COX CASTLE NICHOLSON

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COX CASTLE & NICHOLSON LLP
2010 FIRST QUARTER CEQA CASE LAW UPDATE

A busy first quarter of 2010 for CEQA cases, including two rulings from the California Supreme Court. The following is a summary of all seven new CEQA decisions.

New Projects May Not Use Existing Permits As Environmental Baseline: *Communities For A Better Environment v. South Coast Air Quality Management Dist.*, (2010) 48 Cal.App.4th 310.[1]

Here the California Supreme Court considered for the first time the important question of the environmental baseline that is used to evaluate whether the impacts of a proposed new project are significant. Generally, the CEQA Guidelines provide that the baseline normally consists of the existing physical conditions when the lead agency begins its environmental impact review. For facilities with existing permits, however, several appellate opinions had indicated it was appropriate to include the existing permit in the environmental baseline. The Supreme Court has now rejected that approach as it applies to new projects evaluated under CEQA.

The *CBE* case arose out of the South Coast District's approval of equipment modifications to produce ultra low sulfur diesel at ConocoPhillips' Wilmington refinery. In determining whether additional emissions could be significant, the District concluded that no EIR was required because any new emissions would be within the maximum levels allowed under the refinery's pre-existing permits. The Los Angeles Superior Court upheld the District's approach, but the Court of Appeal had rejected it.

The Supreme Court also rejected the reliance on emissions allowed under existing permits, holding that the District should have calculated the baseline conditions based on existing physical conditions. Significantly, however, the Court also noted that lead agencies have substantial discretion to determine how existing physical conditions are most appropriately measured, and the Court declined to answer any technical questions as to how existing

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Parchester Village Neighborhood Council v. City of Richmond

[1] *Mike Zischke of Cox Castle & Nicholson was co-counsel to ConocoPhillips in this case.*

refinery operations should be measured for baseline purposes in this case. The Court noted that the date for establishing the baseline cannot be a rigid one, as environmental conditions may vary from year to year. Also, where environmental conditions are expected to change, project impacts might reasonably be compared to predicted conditions of the expected date at project approval, rather than to conditions at the time the environmental review begins. The court stated that CEQA does not mandate a uniform or inflexible rule for determining baseline. Instead, an agency has discretion to decide how the existing physical conditions can best be measured, subject to judicial review, as with all CEQA factual determinations, for support by substantial evidence.

The court also noted that the refinery modification project was a "new" project, as distinguished from a project reviewed previously under CEQA. Accordingly, this decision applies only to determining the baseline for new projects. Once a project has undergone CEQA review, changes to that project are reviewed to determine whether there are new or substantially more severe impacts compared to the prior CEQA analysis, under Public Resources Code section 21166 and a long line of interpretive decisions.

CEQA's 30-Day Statute of Limitations Applies to Subsequent Approval Decisions By Lead Agencies: *Committee for Green Foothills v Santa Clara County Board of Supervisors* (2010) 48 Cal.4th 32.

The California Supreme Court upheld CEQA's 30-day statute of limitations as applied to subsequent approval decisions made by a lead agency. The Court affirmed that subsequent approval decisions – when a lead agency issues a further approval for a project that has already been through the CEQA process – enjoy the same certainty against late lawsuits that applies when a project is approved for the first time. The Court cited the legislative history of CEQA's statutes of limitations, which states the bright line rule that the filing of a notice of determination triggers a 30-day statute of limitations, which is designed to promote certainty, thus allowing local governments and developers to proceed with projects without the threat of potential future litigation.

This case involved an agreement between Stanford University and Santa Clara County, whereby Stanford agreed to dedicate land and construct trails as part of its mitigation requirements in an EIR for an overall project that included new buildings on the Stanford campus. After extended negotiations the parties entered into an agreement governing the alignment of the proposed trails ("Agreement"). Upon approval of the Agreement, the County made CEQA findings stating that the Agreement did not constitute a new project subject to independent CEQA review. The County made this determination pursuant to Public Resources Code section 21166 and CEQA Guideline 15162, which generally provides that, once an EIR or negative declaration has been prepared for a project, an agency does not have to prepare a further EIR unless there are project changes, changes in circumstances, or new information showing a new or substantially more severe significant environmental impact. The County filed an NOD following the approval of the Agreement on December 26, 2005; a revised NOD followed four days later on December 20, 2005. The NOD was posted for 30 days, from December 20, 2005, through January 19, 2006.

The Committee for Green Foothills filed a challenge to the County's approval of the agreement 171 days after the filing of the revised NOD. The Committee argued that, because the County did not perform any further environmental review for the later approval of the specific trail, the 30-day statute of limitations did not apply. The County successfully demurred, claiming the challenge was barred by the statute of limitations. Upon review the Court of Appeal reversed and directed the trial court to grant the Committee leave to amend. The Supreme Court reversed

The Supreme Court noted that lead agencies are not required to post a notice of determination (or "NOD") when they approve subsequent activities after an EIR

or negative declaration has already been prepared for a project, and when the agencies determine that no further EIR is required. It also noted, however, that such NODs for follow-up approvals are frequently filed and posted in order to trigger the 30-day statute of limitations. The Court held that when a lead agency does file an NOD for the approval of a subsequent activity, and makes a finding that no further CEQA review is required, the 30-day statute of limitation applies to that decision.

Agencies May Charge Fees For CEQA Administrative Appeals: *Friends of Glendora v. City of Glendora* (2010) 182 Cal.App.4th 573.

Here, a citizens group challenged a standard $2000 fee charged by the City of Glendora for appealing a CEQA determination from the Planning Commission to the City Council. The group argued that, because CEQA requires that local agencies provide for an appeal to the elected decision making body (Pub. Resources Code, §21151(c)), but does not authorize fee for such appeal, no fee may be charged. The Second District disagreed. It upheld a demurrer to the claim, stating that fees can be charged for an appeal and nothing in CEQA restricts imposing the fee. The Court explained that holding otherwise would be inconsistent with Public Resources Code section 21083.1 and its statement of legislative intent that courts should not impose requirements beyond what is in the CEQA statute and Guidelines.

Court Reaffirms CEQA 30-Day Statute of Limitations: *PR/JSM Rivara LLC v. Community Redevelopment Agency of the City of Los Angeles* (2010) 180 Cal.App.4th 1475.

In this case, a property owner challenged design guidelines adopted by the Redevelopment Agency with respect to a particular project area. In addition to various other claims, the property owner argued that the design guidelines were adopted in violation of CEQA. The owner failed to bring the challenge within 30 days after notice of determination was posted, but claimed that the notice of determination was ineffective because it failed to adequately describe the design guidelines. The trial court found that the notice was adequate. On appeal, the Second District held that the property owner had waived the claim because it was first raised in the appellant's reply brief.

EIR Required For Ordinance Banning Use of Plastic Bags: *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2010) 181 Cal.App.4th 521 (Petition for review pending).

In a 2-1 decision the Second District Court of Appeal found that the City of Manhattan Beach should have prepared an environmental impact report before it enacted an ordinance restricting retailers from providing plastic bags to customers. The court based its decision on CEQA's "fair argument" standard, which sets a low threshold for requiring preparation of an EIR. Under that standard, effectively an EIR is required whenever it can be "fairly argued" based on some substantial evidence that the action in question may have a significant environmental effect. This decision illustrates how broad CEQA's requirement for an EIR has become under the fair argument standard. The decision also includes an important ruling on whether a business-based coalition has standing to challenge agency actions under CEQA.

The City argued the "Save the Plastic Bag Coalition" lacked the required beneficial interest in the matter, and thus lacked legal standing to bring the challenge to the ordinance. The Coalition is an association of plastic bag manufacturers, distributors and suppliers, formed to counter what it considers to be misinformation, myths and exaggerations about the impacts of plastic bag use. The court found that this was not a purely competitive or commercial interest, as in cases where one competitor is challenging the CEQA document for another competitor's project. Instead, the Coalition was seeking to enforce CEQA's environmental review requirements, and this brought the case within the "public rights/public duty" rule of standing, where a party that is seeking to enforce a

public right is found to have standing even if that party may not have a direct beneficial interest in the subject of the case. In the court's view, the fact that some members of the Coalition would benefit from the lawsuit (if the City decided to abandon the bag ban after completing the EIR) did not defeat their standing.

On the merits of the case, the court noted the City's goal was to protect the environment, and in particular to reduce the amount of plastic debris and litter that accumulates in the ocean environment both near the City and in the large garbage patch that floats out in the Pacific Ocean. The City prepared an initial study under CEQA, which concluded that the ordinance would increase the use of paper bags, which in turn could increase emissions from paper plants and from trucks carrying heavier, bulkier paper bags. The study concluded that these increased impacts would be less than significant, and that the ordinance would have a modest positive environmental impact in reducing the amount of plastic debris in the ocean.

In evaluating whether an EIR was required, the court reviewed a body of studies that had been prepared, and included in the City's record, on plastic bag restrictions, including several studies commissioned by California cities and counties. Those studies noted the environmental benefits of restricting plastic bags, and also noted potential adverse environmental effects. Under the fair argument standard, those studies were sufficient to demonstrate that the ordinance may have an adverse environmental effect, including potentially greater impacts on energy consumption, greenhouse gas emissions, solid waste and acid rain.

Justice Mosk dissented from the decision, stating the majority was stretching CEQA and the requirements for an EIR "to an absurdity." He questioned whether the action should be considered a project under CEQA in the first instance, asking rhetorically whether this decision might require CEQA review of agency decisions about what type of product to purchase. He concluded that there was not sufficient evidence to show that the potential impact on such broad environmental concerns as acid rain and greenhouse gas emissions would be "significant".

This decision obviously has implications for the ongoing debate about plastic bag restrictions (although each case is governed by its own factual record). The decision also underscores the occasional application of CEQA outside the typical development project context to discretionary agency actions that may restrict or expand the ability to use a particular product. This product-based application of CEQA has, on occasion, frustrated both those trying to restrict certain products (as here) as well as those seeking greater flexibility to use certain products. In *Plastic Pipe & Fittings Ass'n v California Building Standards Commission* (2004) 124 Cal.App.4th 1390, for example, the court held that CEQA review was required for building code standards to allow the use of PEX plastic pipe. This product-based application of CEQA also presents challenges to EIR preparers. Even with CEQA's provisions allowing for more generalized review of broad agency decisions, the impacts of restricting or facilitating the use of a particular product are often broadly dispersed, so it is no easy task to prepare an EIR for this type of agency decision.

A petition for review of this decision is currently pending in the California Supreme Court.

Court Reaffirms Need for Legitimate Basis to Delete a Previously Adopted Mitigation Measure: *Katzeff v. California Dept. of Forestry and Fire Protection* (2010) 181 Cal.App.4th 601.

In *Katzeff*, the Second District Court of Appeal examined whether a mitigation measure must be continue to be implemented even if the originally permitted activity has already taken place, under both CEQA and the Z'Berg-Nejedly Forest Practices Act of 1973 (FPA). Under the FPA, the preparation and approval of a Timber Harvest Plan or THP is the functional equivalent of the preparation and approval of an EIR under CEQA. In this case, a property owner

obtained two THPs, one in 1988 and a second in 1998, to remove a number of trees on his property. Both THPs contained a mitigation measure to preserve a certain stand of trees to avoid wind funnel impacts.

After the THPs had expired, the owner who obtained the original THPs then sold the land, on the condition that the buyer seek a "conversion exemption" from California Department of Forestry and Fire Protection (CDF). The conversion exemption, which permits harvesting of less than three acres on a one time basis, would have allowed the harvest of the trees that were required to be preserved as mitigation under to the now-expired THPs. Once the conversion exemption had been obtained, the seller would essentially take back the rights to log and sell the three acres of timber within the mitigation stand. Following CDF approval of the conversion exemption, a neighbor sued, claiming that the mitigation measure cannot be taken away without supplemental environmental review.

On review, the Court of Appeal held that, under prior CEQA decisions (*Lincoln Place Tenants Association v City of Los Angeles* (2005) 130 Cal.App.4th 1491, and *Napa Citizens for Honest Government v Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342), there must be a legitimate reason, supported by substantial evidence, to delete a previously adopted mitigation measure, even if the originally permitted activity has already occurred. The court reasoned that in this case, since the impacts of the approved activity persist, the mitigation for the impacts should remain in place. The Court also stated that this rule applies even if the proposed change in mitigation is part of a ministerial decision.

Approval of Municipal Services Agreement For Tribal Casino Not A CEQA Project Where It Did Not Unconditionally Commit City to Make Physical Changes to the Environment: *Parchester Village Neighborhood Council v. City of Richmond* (2010) 182 Cal.App.4th 305 (Petition for review pending).

Here, the First District Court of Appeal examined whether the City of Richmond was required to undertake CEQA review prior to approving a municipal services agreement to extend public services to a proposed casino project outside its jurisdictional boundaries. The Scotts Valley Band of Pomo Indians of California submitted an application to the Secretary of the Interior to acquire land in trust on behalf of the Tribe. The land is located in unincorporated west Contra Costa County, adjacent to the City, which it planned to develop with a large casino. The Tribe was in the process of preparing an environmental impact statement under NEPA to analyze the project.

The City approved an agreement that obligated the Tribe to fund new City services over 20 years to support new police, fire and public works personnel and equipment to serve the project, if the project is ultimately approved. The City also agreed to support the Tribe's application to acquire the land. The agreement disavowed any commitment by the City to make physical changes to the environment and indicated an intent to comply with CEQA in the future if necessary.

The Court of Appeal held that the City was not required to comply with CEQA to approve the municipal services agreement. The Court found that the agreement was merely a funding mechanism that did not unconditionally commit the City to making any physical changes to the environment. On this basis, the Court distinguished this case from situations where CEQA review is required because of such a commitment to make physical changes. The Court found also that the Tribe's casino is not a CEQA project of the City because the City has no legal authority over the property upon which the casino will be built.

A petition for review of this decision is currently pending in the California Supreme Court.