, and much of that valued built environment is in urban settings. CEQA does not limit aesthetic protections to wilderness areas or scenic corridors.

I am well-aware of the corporate and building industry determination to unravel CEQA's codified protections of aesthetics, and have heard the trumpeting of the [oft-misrepresented facts] of the *Pocket Protectors* case, which involved proposed changes to a longstanding area plan that included clustered multi-unit housing on a greenbelt. The *Pocket Protectors* Court of Appeal opinion cogently discusses the overarching CEQA statutory authority as well as case law in which "courts have recognized that aesthetic issues 'are properly studied in an EIR to assess the impacts of a project,'" including *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, *Ocean View Estates Homeowners Association, Inc., v. Montecito Water District* (2004) 116 Cal.App.4th 396, and *National Parks & Conservation Association v. County of Riverside* (1999) 71 Cal.App.4th 1341. (*Pocket Protectors, supra*, 124 Cal.App.4th 903, pp. 936-937.)

I attach an article from the California State Bar's 2005 Environmental Law News, entitled *CEQA and Urban Aesthetics: Need There Be An Ocean View?*, which I wrote following the publication of *Pocket Protectors*. I noted that Appendix G appropriately addresses visual impacts both involving and not involving scenic views. That distinction derives from the Public Resources Code section cited above, which separates the protections of *aesthetic* and *scenic* and *historic* resources. As we know, each word in a statute means something.

OPR's statement that infill projects are often challenged on grounds of aesthetics is unsupported; it is also irrelevant due to the statutory authority upon which the CEQA Guidelines and Appendix G rest. As pointed out by OPR, Public Resources Code section 21099 already restricts aesthetic protections for infill projects. There is no such restriction for other sites; nor should there be. Think of your own favorite urban sites; do their unique visual/cultural qualities figure in that preference? Of course. The built environment matters. And environmental consultants know how to assess and mitigate visual impacts in negative declarations and EIRs and have been doing so for decades.

I appreciate that Guidelines respond to the direction of the Courts of Appeal and the Supreme Court. But this proposed change to Appendix G relies on a single case, *Bowman*, widely criticized for failing to apply the fair argument standard to a proposed negative declaration, subsequently distinguished on its facts by *Pocket Protectors*, and that remains directly inconsistent with statutory authority and other case law. While we all understand the pressures OPR faces from the building industry that seeks environmental certainties that simply do not exist in our complex world, the change proposed to Appendix G's aesthetics section cannot be justified and will cause great harm to our built environment.

Thank you for considering these comments.

Sincerely,

  
Susan Brandt-Hawley

# CEQA AND URBAN AESTHETICS:

## Need There be an Ocean View?

By Susan Brandt-Hawley

Do the aesthetics of a non-wilderness area present an environmental issue? In an urban locale, does the California Environmental Quality Act ("CEQA")<sup>1</sup> require that significant aesthetic impacts be quantified and mitigated in a meaningful way? Isn't analysis of such impacts subjective and unwieldy and perhaps even counterproductive to efficient CEQA review? Despite some recent controversy on these issues, California environmental law and practice provide definitive answers of "yes" to the first two questions, and "no" to the third.

### Statutory and Regulatory Background

CEQA's codified policies begin with an overarching commitment to "provide a high-quality environment that at all times is healthful and pleasing to the senses and intellect . . . ." <sup>2</sup> The California Legislature in 1970 declared via its ambitious new environmental law that it intended to "take all action necessary to provide the people of this state with . . . enjoyment of *aesthetic, natural, scenic*, and historical environmental qualities. . . ." <sup>3</sup> Statutes are to be construed in a manner that gives each word meaning, <sup>4</sup> and the separate listing of "aesthetic," "natural," and "scenic" qualities is of consequence. The term "aesthetic" is not defined within CEQA, but its common dictionary meaning is "sensitive to or appreciative of art or beauty; pleasing in appearance." <sup>5</sup>

While many environmental resources protected by CEQA are manifestly aesthetic, natural, and scenic—California's iconic beaches come to mind—aesthetic qualities of the "built" environment are also embodied in resources that are neither natural nor scenic, such as architectural masterworks. Consistently, CEQA review extends to qualified historic properties, including uniquely designed structures that enrich diverse urban landscapes. <sup>6</sup> CEQA's aesthetic concerns have never been limited solely to wilderness areas and ocean views.

Within the CEQA Guidelines, Appendix G contains an environmental checklist that lead agencies use to evaluate whether a proposed project may have significant environmental effects that merit study in an environmental impact report. <sup>7</sup> The first checklist subject is "Aesthetics," and queries whether a project may (a) "have a substantial adverse effect on a scenic vista" or (b) "substantially damage scenic resources," including historic buildings. Notably, there is also an inquiry that does not include any reference to the word "scenic"—whether a project may (c) "substantially degrade the existing visual character or quality of the site or its surroundings." <sup>8</sup> Under criterion (c), existing aesthetic context is inherently relevant to a project's potentially significant impacts, whether located deep in a pristine wilderness or within an urban streetscape surrounded by miles of dense development and concrete.

### Case Law

*The Pocket Protectors v. City of Sacramento* <sup>9</sup> underscores the applicability of CEQA's aesthetic protections to the varied and well-loved city landscapes where most Californians live and spend their time. *Pocket Protectors* applies criterion (c) to a market-rate, non-infill housing project of "mini-mansions" planned along a tree-lined community greenbelt in a residential area of Sacramento known as the Pocket. The Court ruled that the administrative record amply documented the fact-based opinions of City staff, hundreds of area residents, and a professional architect that the "fundamental plan to pack as many houses as possible on lots as small as possible along both sides" of Pocket Road would create a "canyon" effect and would have significant adverse aesthetic impacts. <sup>10</sup> The *Pocket Protectors* group sought preparation of an environmental impact report ("EIR") to analyze the feasibility of a more affordable, multi-unit clustered housing project of equal density that could incorporate open space and adequate landscaping and setbacks,





just as had been planned for the long, narrow gateway site for twenty years.<sup>11</sup> The Court of Appeal agreed that an EIR was required under CEQA's low-threshold fair argument standard of review.<sup>12</sup>

The *Pocket Protectors*' Court invoked the holding of the California Supreme Court that CEQA was intended "to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language," and found no basis to exclude urban venues from the province of CEQA review of aesthetic impacts.<sup>13</sup> *Pocket Protectors* also holds that while earlier CEQA cases dealing with aesthetic issues may have focused on scenic views and vistas, including *Eller Media Company v. Community Redevelopment Agency*,<sup>14</sup> *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas*,<sup>15</sup> *Ocean View Estates Homeowners Association v. Montecito Water District*,<sup>16</sup> and *Riverwatch v. County of San Diego*,<sup>17</sup> Appendix G's criterion (c) standard does not require potential harm to be so "dramatic" as to block a scenic view; the applicable and straightforward question is whether a project may cause substantial degradation of a site's existing visual character.<sup>18</sup>

Evaluation of aesthetic impacts has an admittedly subjective component. In *Ocean View Estates*,<sup>19</sup> the administrative record demonstrated potentially significant aesthetic impacts of a water district's plan to place a pitched aluminum cover over a water reservoir. Despite "appropriate landscape screening, painting the roof to better blend in with the surrounding terrain if feasible"<sup>20</sup> to shield views, the proposed cover arguably remained visible from two private high-elevation homes and from public recreational trails.<sup>21</sup> The water district argued that private views should not be considered environmentally significant under CEQA.<sup>22</sup> The Court disagreed, and ruled that an EIR should analyze project impacts on private views even though such views are not protected by the common law.<sup>23</sup> The Court relied on Appendix G's criterion (c) to question whether the project might "substantially degrade the existing visual character or quality of the site and its surroundings."<sup>24</sup>

The water district also argued that "expressions of concern, questions or objections do not constitute substantial evidence of an adverse aesthetic impact."<sup>25</sup> The *Ocean View Estates* Court again disagreed, holding that

[W]e are not considering a matter as objective as whether the project will obstruct views. Here we are concerned with the overall aesthetic impact of an aluminum cover . . . [which] by its very nature is subjective. Opinions that the cover will not be aesthetically pleasing is not the special purview of experts. Personal observations on these nontechnical issues can constitute substantial evidence.<sup>26</sup>

The Court noted that *Oro Fino Gold Mining Corporation v. County of El Dorado*<sup>27</sup> had similarly found that environmental concerns that are based on residents' personal knowledge could qualify as substantial evidence on nontechnical issues.<sup>28</sup>

One case has restricted CEQA's application to aesthetic impacts in an urban setting. In *Bowman v. City of Berkeley*, an affordable senior housing project on a busy street was designed to exceed building heights and setbacks required by the City's zoning code, thus precluding eligibility for an exemption from CEQA as an affordable infill housing project.<sup>29</sup> Area residents and professional architects sought preparation of an EIR to consider the feasibility of a still-affordable senior housing project that would be consistent with the zoning code, arguing that the size and mass of the proposed four-story building would have significant aesthetic impacts on an adjacent single-family neighborhood of one-story vintage 1920s homes, and would also block views of the Berkeley hills for residents and passing motorists.<sup>30</sup>

The *Bowman* Court acknowledged that aesthetic impacts are subject to CEQA review: "[w]here scenic views or environmentally sensitive areas are concerned, aesthetic considerations are not discounted as environmental impacts merely because they involve subjective judgments."<sup>31</sup> But the Court held that an EIR was not required for the senior housing project in Berkeley, as it concluded that the evidence presented did not suffice as a fair argument of potentially significant aesthetic impacts.<sup>32</sup> The essence of the ruling was that "[t]he aesthetic difference between a four story and a three story building on a commercial lot on a major thoroughfare in a developed urban area is not a significant environmental impact, even under the fair argument standard."<sup>33</sup>

The distinction between the holdings of *Bowman* and *Pocket Protectors* may be explained in large part by the environmental contexts of the sites being developed. The *Bowman* lot was highly degraded, and the Court considered the proposed new development to be a decided improvement that precluded a finding of adverse aesthetic impact as a matter of law.<sup>34</sup> In *Pocket Protectors*, the "mini-mansion" housing project

was proposed for a vacant site at the gateway to the Pocket area, adjacent to a greenbelt, as part of a planned development in which landscaping was a codified priority.<sup>35</sup>

The *Bowman* Court also reviewed the treatment of subjective aesthetic issues within the federal environmental review process, in a discussion that *Pocket Protectors* characterizes as *dicta*.<sup>36</sup> The low-threshold standard for EIR preparation is wildly different from the stringent federal standards for preparation of an Environmental Impact Statement under the National Environmental Policy Act ("NEPA"),<sup>37</sup> and CEQA has much stronger environmental protection policies:

Because [CEQA] is more protective of the environment, . . . it seems fair to say that NEPA cases generally set the environmental floor, but not necessarily the ceiling, for interpreting CEQA. (See *San Francisco Ecology Center v. City and County of San Francisco* (citation).) In other words, the federal cases may be persuasive authority when they require environmental protection on issues not yet reached by California courts; but the state courts may find that the federal precedents require too little protection . . . .<sup>38</sup>

Thus, NEPA does not include the fair argument standard triggering the preparation of EIRs nor Guidelines such as CEQA's Appendix G that spell out aesthetic impacts as appropriate for environmental review. Further, even the federal decision discussed in *Bowman* pointedly allowed that study of aesthetic impacts is warranted when, for example, "high rise buildings in [a] low rise area will interfere with [a] view of mountains."<sup>39</sup>

*Pocket Protectors* does not fault the result in *Bowman*, but recognizes that the case should be limited to its unique facts:

As the [*Bowman*] court characterizes the objectors' aesthetic arguments, they amount to the claim that the building should be one story lower, so as to fit in better with the scale of the surrounding residential neighborhood. Unsurprisingly, the court concludes that the difference between a three-story building and a four-story building does not amount to a significant environmental impact even under the fair argument standard.<sup>40</sup>

### Practical Application

The trepidation expressed in the *Bowman* decision, and by the housing developers in the *Pocket Protectors* case, springs from the fact that opinions regarding aesthetics are somewhat subjective. As noted in *Pocket Protectors*, "Appendix G does not speak of *objectively* significant aesthetic impacts."<sup>41</sup> The *Bowman* Court worried that if EIRs can be triggered by aesthetics, "an EIR would be required for every urban building project that is not exempt under

CEQA if enough people could be marshalled to complain about how it will look."<sup>42</sup>

Yet, as noted above, it has long been the case that fact-based subjective opinions may trigger an EIR on non-technical issues, as allowed and anticipated by the CEQA definition of substantial evidence. Yet EIRs are still prepared for only a very small fraction of projects which are subject to CEQA. The further reality is that although aesthetic impacts have a subjective component, architects and planners earn advanced professional degrees and obtain expert status in developing opinions regarding visual qualities, mass and scale, sunlight, and view corridors. Many other areas of CEQA review also have subjective components. For example, a trained traffic analyst may determine whether a 20 second delay at an intersection—perhaps a short wait from the point of view of many long-term drivers, but interminable to a 16-year old—is or is not significant.

In order to trigger the preparation of an EIR to assess aesthetic effects, the administrative record must contain substantial fact-based evidence sufficient to support a fair argument of significant impact.<sup>43</sup> Mere argument, speculation, and unsubstantiated opinions are *not* sufficient.<sup>44</sup> None of the cases requiring EIR review of aesthetic impacts have involved simple disputes about project design—for example, houses planned in a modern style versus houses of more traditional appearance<sup>45</sup>—or other personal or "beauty contest" issues. To warrant review in an EIR, aesthetic issues must be of substantial import, just as every other type of environmental issue requires substantial evidence of a *significant* effect.<sup>46</sup> Trivial disputes relating to cosmetic design preferences will not qualify, while in appropriate cases the exploration of feasible project mitigations and alternatives in an EIR can minimize significant adverse aesthetic impacts. The development community then ultimately benefits along with area residents through the realization of excellent projects that are compatible with their environs.

It is unusual for a project to present a single environmental issue as the basis for EIR review, and that includes aesthetics. In *Pocket Protectors*, the Court also found substantial evidence supporting a fair argument of significant impacts relating to land use, including the loss of open space and inconsistency with adopted area plans.<sup>47</sup> In *Ocean View Estates*, flooding concerns were significant issues.<sup>48</sup> In *Bowman*, the Court rejected appellants' arguments regarding soil contamination along with the aesthetics issue.<sup>49</sup> While there will no doubt be some CEQA cases in which the only significant environmental issue relates to substantial aesthetic impacts, they are likely to be rare.

Finally, addressing aesthetic issues as part of a comprehensive environmental review process has become the norm for significant projects, and EIRs commonly include chapters on visual impacts. EIR preparers throughout California are skilled at addressing

aesthetic impacts along with traffic and noise and water supply and other environmental issues. Over ten years ago, in *Sequoyah Hills Homeowners Association v. City of Oakland*,<sup>50</sup> an EIR prepared for a housing project in the Oakland hills underscored the importance of CEQA review relative to “[v]isual resources and visual quality,” which it defined as “human perceptions of combining form, bulk, scale, texture, color, and viewing range of a site, relative to the context of its locale.”

Assessment and mitigation of aesthetic impacts in an EIR can be challenging, and many lead agencies adopt their own guidelines and thresholds of significant impacts to be considered within the EIR process, as in *Mira Mar Mobile Community v. City of Oceanside*. Others follow visual assessment guidelines promulgated by other agencies, particularly those of the Federal Highway Administration.<sup>51</sup> Many EIR consultants start with their locale’s definition of the range of “sensitive viewers” that may be affected by a project’s aesthetic impacts. Consideration of the extent of grading and cutting or alteration of existing slopes is relevant, as are percentages of shadows that are predicted to be cast by new urban construction. Mock-ups of view impacts through construction of story poles and the use of computer-assisted drawing and visual montages are also common methods of reviewing a project’s potentially significant aesthetic effects, all as mandated by CEQA.

### Conclusion

Not all aesthetic impacts relate to scenic wilderness or even to natural resources. CEQA review is appropriate and practical to disclose and mitigate the aesthetics of a high-rise development proposed on a waterfront, or a project that would block sunlight from a beloved urban park, or construction that requires alteration or loss of an architecturally stunning building, or a billboard in Hollywood, or housing that encroaches upon well-loved views and open space. While aesthetics analysis always relates to context, there is no bright line between the importance of urban versus rural impacts, nor any need to have an ocean view in order to invoke the protections of CEQA.

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*Susan Brandt-Hawley is a Principal of the Brandt-Hawley Law Group and has represented public interest groups in CEQA matters throughout California for twenty-five years. Her practice substantially focuses on historic resource issues. She thanks her associate attorney Paige J. Swartley for her assistance with this article.*

### ENDNOTES

- 1 CEQA is codified at CAL PUB. RESOURCES CODE § 21000 *et seq.*
- 2 CAL PUB. RESOURCES CODE § 21000, subd.(b).
- 3 *Id.* at § 21001, subd. (b). Emphasis added.
- 4 There is a “presumption against construing a statute as containing superfluous or meaningless words or giving it a construction that would render it ineffective.” *United States v. Blasius*, 397 F.2d 203, 207 n.9 (2d Cir. 1968), *cert. granted*, 393 U.S. 950 (1968), and *cert. dismissed*, 393 U.S. 1008 (1969).
- 5 *Encarta World Dictionary*, Mac Word OSX.
- 6 CAL PUB. RESOURCES CODE §§ 21001, subd. (b), 21084.1.
- 7 14 Cal.Code Regs §§ 15000 *et seq.* [CEQA Guidelines] Appendix G, “Evaluation of Environmental Impacts”, (8).
- 8 *Id.* at Appendix G Checklist, § 1.
- 9 (2004) 124 Cal.App.4th 903, 936-939.
- 10 *Id.* at 931, n.19, 916-917, 920-921, 935-939. While many affordable urban infill projects now qualify for exemptions from CEQA and such projects will not face EIR review relative to aesthetic or any other significant environmental impacts, the housing proposed in *Pocket Protectors* was concededly neither affordable housing nor infill, and was instead the last market-rate piece in a long-planned development. *Id.* at 930-931; CAL PUB. RESOURCES CODE §§ 21159.23, 21159.24.
- 11 *Pocket Protectors*, *supra*, 124 Cal.App.4th 903, 908-908, 913, 922, n.13.
- 12 *Id.* at 931.
- 13 *Id.* at 926, citing *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.
- 14 (2003) 108 Cal.App.4th 25. The aesthetic issue in *Eller Media Company* was decidedly urban: a billboard on Hollywood’s Sunset Boulevard would impact motorists’ views of a row of palm trees on the famous street. *Id.* at 35-36.
- 15 (1994) 29 Cal.App.4th 1597.
- 16 (2004) 116 Cal.App.4th 396.
- 17 (1999) 76 Cal.App.4th 1428.
- 18 *Pocket Protectors*, *supra*, 125 Cal.App.4th 903, 937-938 [citations].
- 19 *Ocean View Estates*, *supra*, 116 Cal.App.4th 396, 401.