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2010 FOURTH QUARTER CEQA CASE LAW UPDATE

The fourth quarter of 2010 was another relatively busy time for CEQA case law. Most significantly, there were two decisions evaluating the proper baseline conditions for conducting an environmental impact review (*Sunnyvale West Neighborhood Association v City of Sunnyvale City Council and Cherry Valley Pass Acres and Neighbors v. City of Beaumont.*) It was also the culmination of the busiest year in CEQA jurisprudence ever, with 29 published opinions, including three from the California Supreme Court.

In other significant fourth quarter news, the California Supreme Court has granted review in the case of *Tomlinson v. County of Alameda* (previously published at 188 Cal.App.4th 1406). As we reported in our Third Quarter Update, in *Tomlinson*, the Court held that a party challenging the use of a CEQA exemption is not required to exhaust administrative remedies, even when the lead agency holds a hearing at which the CEQA exemption could have been raised. Cox, Castle & Nicholson represented the League of California Cities and the California State Association of Counties in urging the court to review this decision, and will be filing an amicus brief for those organizations as well.

In contrast to the hyper-active year in the courts, there was little CEQA legislation in 2010 and virtually none of any significance. (A summary of 2010 CEQA legislation can be found here.).

The cases that were decided in the fourth quarter are described below.

Delay Period for Consideration of Demolition Permit Did Not Render The Permit a Discretionary Act: *Friends of the Juana Briones House v City of Palo Alto* (2010) 190 Cal.App.4th 286 (petition for review filed January 4, 2011).

Here the Court considered whether issuance of the demolition permit for a historic home was a discretionary act, under the specific municipal code provisions in the City of Palo Alto. Those provisions provided for a mandatory delay or moratorium once an application was filed, but also provided that the demolition permit must

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be issued if two requirements were met. Those two requirements were that the residence be vacant, and that any tenants must be notified.

In reviewing the case law governing what is a ministerial action and what is a discretionary action, the Court described the case law generally as having developed a functional test for distinguishing ministerial from discretionary decisions. Under this functional test, if the agency lacks the power to modify the project to respond to environmental concerns, the project is ministerial. Or, if the applicant can legally compel the approval of the permit without any changes that alleviate environmental impacts, then the approval is ministerial and not subject to CEQA. Based on the standards in the city ordinance, the Court held that the permit was ministerial.

The Court rejected arguments that the moratorium or delay provision rendered the decision discretionary, noting that the city did not have any power as a result of this delay period to modify the demolition. This distinguished this case from *San Diego Savings & Trust v. Friends of Gill* (1981) 121 Cal.App.3d 203, where there was a moratorium provision but that moratorium provision was also linked to some discretionary authority to change the proposed demolition.

The Court also rejected arguments that the city had the power to condition the project, and that the city had in fact imposed conditions. It found that these conditions (such as photographing the house and preserving plants) were in fact concessions voluntarily offered by the property owners. The Court also stated that the mere presence of conditions is not dispositive, and the pertinent test is the functional standard of whether the applicant can compel the issuance of the permit without imposition of conditions that mitigate environmental impacts.

Future Baseline for Evaluating Traffic Impacts Inadequate as a Matter of Law, and Not Supported By Substantial Evidence: *Sunnyvale West Neighborhood Association v City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351 (decision not yet final).

In this case, the city prepared an EIR for a four lane street extension project designed to improve traffic flow. The city used a baseline for evaluating traffic impacts of 2020 traffic conditions, on the basis that such projections were recommended by the local transportation authority in its transportation impact analysis guidelines, and also on the basis that the project would not be complete and operational until 2020.

The court rejected this baseline as the type of hypothetical baseline disallowed by the decision in *Communities for a Better Environment*. Surprisingly, the court treated this question as a matter of law, despite the directive from the California Supreme Court in last year's *Communities for a Better Environment* decision indicating that baseline determinations are reviewed under the substantial evidence standard. The court indicated that there was no case law specifically upholding the use of a future baseline beyond the expected date of project approval. The court also indicated that the CEQA Guidelines' use of the terms "normally" could not authorize a deviation from what it characterized as a statutory requirement to evaluate existing physical conditions as the baseline.

The court then went on to indicate that, even under the substantial evidence standard, there was no such evidence in the record supporting the use of the year 2020 baseline. The court noted that city staff estimated that the road extension would be operational in 2020, but stated that this was "merely a guesstimate." The court also held that the transportation authority guidelines were not substantial evidence justifying a difference CEQA baseline, because those impact assessment guidelines were not mandatory and also were not intended to cover CEQA requirements. Finally, the court held that the use of the 2020 future conditions baseline had skewed the project analysis with respect to a number of potential environmental impacts, so that use of this future baseline was prejudicial error, requiring the EIR to be set aside.[1]

[1] The *Sunnyvale West* decision is remarkable in several respects. The court first evaluates the baseline issue as a matter of law, even though the California Supreme Court held last year such determinations are reviewed under the substantial evidence standard. Then, when the court later applies the substantial evidence standard, the court reweighs the city's evidence, contrary to a long line of case law applying that standard. As this update went to press, the deadline for seeking depublication of this decision had not passed, and various public agency organizations were planning to file depublication requests. Mike Zischke and Andrew Sabey represented the League of California Cities and the California State Association of Counties as friends of the court in this case, and will be filing a depublication request on their behalf.

Negative Declaration for New Surface Mining Project on Federal Land Improperly Limited Environmental Review to Reclamation Plan Only: *Nelson v County of Kern* (2010) 190 Cal.App.4th 252 (request for modification pending, proceedings stayed by bankruptcy filing).

Here the Court of Appeal held that it was error for a county to limit CEQA review of a new surface mining project to only the reclamation plan for the mining project. The county had determined that, because the mine was located on federal land and the federal government had approved the mining, the county's authority was limited to the approval of the reclamation plan. The Court found, however, that both the Surface Mining and Reclamation Act ("SMARA") and the county code required the county to approve both the new mining and the reclamation plan before mining could commence. Based on this interpretation of the county's authority, and CEQA's requirement that a lead agency consider the "whole of the action" before it, the Court held that the county had to evaluate the mining as well as the reclamation plan.

The Court distinguished prior cases which had limited CEQA review to reclamation plans, noting that in those cases the mining operator had a vested right to continue mining and the lead agency was only approving a reclamation plan. Here, in contrast, the Court was considering a new mining proposal, and SMARA and the county code required the county approve the mining in addition to the reclamation plan.

The court also rejected the county's argument that a memorandum of understanding between the State of California and the Forest Service and Bureau of Land Management governed review of mining projects proposed on federal lands. The MOU generally provided for cooperation in permitting and review, but did not specifically limit CEQA review of proposed projects. In fact, the court found that the MOU reaffirmed the obligation of the county to comply with CEQA. Given that both federal and local approvals were required, the Court noted that both NEPA and CEQA applied to the proposed mining project.

Finally, the Court held that there was evidence in the record supporting a fair argument that the full project would have significant environmental impacts. This evidence included information about emissions from the mining project, and letters from the Regional Water Board and the Department of Fish and Game expressing concern about impacts on a blue line stream and on sensitive and threatened species. Accordingly, the Curt held than an EIR is required to be prepared for the project.

Petitioners Conferred a Significant Public Benefit, and Their Losing Claims Were Related to Their Winning Claims for Purposes of Determining the Fee Award: *Environmental Protection Information Center v. California Dept. of Forestry and Fire Protection*, 190 Cal.App.4th 217

Here the Court of Appeal considered whether CEQA petitioners who lost their lawsuit could nonetheless recover attorneys' fees under the private attorney general doctrine in Code of Civil Procedure Section 1021.5. The Court held that the petitioners in the underlying Headwaters Agreement CEQA litigation conferred a significant public benefit for the purposes of attorney fee eligibility, and their losing claims were related to their winning claims for the purposes of determining attorneys' fee awards. In *Environmental Protection Information Center v. Department of Forestry & Fire Protection* (2008) 44 Cal.4th 459 ("EPIC II"), the California Supreme Court set aside the CEQA review for the Headwaters Agreement on the basis that there was no single, integrated sustained yield plan under forestry rules, and on the basis of the "no surprises" clause contained in the agreement.

In the published portions of the opinion, the Court first held that the petitioners had conferred a significant public benefit for purposes of attorney fee eligibility. The Court held that no specific tangible or concrete environmental benefit is required; instead, it is to enforce a statutory policy. The Court held that a significant benefit was conferred by the *EPIC II* rulings.

The Court remanded the issue of attorneys' fees to the trial court, and stated that the trial court must evaluate whether the extent of settlement discussions in the litigation demonstrated that private enforcement was necessary. It held that for the purposes of demonstrating prelitigation settlement efforts, it is not sufficient simply to demonstrate that a petitioner exhausted administrative remedies on the issues that were litigated.

Finally, the Court held that the fee award need not be reduced based on petitioners' partial success, because the losing claims were substantially related to the winning claims. The court also held that the trial court did not abuse its discretion in awarding fees based on San Francisco rates rather than Humboldt County rates, based on declarations from local counsel that they would not take the case, given the specialized area of law involved. The Court cited the holding in *Center for Biological Diversity v. County of San Bernardino* in support of this ruling.

An Adjudicated Water Right Was Proper Baseline for Review of Water Supply Impacts in EIR: *Cherry Valley Pass Acres and Neighbors v. City of Beaumont*, 190 Cal.App.4th 316 (request for review filed January 4, 2011).

Here the Court evaluated the EIR for a 560 unit residential specific plan on 200 acres of land that had been use previously as an egg farm. The Court considered whether the proper baseline for water was the adjudicated groundwater basin water rights for the area, which totaled 1484 acre feet per year, or the actual current groundwater basin water usage, which was then approximately 50 acre feet per year, but had recently averaged 1340 acre feet per year when the egg farm was in operation. The Court upheld the City's use of the adjudicated water right as the proper baseline, and rejected a comparison of that adjudicated water right to the type of hypothetical baseline that was rejected in *Communities for a Better Environment v. South Coast Air Quality Management Dist*. (2010) 48 Cal.4th 310 and other decisions. The Court held that based on the actual recent water usage and the adjudicated right of the property owners to use that amount of water in the future on the property that the adjudicated water right was not a hypothetical baseline, but instead, qualified as the actual condition that existed on the ground.

The Court also upheld the city's determination that continued agricultural use of the land was not economically feasible as mitigation for the loss of agriculture land, and the various alternatives involving continued agriculture use were similarly not feasible. Finally, it upheld the statement of overriding considerations as adequate and supported by substantial evidence, even though the project benefits were stated in general terms.

Supreme Court Holds That "Private Attorney General" Attorneys' Fees Cannot Be Disallowed on the Basis of Non-Pecuniary Interest in the Litigation: *In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206.

This case concerns the award of attorneys' fees pursuant to the "private attorney general" doctrine and Code of Civil Procedure § 1021.5 and arose outside the CEQA context. However, it is significant for CEQA practitioners because in it the Supreme Court rejects the line of cases begun with *Williams v San Francisco Board of Permit Appeals* (1999) 74 Cal.App.4th 961, pursuant to which trial courts have had the discretion to disallow attorneys' fees on the basis of a non-pecuniary (or non-financial) personal interest in the litigation.

One of the requirements that courts must consider when determining eligibility for attorneys' fees is the necessity and financial burden of private enforcement. This had previously been interpreted to mean that litigants who have a financial interest in litigation may be disqualified from obtaining an award of attorneys' fees when the expected gain from the litigation effectively offsets the cost of the litigation. Further, under several appellate cases, non-financial or non-pecuniary personal interests in a case, such as protecting of the quality of a view for the aesthetic appeal of a home, could also be considered in determining whether a litigant is eligible for attorneys' fees. This decision eliminates a court's ability to consider such personal, non-financial, interests in disallowing attorneys' fee awards to CEQA petitioners.

Court of Appeal Applies CEQA Substantial Evidence Standard to Challenges to Urban Water Management Plans: *Sonoma County Water Coalition v. Sonoma County Water Agency*: 189 Cal.App.4th 33.

Here, the Sonoma County Water Coalition challenged the legal adequacy of the Sonoma County Water Agency's 2005 Urban Water Management Plan. The Urban Water Management Planning Act requires water suppliers in urban

areas, such as the Water Agency, to adopt water management plans every five years to ensure adequate water supplies to serve existing and future water demands. The Coalition unsuccessfully challenged the Plan before the Water Agency, and then sought a writ of mandate to enjoin the Water Agency from adopting or implementing the Plan and directing them to adopt a legally adequate plan. The trial court found the Plan legally deficient on grounds that it: (1) failed to provide the detailed water supply information required by the statute; and (2) was not prepared in coordination with state and federal agencies as required.

The First District Court of Appeals overturned the trial court, finding that the trial court improperly made de novo determinations and did not accord the requisite deference to the expertise and discretion of the Water Agency required by the substantial evidence standard of review. In doing so, for the first time, the Court of Appeal employed CEQA case law to illuminate the proper application of the substantial evidence standard of review to actions challenging Urban Water Management Plans. The Court held that its power begins and ends with a determination as to whether there is any substantial evidence, contradicted or otherwise, to support the Water Agency's decision. It noted that this deferential standard is satisfied if the record contains relevant information that a reasonable mind might accept as sufficient to support the conclusion reached. In reversing the trial court, the Court of Appeal found that the trial court failed to defer to the Water Agency's expertise and improperly weighed and considered conflicting evidence taken from Coalition's arguments.

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