

COX CASTLE & NICHOLSON LLP 2009 THIRD QUARTER CEQA CASE LAW UPDATE

It has been a fairly busy quarter, with the publication of six new CEQA cases. As well, in an important development, the Supreme Court has denied the Petition for Review in California Oak Foundation v. County of Tehama (2009) 174 Cal.App.4th 1217. In California Oak, the Court of Appeal applied general “joint defense” case law in the CEQA context and found that CEQA does not override a claim of attorney-client privilege and that joint defense 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’ legal work. The California Oak case is an important decision protecting the consultations between counsel during the EIR process as counsel for applicants and agencies work together to prepare a defensible EIR.

AUTHORS

Michael H. Zischke
415.262.5109

Sarah E. Owsowitz
415.262.5122

Scott B. Birkey
415.262.5162

James R. Repking
310.284.2214

Kathryn J. Paradise
310.284.2258

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EIR for New High School Upheld Against Health Risk, Cumulative Impacts, Traffic, Safety, Parking and Land Use Claims: *City of Long Beach v. Los Angeles Unified School District* (2009) 176 Cal.App.4th 889

In *City of Long Beach v. LAUSD*, the Second District Court of Appeal rejected Long Beach’s challenge to the LAUSD’s certification of a Program Final EIR for an 1,800 student high school to be located near the western edge of the city. The court upheld the EIR against a variety of substantive CEQA challenges, including claims relating to health impacts, traffic, air quality, pedestrian safety, parking, land use, and project alternatives.

The court held the EIR’s analysis of potential long-term exposure of students and staff to hazardous emissions was adequate, reasoning that specific mitigation measures were proposed to reduce the risks to a less than significant level. The court also concluded those measures were well-defined and that it was appropriate for the school district, in response to comments on the Draft EIR, to refer to supporting documentation and studies in the EIR appendices. The court found LAUSD’s responses to comments on health risks adequate because they were as detailed as the comments themselves in explaining how the health risk assessment accounted for increased truck activity. With respect to cumulative impacts relating to air quality and truck traffic, the court rejected Long Beach’s

argument that LAUSD should have analyzed the impact of the existing environment on the project. It determined that the geographic scope of the cumulative impacts analysis was adequate and supported by substantial evidence as the EIR provided justification for the area analyzed. The court also noted that Long Beach failed to make any showing that additional projects would have changed the analysis in the EIR.

With respect to Long Beach’s claim that the EIR failed to adequately consider risks from a nearby rail line by omitting an analysis of specific types of chemicals the trains might carry, the court found LAUSD had satisfied CEQA. The EIR included mitigation measures to address potential hazardous releases and adequately described how those measures would work. The court also concluded the likelihood that the railroad would carry hazardous materials was hypothetical, holding that analyzing each specific chemical that might theoretically be carried was “speculative and infeasible.”

The court rejected Long Beach’s claim that LAUSD did not properly analyze traffic and pedestrian safety, noting that the conclusions in the EIR were supported by detailed analysis found in an appendix. The court also upheld the EIR’s parking analysis, which analyzed parking demand in detail and noted that sufficient parking spaces were available in the adjacent neighborhood to accommodate more than the expected parking needs.

Long Beach's argument that the EIR failed to properly analyze land use impacts was similarly unpersuasive. The court found that the claimed inconsistencies with the Long Beach general plan were inaccurate, noting that school district's responses to comments explained why the school would not conflict with the general plan. The court also found that the school district had, under its statutory authority, appropriately exercised its power to exempt itself from Long Beach's zoning code.

Finally, the court upheld the EIR's analysis of project alternatives, finding that the EIR's inclusion of a no project alternative, a continued use alternative, a reduced-size project, and alternative project sites was sufficient under CEQA.

EIR for Development of Trails on City Greenbelt Property Upheld Against a Challenge to the City's Determinations Regarding the Feasibility of Alternatives : *California Native Plant Society v. City of Santa Cruz* (Filed 8/20/09, published 9/18/09) Sixth District, H032502¹

In this case, the City of Santa Cruz approved an EIR evaluating a master plan for city greenbelt property, which plan included a system of public trails. Due to the alignment chosen for a multi-use trail, the project had a significant impact on the Santa Cruz tarplant. The court found that the EIR's discussion of alternatives, and the City's finding of alternatives, complied with CEQA procedural mandates and were supported by substantial evidence.

First, based on *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, the court noted that the determination whether alternatives are feasible arises at two different junctures in the EIR process. First, the agency determines what alternatives to include for an evaluation in the EIR, and the standard applied at that stage is whether an alternative is potentially feasible. Later, when the agency is making its final decision on the project, the decision-making body evaluates whether the alternatives are actually feasible, and makes findings to that effect.

With respect to the range of alternatives selected for evaluation in the EIR, the court rejected a claim that the selected alternatives must meet all project objectives, and noted that each of the selected alternatives met some project objectives. Petitioners also argued that the EIR was required to evaluate an offsite trail to avoid impacts to the tarplant, and the court rejected that claim on three bases. First, the court said there is no rule requiring analysis of offsite alternatives on every case. Second, the court held that an alternative involving only one component of the

project is not required to be analyzed. Finally, the court held that substantial record evidence supported the decision to exclude offsite trail alternatives, which had been extensively considered both in selecting the range of alternatives for the EIR, as well as in prior planning and environmental review efforts.

The court also upheld the City's substantive decision to reject the evaluated alternatives in favor of the proposed project. The City's findings stated that each of the analyzed alternative failed to meet certain project objectives, and was "undesirable from a policy standpoint." Procedurally, the court noted the two different stages of determining feasibility, and held that it does not "subvert the CEQA environmental review process" for a decision making body to reject as infeasible those alternatives that were identified and evaluated in the EIR.

Finally, the court held that the policy considerations identified in the City's findings were a permissible basis for rejecting the alternatives, noting that an alternative can be rejected as infeasible on the basis that it is undesirable, based on a balancing of economic, environmental, social and technological factors. This aspect of the decision also followed the earlier decision in *Del Mar*. The court also held that the Supreme Court's *City of Marina* decision did not disapprove the balancing of statutory factors as outlined in the *Del Mar* case. The Court explained that the *City of Marina* holding only applies where the agency excludes an potential alternative during the first stage based on a legally erroneous reason.

Attorney Fee Award Properly Granted Even Though Petitioner Prevailed on Only Some Claims Challenging an EIR: *Riverwatch v. County of San Diego Dep't of Env'tl. Health* (2009) 175 Cal.App.4th 768

Attorney fee claims in CEQA cases are governed by the same rules that govern other fee claims under California Code of Civil Procedure § 1021.5 and the "private attorney general" doctrine. Under this authority, a court must consider whether the plaintiff's action has resulted in enforcement of an important right affecting the public interest, a significant benefit has been conferred on the general public or a large class of persons, and the necessity and financial burden of private enforcement make the award appropriate.

Riverwatch v. County of San Diego is one such case involving an attorney fees claim in the context of a CEQA action. This case, like this year's earlier *Riverwatch v. Olivenhain Municipal Water District* case, arose out of the permitting process for the proposed Gregory Canyon landfill project in northern San Diego County. Petitioners

¹ *California Native Plant Society v. City of Santa Cruz* was initially unpublished. Because of the importance of the decision, Cox, Castle & Nicholson LLP filed a request for publication on behalf of the California Building Industry Association and Building Industry Legal Defense Foundation, which was granted by the Court on September 18, 2009.

RiverWatch and the Pala Band of Mission Indians brought a successful lawsuit alleging that the County of San Diego Health Department had violated CEQA in approving an EIR and permits for the landfill. Petitioners ultimately were awarded \$239,620 in attorneys fees by the trial court, which was slightly more than half of the fees they had originally sought.

The county and the real party in interest challenged the award on the grounds that the petitioners failed to satisfy at least two requirements of Code of Civil Procedure Section 1021.5, including the requirements that the litigation confer a significant benefit on the public and that the necessity and financial burden of private enforcement makes the award appropriate. With respect to the Pala Band in particular, the county and real party in interest opposed the award on the grounds that the Pala Band had financial and personal interests in the outcome of the litigation that far exceeded any benefit to the public. The county and real party in interest also argued that petitioners' hourly fees were unreasonable and the work duplicative. Finally, the county and real party in interest asked that the award be reduced to account for petitioners' lack of success on numerous issues in the case.

The Court of Appeal rejected these arguments, and upheld the trial court's fee award. The court first noted that attorney fee awards under Section 1021.5 are within the trial court's discretion, and will not be disturbed on appeal absent a showing that there is no reasonable basis in the record for the award. The court rejected arguments that the Pala Band was primarily motivated by the economic interest of protecting their casino, noting evidence in the record that the tribe was substantially motivated by environmental concerns. The court determined that the cost of litigation was disproportionate to the Pala Band's individual stake in the matter. The court also held that the litigation brought by petitioners conferred a significant public benefit because it ensured that the EIR properly assessed and mitigated traffic and water supply impacts related to the landfill project. The court found that this assurance that the impacts of the project were properly assessed and mitigated constituted a significant benefit to the environment and thus to the public at large. Finally, the court rejected claims that the fee award should be reduced because petitioners prevailed on only three of the many claims that they presented against the EIR. The court held that the petitioners were successful in enforcing CEQA requirements and were the prevailing parties, and stated that the trial court was in the best position to assess the significance of the issues on which petitioners prevailed. The court thus affirmed the trial court's judgment in its entirety.

Lead Agency Has Discretion To Determine Which Entities Are Qualified To Accept Mitigation Lands: *The Habitat Trust For Wildlife, Inc. v. City of Rancho Cucamonga, et al.* 174 Cal.App.4th 1306

In this case, a city approved an EIR for a residential subdivision. The EIR proposed that the project developer would convey off-site land in order to mitigate the potential loss of habitat for sensitive plant and animal species and the loss of raptor foraging land. The City specified that the lands could be conveyed to the County or another conservation entity approved by the City. Petitioner Spirit of the Sage Council opposed the Project, and argued that the mitigation lands should be transferred to its land trust, Habitat Trust for Wildlife. Sage sued the City, challenging the approvals. In response, the developer, Sage and Habitat entered into a settlement agreement whereby the developer agreed to convey the mitigation lands to Habitat. The City was not a party to the settlement agreement.

The City Council ultimately determined that Habitat was not qualified to accept the mitigation lands and that the County would be a better management entity. The Council also adopted a resolution establishing criteria for conservation entities. Sage and Habitat brought a writ of mandate action against the City and a breach of contract action against the developer. Among other things, Sage and Habitat argued that the City's decision was not supported by substantial evidence, conflicted with state and federal law and was a denial of due process.

The Court rejected the claims. The Court held that the City had not waived the deferential substantial evidence standard of review by agreeing in the Development Agreement that consents or approvals would not be unreasonably withheld. The Court held that, despite this language, the substantial evidence test still applied. Furthermore, the Court rejected the argument that Sage/Habitat had a fundamental vested right, subject to independent review, because they had entered into the settlement agreement with the developer. The Court also rejected Sage and Habitats' due process claims.

The Court found that the City's findings that Habitat was not qualified to accept the mitigation lands was supported by substantial evidence and, therefore, the Court deferred to the City's decision.

Apart from the holding that a lead agency has discretion to determine which entities are qualified to accept mitigation lands, the case is notable for highlighting the risks of relying on settlement agreements which do not include the lead agency as a party. A settlement agreement between the petitioner and developer does not prevent the lead agency from taking actions contrary to those specified in the agreement. Further, it is important to note that the

case concerns contract provisions entered into pursuant to CEQA, and does not actually interpret the CEQA statute or Guidelines.

Retail Project EIR Upheld Against Challenges to Analysis of Energy Impacts, Extra-Territorial Mitigation, Project Alternatives and Procedural Requirements: *Tracy First v. City of Tracy*² (filed 9/27/09, published in full 9/18/09) Third District, C059227

Tracy First v. City of Tracy is a significant decision important to developers, public agencies, and other participants in the CEQA process. Perhaps most notably, this is the first published case law regarding the evaluation of energy impacts in an EIR. The decision also provides helpful interpretation of the California Supreme Court's 2006 decision in *City of Marina v. Board of Trustees of California State University* regarding mitigation of extra-territorial impacts, and guidance on the question of what constitutes a reasonable range of alternatives. Finally, the decision confirms that a city council is not required to remand an EIR back to a planning commission when the council adds supplemental information to the EIR.

In *Tracy First*, the Court of Appeal upheld an EIR prepared for a large grocery store in the City of Tracy. In rejecting Petitioner's appeal the Court found as follows:

Energy: The Court ruled that it was appropriate for the EIR to rely upon the California Building Energy Efficiency Standards, which are part of the State's Title 24 Building Code, to determine that the project's energy impacts would be less than significant. The Court also held that CEQA does not require that an EIR discuss "every possible energy impact or conservation measure" listed in Appendix F of the CEQA Guidelines.

Further, the Court rejected Petitioner's claim that the EIR improperly piecemealed its analysis of energy impacts. The EIR included a detailed analysis of energy usage for the proposed grocery store, and a less detailed analysis of energy use at a separate northern parcel that was part of the project, but not the subject of a development application. The Court found that the difference in the level of analysis was appropriate based on the different status of development plans for the two parcels.

Extra-Territorial Impacts: The Court found that it was proper for the City to find traffic impacts at two County intersections to be significant and unavoidable. The EIR reflected that the County had no plan to mitigate congestion at either intersection, so the City found that it was infeasible to mitigate the impacts. Petitioners argued that, based on the Supreme Court's *City of Marina* decision,

the City was required to mitigate the extra-territorial impacts. The Court rejected this claim, finding that the City lacked jurisdiction to implement mitigation outside its boundaries. The Court also held that there was no basis in CEQA for the argument that the city must develop and impose on the County a plan for improvement of the county intersections.

Alternatives: The Court ruled that the EIR was not required to consider a smaller store alternative where there was no evidence that such an alternative would avoid any significant impact of the proposed project. The Court distinguished *Preservation Action Council v. City of San Jose*, where the smaller sized project alternative would have preserved a historic building, and thus avoided a significant impact.

Planning Commission Review: The Court held that the fact that the City Council requested that City staff include supplemental information to a Final EIR did not require the Council to remand the EIR to the Planning Commission for review. The Court held that CEQA only requires a Planning Commission to consider either draft or final EIR.

City has No Mandatory Duty to Complete EIR for Rejected Project: *Las Lomas Land Co. v City of Los Angeles*, Second District Court of Appeal Case No. B213637 (September 17, 2009)

Las Lomas Land began the environmental review process in 2002 for a 555 acre site near Santa Clarita. By 2008, the Los Angeles City Council had decided it did not want to proceed with the project, and the Council decided to stop all work on the EIR, and not to enter into an agreement with Las Lomas for reimbursement of fees. Las Lomas sued, claiming that the City had a mandatory duty, once it had commenced the CEQA process, to complete its environmental review before deciding whether to approve or reject the project.

The court rejected this claim, noting that CEQA applies only to projects that a public agency proposes to carry out or approve. The court also held that CEQA Guideline 15270, and its statement that the exemption for disapproved projects allows agency to initially screen projects and avoid expending resources on environmental review for projects which cannot be approved, did not limit the City from later stopping the EIR process. Both holdings are consistent with existing case law. (*See Main San Gabriel Basin Watermaster v. State Water Resources Control Board* (1993) 12 Cal.App.4th 1371, 16 Cal.Rptr.2d 288.) The court also rejected claims that stopping processing on the project amounted to a denial of due process.

² *Cox, Castle & Nicholson's Andrew Sabey and Sarah Owsowitz represented the developer in this litigation*