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COX CASTLE & NICHOLSON LLP

SPRING QUARTER 2009 CEQA CASE LAW

During the second quarter of 2009, there were three published Court of Appeal decisions under CEQA dealing with whether follow-up approvals for a development project are ministerial or discretionary, whether communications between attorneys for applicants and lead agencies remain confidential under "joint defense" non-waiver doctrines, and whether CEQA's shorter statute of limitations governs in a lawsuit under both CEQA and the Coastal Act.

In addition to these case law developments, some significant administrative developments are in the works. The Natural Resources Agency announced by email that it will shortly begin the rulemaking process for adoption of the proposed new CEQA Guidelines on greenhouse gas emissions that were recommended by the Office of Planning and Research. Also, it appears likely that the State Budget negotiations will result in the elimination of the Office of Planning and Research, with the transfer of its CEQA functions (particularly as clearinghouse for state agency review of EIRs and negative declarations) to another agency.

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Health First v. March Joint Powers Authority (Tesco Stores West, Inc.), (2009) (petition for review filed May 29, 2009)

Lead agencies under CEQA sometimes seek to approve detailed plans for development projects in an attempt to complete CEQA compliance at the planning stage and avoid the need for further environmental review later. One means of doing this can be to adopt a detailed plan, so that follow-up approvals can be processed as ministerial actions with a compliance type checklist. In *Health First*, the Fourth District Court of Appeal upheld that approach. The Court considered whether the approval of a design application, which involved a 125 question yes/no checklist based on a previously approved specific plan, was a ministerial or discretionary decision for the purposes of CEQA. The Court held the approvals were ministerial and thus exempt from CEQA review. The Court also held that the implementation of mitigation measures previously analyzed and included in the specific plan and its supporting EIR did not render the approval of the design review application discretionary.

Health First arose out of the redevelopment of the March Air Force Base, which was led by the March Joint Powers Authority ("JPA"). The JPA has worked on developing and implementing a reuse plan for the site of the former base since the mid 1990s. In 1996, as a part of that process, a Final Environmental Impact Statement and a redevelopment plan, with a corresponding Environmental Impact Report, were prepared. The JPA subsequently approved a general plan and master EIR evaluating the environmental impacts of redeveloping the base site. A specific plan for the March Business Center, to be constructed on the site, was developed based on the general plan. After the approval and certification of a Focused EIR and a mitigation monitoring and reporting plan for the specific plan, the JPA approved the specific plan. The specific plan and its corresponding environmental review evaluated the environmental impacts of a full build-out of the March Business Center, including the site of the challenged Tesco warehouse. The JPA also adopted design guidelines and a 125 question yes/no checklist for use by an implementation commission with the limited

authority to review design plan applications and verify conformance with the design guidelines.

Health First argued that the implementation committee's review and approval of the design application for the Tesco warehouse and distribution center was discretionary and thus required independent environmental review as a "project" under CEQA. Instead the committee acted only to confirm that the Tesco warehouse was consistent with the specific plan and its focused EIR and that the warehouse complied with the design guidelines, as evidenced in the completed checklist. Health First further contended that the Tesco facility did not comply with the mitigation plan adopted as a part of the Business Center specific plan and thus the facility was part of a discretionary approval.

The Court rejected all of Health First's contentions, issuing a strong decision in favor of the JPA. It found that the Tesco facility was not a discrete project under CEQA, but rather a part of the larger March Business Center project, which has already undergone extensive environmental review. It held that a design review process that involved a mere checklist is ministerial and, as the Court stated, "[t]he determination of what is ministerial is most appropriately made by the public agency." It found the arguments regarding the implementation of the mitigation plan was similarly unpersuasive, reasoning that the mitigation plan was approved as part of the specific plan and was applied to the Tesco facility without alteration or modification. As such, no discretion was exercised with regards to the mitigation measures for the Tesco facility. Finally, the Court pointedly remarked that any challenge to the March Business Center specific plan should have been raised during the CEQA review process for the specific plan, not three years later at the design review stage of the Business Center project.

<u>Note</u>: The *Health First* decision was originally issued by the court as an unpublished decision, meaning it would not have been citable as legal precedent. Several parties, including Cox Castle & Nicholson, requested publication of the decision, and the court published it in response to those requests.

***California Oak Foundation v. County of Tehama* (*Del Webb California Corp.*) (2009) 174 Cal.App.4th 1217.**

When a project is going through the CEQA process and there is a risk of litigation, attorneys for the project applicant and the lead agency often seek to work together to develop a CEQA document that is more likely to withstand a lawsuit. Many attorneys believe that such "joint defense" efforts are confidential, and that documents shared between attorneys during this process also are confidential. In *California Oak Foundation,* the Third District Court of Appeal confirms that this is the case. The court found that CEQA does not override a claim of attorney-client privilege and that communications between counsel for a lead agency and real parties are protected by that privilege. The decision cites prior case law applying the "common interest doctrine" of non-waiver, pursuant to which an attorney's communications with third parties do not waive the attorney-client privilege and work product doctrines if those communications are reasonably necessary to the attorneys' work.

California Oak Foundation centered around opposition to the County's approval of a specific plan to allow for commercial and residential development of approximately 3,320 acres adjacent to Interstate Highway 5 between Red Bluff and Redding, in Northern California. Following a trial court decision in favor of the County, the petitioners appealed. The petitioners contended that the trial court should have granted its motion to include certain contested documents in the administrative record.

The Court sided with the County and upheld the trial court's determination that documents prepared by the County's outside counsel were protected by the attorney-client privilege. The County had retained the outside law firm to provide advice on CEQA compliance issues. In providing that advice, the outside counsel shared the four documents at issue with counsel for the real parties in interest. Petitioners asserted that Public Resources Code section 21167.6(e), which sets forth the requirements governing preparation on an administrative record for CEQA review, overrides any claim that documents prepared during the approval process are protected by the attorney-client privilege. They also argued that, even if the privilege was applicable, the County had waived the privilege by sharing the documents at issue with real parties' counsel.

The Court rejected both of these claims. It held that the provisions of CEQA relating to preparation of an administrative record do not limit the County's attorney-client privilege claim. Moreover, it ruled that Evidence Code section 912, and the common interest doctrine, as described in *OXY Resources California LLC v. Superior Court*, (2004) 115 Cal.App.4th 874, protects communications between counsel. Under the common interest doctrine, when the disclosure of an otherwise privileged document is made to a third party and that disclosure is reasonably necessary to fulfill the purpose for which the attorney was retained, there is no waiver of the privilege. The Court here concluded that achieving CEQA compliance, the purpose for which outside counsel was retained in this case, includes "producing an EIR process and product that will withstand a legal challenge for noncompliance." Because disclosing the documents to counsel for real parties, the co-defendants in the subsequent CEQA litigation, was reasonably necessary to further the purpose of the original legal consultation, the County did not waive attorney-client privilege with respect to those documents.

The *California Oak Foundation* case is an important decision protecting the consultations between counsel during the EIR process, who often will be working together to defend the EIR that is in part a product of that consultation. The decision upholding the application of attorney-client privilege is important for project applicants and real parties in interest, whose attorneys need to consult with counsel for lead agencies on the many legal strategy decisions that go into the preparation of an EIR.

Strother v. California Coastal Commission (Alvarez) (2009) 173 Cal.App.4th 873

CEQA has strict statutes of limitations, which generally require lawsuits to be filed within 30 days after the lead agency posts a "notice of determination" announcing the approval of a project. Many lawsuits against projects are filed under both CEQA and another statutory regime, such as the Subdivision Map Act, the Planning and Zoning Law or the Coastal Act. This raises the question of whether the applicable time limit is CEQA's short statute of limitations, or the (typically longer) time periods of other statutes. Generally, the courts have held that CEQA's specific and short statutes govern if the lawsuit raises a CEQA claim, and that is the result reached by the Fourth District Court of Appeal in *Strother*. The Court concluded that the more specific statutory limitations found in CEQA control over the more general limitations described in the Coastal Act.

In *Strother* the plaintiffs appealed a trial court's order dismissing their petition for a writ of mandate to vacate decisions by the Coastal Commission, which has approved coastal development permits for two unimproved residential lots in San Clemente. CEQA allows agencies with regulatory programs certified by the Secretary of Natural Resources, such as the Coastal Commission, to rely upon written documentation from those programs when issuing approvals. Here the Commission approved development permits for two lots, but failed to file a notice of its approval of those permits with the California Resources Agency until six weeks after the Commission's decision. The plaintiffs filed their petition outside of the 60 day statute of limitations period under the Coastal Act (a clock which starts when the Commission's decision becomes final), but less than a month after the Coastal Commission filed notice of its decision with the Resources Agency, and thus within the 30 day statute of limitations period under CEQA (which is triggered by the Commission's filing of a notice of approval with the Resource Agency).

The Court concluded that both statutes of limitations could be read in concert, thus allowing plaintiff's claims for violations of CEQA to proceed, even if their claims for violations of the Coastal Act were time-barred. The Court noted that had the Commission filed its notice of ruling with the Resource Agency in a timely manner, the entire dispute could have been avoided.

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