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

The Courts of Appeal issued six decisions relating to the California Environmental Quality Act during the third quarter. Most of the decisions relate to attorneys fees and litigation procedure. The one substantive EIR case upholds the UC Berkeley stadium renovation EIR against a laundry list of CEQA claims. The most interesting news is the split between panels of the First District on the important procedural question of whether project opponents must exhaust administrative remedies before challenging categorical exemption decisions.

Court of Appeal Refuses to Authorize A New Theory for Recovery of Attorneys Fees Under CCP Section 1021.5: *Ebbetts Pass Forest Watch v. California Dept. of Forestry and Fire Protection*, (2010) 187 Cal.App.4th 376; rev. filed 9/21/10.

Generally, only a prevailing party in a CEQA case can bring a claim for attorneys fees under the so-called "private attorney general" doctrine. Here the Court of Appeal considered a novel claim by CEQA petitioners that they were successful parties and entitled to attorneys fees under the private attorney general doctrine, even though the California Supreme Court had rejected their challenge to timber harvest plans. (*See Ebbetts Pass Forest Watch v. California Dept. of Forestry Fire Protection* (2008) 43 Ca1.4th 936.) The Court of Appeal upheld the trial court's denial of the motion for attorneys fees, stating that granting attorneys fees under petitioner's theory "would be an unwarranted expansion of section 1021.5."

Petitioners claimed that they entitled to an award of over $300,000 in attorneys fees because the Supreme Court's decision "clarified the law regarding California Department of Forestry's (CDF) authority and duty to analyze herbicide use." Petitioners argued that the Supreme Court had expressly agreed with three interpretations of law that they had argued for in their briefing. The Court of Appeal rejected this claim, concluding that "when the Supreme Court's agreement statements are read pragmatically and in context, they do not support the conclusion that plaintiffs succeeded on any significant issue in the litigation that achieved some of the benefit they sought in bringing suit."

AUTHORS

Michael H. Zischke
415.262.5109

Andrew K. Fogg
310.284.2178

Sarah E. Owsowitz
415.262.5122

Lisa M. Patricio
310.284.2220

James R. Repking
310.284.2214

CASES IN THIS ISSUE:

Ebbetts Pass Forest Watch v. California Dept. of Forestry and Fire Protection

California Oak Foundation v. Regents of University of California

Hines v. California Coastal Commission and *Tomlinson v. County of Alameda*

Torrey Hills Community Ass'n v. City of San Diego

Center for Biological Diversity v. County of San Bernardino

One Justice issued a vigorous dissent, concluding that petitioners were partially successful, and that their success involved issues of significant concern to the general public concerning CEQA and the Z-berg-Nejedly Forest Practice Act of 1973. The dissent argues that the Supreme Court's decision created new law because it set forth two new legal principles regarding CDF's authority and its duty to review potential herbicide use and also reached a conclusion of law regarding the scope of the project covered by a timber harvest plan that had not been set forth in any other published decision.

EIR For Renovation of UC Berkeley's Memorial Stadium Upheld Against a Laundry List of CEQA Claims: *California Oak Foundation v. Regents of University of California*, (2010) 188 Cal.App.4th 227.

The case involved the UC Berkeley stadium renovation project, which became famous when it was delayed for over a year by protesting tree-sitters. The Court of Appeal had earlier rejected a motion to stop the project from proceeding. In this decision, issued the day before the season's first football game at the stadium, the Court rejected a wide range of CEQA challenges to the EIR. The Court also rejected claims that the project itself violated the substantive requirements of the Alquist-Priolo Earthquake Fault Zoning Act.

Petitioners argued that the EIR inadequately described the project's baseline geological conditions, and that UC should have recirculated the Draft EIR to reflect the issuance of new geologic reports. Petitioners also contended that the Regents failed to disclose a disagreement of among experts related to geological conditions. The Court of Appeal rejected these claims, finding that the EIR accurately described the existing baseline conditions, and this information was confirmed by the geotechnical study made available after circulation the Draft EIR. The geological study did not require recirculation because it only confirmed information already contained in the Draft EIR.

Petitioners also contended that the EIR's project description lacked the degree of specificity required by CEQA for a "project-level" EIR. The Court rejected this claim, finding that the EIR's project description complied with CEQA Guidelines section 15124 because it contained sufficient detail to permit reasonable and meaningful environmental review based on the information known at the time. Petitioners also argued that the EIR's Statement of Objectives was impermissibly vague, but the Court found that the objectives, though "stated broadly," still served the "requisite purpose of assisting in the development and evaluation of a reasonable range of alternatives."

Petitioners alleged that the EIR contained an inadequate analysis and comparison of the project alternatives. The Court found that the EIR's methodology for presenting and analyzing project alternatives in a matrix and narrative format was appropriate despite some broad wording. It concluded that because the significant environmental impacts and corresponding components of each of the alternatives were evaluated against the corresponding component of the project, the EIR demonstrated a good faith effort to provide a meaningful discussion of a range of reasonable project alternatives.

Petitioners claimed that the EIR did not adequately evaluate archeological and biological resources, and also that the Regents' CEQA findings and statement of overriding consideration on these subjects were not supported by substantial evidence. The Court rejected these claims, finding that substantial record evidence supported both the EIR analysis as well as the Regents' findings.

The Court also rejected a claim of improper delegation (a claim that usually arises in challenges to state agency projects where either an official or a subsidiary committee makes a decision to certify an EIR. The Court held that the Regents Committee on Buildings and Grounds was the appropriate body to certify the EIR, because that Committee was also the decision-making body with authority to approve the renovation project. Finally, the Court rejected a claim that an earlier decision about the budget for the project was an improper approval in advance of the EIR.

First District Court of Appeal Issues Contradictory Decisions Regarding Whether Project Opponents Must Exhaust Administrative Remedies Before Challenging Categorical Exemption Decisions. *Hines v. California Coastal Commission* (2010) 186 Cal.App.4th 830 and *Tomlinson v. County of Alameda* (First District Case No. A125471, October 6, 2010) Cal.App.4th 2010 WL 3897507.

In *Hines*, petitioners challenged Sonoma County's and the Coastal Commission's approval of a single-family residence within the 100-foot setback from riparian vegetation recommended by the certified local coastal program, including the County's reliance on a categorical exemption from CEQA for new construction and conversion of small structures to support the approval (CEQA Guideline 15303).

In addition to claims under the Coastal Act, petitioners claimed that the project was not exempt from CEQA because it would impact riparian wildlife and open the door to successive projects of the same type in the same area, impacting cumulatively sensitive riparian resources. Though petitioners had participated in the County's administrative process, they failed to raise this precise issue. The Court held that the petitioners failed to exhaust their administrative remedies, despite ample notice that County staff considered the project exempt and several opportunities during public hearings to raise any objection or argument with respect to the categorical exemption. The Court also found that the exemption was proper, in any event, because there was no evidence in the record that construction of a modest single-family home within the setback area would have any significant adverse effect on the environment. It also found petitioners claim that the approval would open the door to successive similar development having a potentially cumulative impact on sensitive riparian resources was speculative.

Hines contradicted an earlier ruling by a different panel of the First District Court of Appeal in *Tomlinson v. County of Alameda* (reported in the CCN 2010 Second Quarter CEQA Case Law Update). In *Tomlinson*, the Court held that exhaustion is not required when challenging an agency's reliance on a categorical exemption for infill development (CEQA Guideline 15332). After *Hines*, the *Tomlinson* panel re-issued its opinion to acknowledge *Hines*, but refused to alter its holding that exhaustion is not required to challenge the use of a categorical exemption. The *Tomlinson* Court found that *Hines* does not purport to interpret the statutory requirement for exhaustion or the analysis in *Azuza Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165 that exhaustion applies only where CEQA provides a public comment period or there is a public hearing before a notice of determination is issued.

Note: The new Tomlinson decision was issued only recently, and the time for the parties to seek depublication or Supreme Court review has not yet expired.

CEQA Action Challenging a Tentative Map Approval Dismissed for Failure to Serve a Summons Within 90 Days, and Petitioners Did Not Make a Sufficient Showing it Was Impossible to Obtain a Summons; Action Also Dismissed for Failure to Make Written Request for a Hearing Within 90 Days: *Torrey Hills Community Ass'n v. City of San Diego* (2010) 186 Cal.App.4th 429.

In this case, the petitioners did not serve a summons with 90 days of filing the action, as Government Code section 66499.37 requires for any action challenging a subdivision map. Petitioners also failed to make a written request for a hearing within 90 days of filing the action, under Public Resources Code 21167.4. The Court of Appeal held that the case was properly dismissed on both grounds.

The petition for writ of mandate was filed in early November 2008. In mid-November, the Fourth District issued its decision in *Friends of Riverside's Hills v. City of Riverside* (2008) 168 Cal.App.4th 743, confirming that the requirement for service of a summons within 90 days applies to any action challenging a map approval under the Subdivision Map Act, including a CEQA challenge. The respondent city and real party developer specially appeared and moved to dismiss for failure to timely serve the summons, and the trial court granted this motion.

On appeal, petitioner argued that service of a summons was impossible under Code of Civil Procedure section 583.240, which exclude from the time calculated for service deadlines any time during which service was impossible due to causes beyond petitioners' control. Petitioner proffered several letters attesting that the San Diego Superior Court refused to issue summons when a case involved a CEQA cause of action. The Court of Appeal noted there was no case law expressly holding that section 583.240 applied to the 90-day rule under Government Code section 66499.37. The Court then held that even if it did apply, petitioners had made an insufficient showing of impossibility, because they had not made any specific effort to obtain a summons from the trial court, instead relying on the general declarations and letters stating that the court would not issue a summons in a CEQA case.

As to the section 21167.4 request for a hearing, the Court held that an oral request was insufficient. In response to petitioners' argument that there was no specific requirement for a written request, the court noted that section 21167.4 requires such a request to be "filed." Citing *County of Sacramento v. Superior Court* (2009) 180 Cal.App.4th 943, as well as other case law, the Court upheld dismissal of the action on the additional basis of the failure to request a hearing in writing.

Court of Appeal Clarifies Standards for Attorneys' Fee Awards for Greater Success in Appellate Court than in Trial Court. *Center for Biological Diversity v. County of San Bernardino* (2010) 188 Cal.App.4th 603.

Petitioners brought suit challenging a 57-unit residential subdivision near Lake Arrowhead, California, alleging both CEQA and non-CEQA claims. The trial court rejected the CEQA claims, but issued a peremptory writ on the non-CEQA claims. The County and Real Parties appealed the trial court's ruling on the non-CEQA claims, and Petitioners cross-appealed on the CEQA claims.

Subsequently, Petitioners sought costs and attorneys' fees in excess of $191,000. Due to the limited success on the CEQA claims, the trial court awarded plaintiffs $50,000 in attorneys' fees and $1,000 in costs. County and Real Parties appealed the fee award, and Petitioners cross-appealed. The parties filed a stipulation to stay this appeal pending resolution of the underlying appeal, which the appellate court rejected. The parties then stipulated to dismiss the appeals of the attorney fee order. The trial court's attorney fee order thus became final and non-appealable.

The court of appeal, in a prior non-published opinion, reversed the trial court's ruling on the CEQA claims and modified the writ to require additional CEQA review. Following the appellate court ruling, Petitioners sought attorneys' fees in excess of $560,000, which included over $136,000 for the underlying trial proceedings that were not granted as part of the prior $50,000 fee award, over $180,000 for the appellate proceedings, and over $40,000 for the motion for fees, plus a multiplier.

The trial court refused to consider an additional request for the prior trial proceedings because that judgment had become final. The trial court awarded $62,530 for the appellate proceedings and $10,000 for the motion for fees. The trial court declined to apply a multiplier. Further, the trial court disallowed hourly rates of out-of-town counsel that exceeded local Inland Empire rates of $370 per hour. Finally, the trial court reduced the number of hours permitted for the appellate proceedings as duplicative of the work undertaken at the trial proceedings.

The appellate court reversed the trial court's ruling on the fee award. The appellate court concluded that the court was within its power to consider a *supplemental* fee award for the trial proceedings based on the increased success achieved at trial. The court also held that out-of-market rates could be applied where there were no local attorneys with sufficient skills to handle the litigation. Finally, the appellate court rejected the concept that the appellate proceedings were so duplicative of the trial proceedings so as to require a reduction in the number of hours.

The appellate court expressly declined to address whether a multiplier was appropriate. However, it noted that to the extent that full market rates are used to calculate the fee award, a multiplier may not be appropriate. The appellate court noted that Petitioners were entitled to fees for the instant appeal in addition to their prior work. The appellate court remanded for the trial court to make a new award consistent with the opinion.

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