

'We are not persuaded.' Appeals court rules against San Diego in battle over Midway District height limit

By Jennifer Van Grove

In the ongoing legal battle over building heights in San Diego's Midway District, environmental activists have scored another point against the city of San Diego, although the final outcome has yet to be decided.

Friday, California's Fourth District Court of Appeal upheld a San Diego Superior Court judge's earlier decision to invalidate the 2020 ballot measure that sought to lift the 30-foot height limit in the Midway District. The lower court ruled that the city did not properly analyze the environmental impacts of buildings taller than 30 feet, in violation of the California Environmental Quality Act.

The appeals court decision does not apply to the do-over ballot measure, or Measure C, which passed in November with 51 percent approval and is also being contested in court.

"The mayor and council have been determined to mislead the public in order to give away our prime coastal public land to their campaign contributors with the effect of blockading citizen's access to the coast," said John McNab, who is the founder of Save Our Access, the plaintiff in the case. "Today the people won a major victory."

North of the San Diego International Airport and south of Mission Bay, the 1,324-acre Midway District has been subject to a 1972 referendum on buildings over 30 feet in the city's Coastal Height Limit Overlay Zone, or coastal zone for short, which was defined at the time as extending from the water to Interstate 5 in city limits with some exceptions.

In 2020, the city asked voters to strike the entirety of the community plan area from the coastal zone to allow for redevelopment, which local leaders maintain is essential to uplifting a neighborhood best known for its aging sports arena, strip clubs and suburban-style shopping centers.

The ordinance, known as Measure E, was approved by 57 percent of voters. However, in December 2021, Superior Court Judge Katherine Bacal ruled that the city should have studied the environmental impacts of taller buildings before putting Measure E in front of voters.

At the direction of Mayor Todd Gloria, San Diego then advanced a dual-track approach — with the city pursuing both an appeal and a repeat ballot measure — to keep from derailing efforts to remake the city's sports arena real estate. The appellate route now appears to be nearing a dead end.

The Fourth District Court of Appeal said Friday that the city erred in presuming that the

state-mandated 2018 environmental impact report prepared alongside the new Midway-Pacific Highway Community Plan adequately considered the impact of taller buildings. The 30-year blueprint allows for major land-use changes and a population boom of 23,660 people, but it did not explicitly contemplate taller buildings.

“The city argues that because city-wide base zones allowed maximum structure heights more than 30 feet in some zones, we should understand the (community plan update) anticipated there would be a later proposal to remove the coastal zone height limit. We are not persuaded,” Justice Joan Irion wrote in the court’s published opinion. Justices Richard Huffman and Terry O’Rourke concurred. “Expecting the court or, more importantly, the public to understand from the (community plan update) that the coastal zone height limit could be removed at some future date based only on references to city-wide base zones, is fundamentally inadequate and inappropriate.”

The City Attorney’s Office is still reviewing the appellate court’s decision, a spokesperson for the office said. As it stands, the city can request a rehearing or petition the state Supreme Court to take the case.

“The Court of Appeal decision on 2020’s Measure E, while unfortunate, was a possibility we anticipated in December 2021 when we made the decision to pursue a dual-track strategy of appealing the ruling while also pursuing a second vote after curing what the judge said was deficient in the 2020 measure,” Gloria said Friday in a statement to the U-T. “In November 2022, the voters of San Diego once again affirmed their desire to raise the height limit in the Midway area — and this time did so with the benefit of additional analysis. It’s a clear indication of the desire for more affordable housing and the opportunity to revitalize the Midway District.”

The city is banking that its backup plan, Measure C, is on solid legal footing. In early 2022, the city’s planning department prepared a supplemental environmental impact report that studied the visual impacts of buildings up to 100 feet tall, as permitted by the different zones in the community plan, ahead of presenting the do-over initiative to voters. The analysis studied 10 view corridors that look into the Midway area, and found there would be significant and unavoidable impacts to views and neighborhood character with the removal of the coastal height limit.

The addendum, however, did not analyze the impact of taller buildings on other environmental factors, such as traffic, noise and air quality. As such, the supplemental analysis is deficient in scope, according to Save Our Access, which sued again last year, alleging that the second ballot measure also violates the California Environmental Quality Act. That case, also assigned to Bacal, is still pending in Superior Court.

“All we really want to do is to be able to implement our community plan. As long as we’re legally in compliance, then I don’t care how we get there or how it gets done or how we get to this confirmation,” said Dike Anyiwo, who chairs the Midway-Pacific Highway Community Planning Group. “My hope would be that the (supplemental analysis) that was conducted is sufficient and we can move forward, but I guess we won’t know that until the secondary lawsuit is dealt with.”

Development group Midway Rising, which was selected last year by the city to redo its sports arena real estate, is moving forward with a large, mixed-use project under the assumption that Measure C will hold up in court. The group's plan calls for 4,250 residential units, a new 16,000-seat arena, a 200-room hotel, and 20 acres of plaza and park space. Earlier this month, billionaire Stan Kroenke signed on as the majority investor in the project.