COX CASTLE NICHOLSON

LAND USE & NATURAL RESOURCES

CLIENT ALERT MARCH 26, 2009

COURT OF APPEAL ISSUES DECISION IN SUNRISE DOUGLAS LITIGATION

The Third District Court of Appeal recently issued its decision in California Native Plant Society v. City of Rancho Cordova, Case No. C057018. This decision is significant for its views on off-site mitigation for impacts to wetlands and listed species habitat under the California Environmental Quality Act. It is also significant for its analysis of general plan consistency and the standards by which a court will review a city's determination of consistency. Finally, this case confirms that parties must raise issues before public agencies if they wish to preserve those issues for judicial review.

Development within the City of Rancho Cordova's Sunrise Douglas Community Plan area has seen its share of litigation over the past couple of years. Perhaps most notably, the California Supreme Court in 2007 issued its landmark decision Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, which involved a challenge to the Plan's environmental impact report and its analysis of water supply and groundwater impacts. The Supreme Court established several key principles in Vineyard Area Citizens that continue to guide CEQA lead agencies in their evaluation of these environmental issues.

The CNPS case is the most recent decision involving litigation over development in the Plan area. In this case, the California Native Plant Society challenged Rancho Cordova's approvals and EIR for the Preserve at Sunridge project, a 530-acre residential and commercial development project located at the center of the Plan area. The project site includes vernal pools and other aquatic features, some of which would be filled for development of the project. Many of these features provide habitat for two species of vernal pool crustaceans listed as threatened and endangered under the federal Endangered Species Act. The EIR for the project determined that the loss of this habitat was a significant impact.

As mitigation for this impact, the EIR required the project applicant to prepare and implement a habitat mitigation and monitoring plan to compensate for the loss of acreage, function and value of these resources. Generally, the plan would require the applicant to preserve two acres of existing habitat or create one acre of new habitat for each acre of habitat impacted by the project. The plan would be required to include "target areas" for these creation, restoration and preservation efforts, a "biological assessment" of the existing resources on these target areas, "specific creation and restoration plans" for each of the target areas, and "performance standards for success that will illustrate that the compensation ratios are met." The EIR also required the applicant to mitigate indirect effects on habitat for these species within on-site and off-site preserve areas consistent with these same mitigation requirements.

CNPS alleged, among other things, that the City violated CEQA by improperly deferring this mitigation, because the EIR did not identify where the off-site mitigation might occur and did not sufficiently evaluate the impacts of that mitigation. To evaluate this argument, the court examined case law involving deferral of mitigation claims and discerned two guiding principles. On the one hand, it is improper for an agency to defer the formulation of mitigation measures until after project approval; instead, the determination of whether a project will have significant environmental impacts, and the formulation of measures to mitigate those impacts, must occur before the project is approved. On the other hand, when an agency has evaluated the potentially significant impacts of a project and has identified measures that will mitigate those impacts, the agency does not have to commit to any particular mitigation measure in the EIR, as long as it commits to mitigating the significant impacts of the project. In addition, the details of exactly how mitigation will be achieved under the identified measures can be deferred pending completion of a future study.

In light of these guiding principles, the court upheld the City's mitigation for impacts to wetland and listed species habitats. The court found that the City did not defer a determination of whether the project would have a significant impact on these habitats or defer the identification of measures calculated to mitigate those impacts. The City determined the impact the project would have, i.e., habitat loss, then identified a specific measure to mitigate that impact, i.e., preservation or creation of

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replacement habitat off site in a specific ratio to the habitat lost as a result of the project. The court further found that the case law did not require the City to identify any specific proposed mitigation site.

This holding is significant because it countenances an approach often taken by public agencies and project applicants for the mitigation of impacts to wetlands and habitat for listed species. In many instances, the exact location and details associated with off-site mitigation lands for the preservation, restoration, or creation of wetlands and habitat are not fully worked out until later. This is often the case when project applicants are required to negotiate the purchase of mitigation lands or credits or to negotiate the terms of a conservation easement or deed restriction. In those situations, the public agency or project applicant can commit to specific mitigation, such as mitigation ratios, for an identified impact to wetlands or listed species habitat, even if the exact location or parameters for those lands have not yet been identified. The CNPS case now authorizes this common approach to mitigation.

This case is also important for its discussion of the project's consistency with the City's General Plan. CNPS argued that the project approvals had to be set aside because the project was inconsistent with a number of policies and actions in the City's General Plan. Although the court found that the project was consistent with most of the policies and actions identified by CNPS, it held that the project was inconsistent with an action in the General Plan requiring mitigation to be "designed . . . 'in coordination with' the U.S. Fish and Wildlife Service and the California Department of Fish and Game." The court rejected the City's argument that it "coordinated" with the Service by consulting with the Service. According to the court, "coordination" is not synonymous with "consultation," and the City's use of the word "coordination" implied a measure of cooperation, not "mere solicitation and rejection of input."

This holding is troubling. For those cities with general plan policies requiring "coordination" with other agencies, this case would appear to require those cities to do more than consult with the agencies. In light of the CNPS case, merely soliciting comments may not be enough. Unfortunately, the case leaves uncertain just how much more is required. Nonetheless, and somewhat ironically, this case reaffirms the principle that a city's finding of consistency with its general plan will be upheld if it is reasonable based on evidence in the record. Under this principle, a project need not be in perfect conformity with each and every general plan policy, and it is the province of the city to determine whether the specifics of a proposed project are "in harmony" with the policies set forth in the general plan.

Finally, this case is notable for its detailed application of the exhaustion of administrative remedies doctrine. This doctrine generally requires that an issue must be presented to the public agency during its decisionmaking process in order for a plaintiff to raise that issue in a later judicial proceeding against that agency. The court in the CNPS case determined that many of CNPS's allegations against the City's EIR were not exhausted at the administrative level, and therefore the court had no authority to consider them. Lead agencies interested in the careful application of this law to a set of facts should pay particular attention to this discussion in the case.

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