COX CASTLE NICHOLSON

LAND USE & NATURAL RESOURCES

SECOND QUARTER 2011 VOLUME 2

COX CASTLE & NICHOLSON LLP
2011 SECOND QUARTER CEQA CASE LAW UPDATE

There was substantial CEQA activity in the Courts of Appeal during the second quarter of 2011, with eight important decisions summarized in this Update. In a case arising out of the proposed new stadium for the 49ers, a Court of Appeal ruled that a city does not need to conduct a CEQA review before approving a "term sheet" for a proposed project. The decisions also include a ruling about whether an EIR must evaluate indirect impacts on school facilities, and a case holding that the emergence of climate change as a CEQA issue may not be sufficient information in itself to require a supplemental EIR for a project that was already reviewed under CEQA. There is an important procedural ruling that should restrict the ability of project opponents to litigate issues that are never presented until a last minute "data dump" at the final project hearing. There is also a significant decision on the scope of CEQA overall, confirming earlier court decisions to the effect that CEQA protects the environment from project impacts, but is not designed to protect proposed projects against pre-existing conditions.

City's Entry into "Term Sheet" with Project Proponent Was Not Itself a Project Requiring CEQA Review: *Cedar Fair L.P. v. City of Santa Clara*, (2011) 194 Cal.App.4th 1150 (request for depublication pending).

In this case, the Sixth District Court of Appeal held that the City of Santa Clara's approval of a "term sheet" for the new 49ers football stadium, which set out in some detail the proposal for a new stadium, was not itself a project requiring CEQA review. The issue was whether the term sheet, as a practical matter, committed the City to the project such that it effectively precluded alternatives or mitigation measures that CEQA would otherwise require to be considered, including the alternative of not proceeding with the project.

The Court relied on the California Supreme Court's decision in *Save Tara v. City of West Hollywood*,(2008) 45 Cal.4th 116, which lays out the test for assessing whether a government agency has committed itself to a project. In *Save Tara*, the Supreme Court concluded that merely inserting a "CEQA compliance condition" in an

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agreement will not save the agreement from being considered a project if, in light of all the surrounding circumstances, the agreement commits the agency to proceed. *Cedar Fair* is the first Court of Appeal decision to wrestle with the *Save Tara* test in the context of a term sheet (sometimes also called a "letter of intent"). The Court of Appeal was sensitive to the fact that the modern phenomenon of public-private partnerships for large development projects makes "the time of approval under CEQA more difficult to ascertain since a local agency may be a vocal and vigorous advocate of a proposed project as well as an approving agency." The Court acknowledged that "determining which side of the *Save Tara* line the term sheet falls is not an easy judgment call." But the Court also noted that publicly advocating for a project does not constitute an approval so long as the agency has clearly reserved its discretion to deny or to modify the project as may be called for by CEQA.

Despite the petitioner's allegations that the terms sheet and the City's public pronouncements of support for the stadium made clear that the City had effectively issued an approval, the Court ultimately relied on the actual provisions of the term sheet to conclude that, while detailed and robust, it expressly preserved the City's sole discretion to decline to proceed or to alter the project based on the results of CEQA. Therefore, the term sheet was not an "approval" under CEQA and did not itself require CEQA review.

Note: A request for depublication is pending. Ken Bley of Cox, Castle & Nicholson is representing homebuilders in opposing the depublication request, and public agency groups are also opposing depublication.

Despite Payment of School Impact Fees Under SB 50, Lead Agencies May Also Need to Consider Indirect Impacts to Schools in CEQA Documents: *Chawanakee Unified School Dist. v. County of Madera* (2011) 196 Cal.App.4th 1016 (petition for review filed August 1, 2011).

In *Chawanakee*, the Fifth District Court of Appeal issued a narrow interpretation of the 1998 school facilities mitigation statute (SB 50). SB 50 was intended to remove the need to consider or mitigate school facilities impacts as part of the CEQA process, providing that the payment of statutory school fees is "the exclusive methods of considering and mitigating impacts on school facilities" caused by new development.

The case arose out of an EIR for a 1500-plus acre planned development project and challenges to the EIR for that project based on school facilities issues. In reviewing these challenges, the Court considered the scope of SB 50 and distinguished between direct and indirect impacts. The Court held that, although the plain language of SB 50 precludes consideration and implementation of additional mitigation measures for a project's direct impacts on school facilities, SB 50 does not excuse or limit CEQA's requirements for analysis and mitigation for indirect impacts on parts of the physical environment that are not school facilities. Based on this distinction, the Court then rejected a school districts challenge to the EIR's analysis of overcrowding at existing schools. The Court stated, that SB 50 does not prohibit analysis and mitigation of increased traffic impacts near existing schools while new schools are under construction, because a traffic impact is not an impact on school facilities. The Court reasoned that such analysis and mitigation is appropriate because the additional students traveling to existing schools will impact roadways and traffic before they set foot on the school grounds and the capped school facilities fee will not be used by a school district to improve intersections affected by traffic. The Court also stated that the impacts of constructing new schools are not impacts on school facilities, and therefore not limited by SB 50. Based on these general holdings, in unpublished portions of the opinion, the Court found that the EIR analysis was not sufficient.

Note: The County and the project applicant jointly filed the pending petition for review. Andrew Sabey of Cox Castle & Nicholson and a homebuilding association counsel filed an amicus letter supporting review, on behalf of several homebuilding groups.

CEQA Claims Relating to Construction Impacts Found Moot Where Project Construction Was Already Completed: *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538.

This decision by the Second District Court of Appeal includes three rulings on common issues in CEQA litigation: 1) whether claims are to be independently reviewed by a

court or reviewed under the deferential substantial evidence test, 2) when CEQA claims are rendered moot by construction of the project, and 3) when an evaluation of cumulative impacts is required. The case arose out of Baykeeper's challenge to the Legacy Park project, a project that includes stormwater detention, habitat restoration, wastewater treatment, and a park in Malibu.

Regarding the applicable standard of review, the Court faced a familiar set of arguments, with the petitioners arguing that they raised "compliance with law" claims that should be independently reviewed by the Court, and the City arguing that the legal challenges related to factual determinations that should be reviewed only to determine if they were supported by substantial evidence. In a significant discussion of the applicable standard of review, the Court found that the arguments of inadequate disclosure under CEQA here were substantial evidence questions. The Court cited prior case law holding that how a potential impact is disclosed, discussed and studied is a question that is reviewed under the substantial evidence standard, and courts should not engage in independent de novo review. The Court also noted the lines of case law holding that project opponents have the burden of proving the certified EIR is inadequate, and the local agency's certification of the EIR is presumed correct.

The Court then considered whether Baykeeper's claims regarding construction-related impacts were rendered moot because the project was fully constructed and operating. The Court held that such claims were moot, because the Court could not fashion any effective relief (had the court found any error) given that the construction process was over. The Court did consider, however, claims relating to ongoing operational impacts of the project.

Finally, the Court rejected Baykeeper's claims that the City improperly deferred analysis and mitigation of the cumulative impacts on groundwater mounding. The Court found that the groundwater mounding study requested by the Regional Water Quality Control Board was not improperly deferring review of the project because the project did not discharge anything to the groundwater; therefore, the study was not necessary for the City to conclude no cumulative analysis of groundwater impacts was required. The Court affirmed the trial court decision in its entirety.

EIR's Seismic Impact Mitigation Measures Provided Sufficient Standards of Performance and Did Not Constitute Improper Deferment: *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884.

Here, the First District Court of Appeal reviewed the adequacy of a revised EIR certified by the City of Oakland to address a project's seismic risks. The EIR incorporated revised mitigation measures that, among other things, required a) the preparation of building-site specific geologic reports and b) compliance with all building code requirements, including special requirements where warranted by soil or other conditions, and implementation of all recommendations from the soil reports. The trial court found the revised EIR adequate and discharged the writ. The Court of Appeal affirmed, finding that the revised EIR's discussion of seismic impacts provided sufficient standards of performance, adequately committed the project to compliance with statutory schemes and site-specific mitigation measures, and did not defer mitigation.

In affirming the lower court's decision, the Court rejected arguments advanced by the project opponents that a project would have significant unavoidable seismic impacts, as a matter of law, "unless buildings could be repaired and ready for occupancy after a major earthquake." The Court further rejected an argument that novel, performance-based seismic design guidelines should be mandated in lieu of reliance on current building standards. The EIR had concluded that with the application of current building standards, combined with site-specific mitigation measures to be developed following additional geologic testing, constituted adequate mitigation. The Court agreed and held that it was not an abuse of discretion for the City to elect to rely on existing building standards.

Notice of Determination Must Be Posted for 30 *Full* Days. *Latinos Unidos de Napa v. City of Napa*, (First District Case No. A129584, June 27, 2011) (2011) 196 Cal.App.4th 1154.

CEQA requires local agencies to file and the County Clerk to post "for a period of at least 30 days" a notice of determination ("NOD") whenever a local agency decides to approve or carry out a project requiring preparation of a negative declaration or EIR. If an NOD is posted, then the statute of limitations for a CEQA challenge to the local agency approval is 30 days from the date the NOD is posted. If an NOD is not posted, the statute of limitations is 180 days.

In *Latinos Unidos de Napa*, the First District Court of Appeal held that, in order for the 30-day statute of limitations to apply, the NOD must be posted for the "entire" 30-day posting period, not including any partial days. Further, the Court concluded, based on California Code of Civil Procedure section 12, that the 30 days did not include the first partial day when the NOD was posted, or the last day when the NOD was removed. Accordingly, if the NOD is removed by the County Clerk before the close of business on the last day, that day would not count, and the 30-day statute of limitations would not apply.

Petitioners Seeking Attorneys Fees Under the Private Attorney General Statute Must Have Achieved More Than a Procedural Victory: *Center for Biological Diversity v Department of Fish & Game* (2011) 195 Cal.App.4th 128 (petition for review filed June 14, 2011; request for depublication also pending).

In this case, the First District Court of Appeal concluded attorney's fees should not be awarded where an environmental lawsuit resulted in no significant benefit to the general public. In 2008, the Center for Biological Diversity (CBD) challenged the Fish and Game Commission's decision not to list the California pika under the California Endangered Species Act. The trial court granted CBD's petition on limited grounds, namely that the Commission had applied the incorrect legal standard in issuing findings refusing to list the pika. In 2009, the Commission adopted new findings reaffirming its earlier decision. The trial court granted $257,675 in attorneys fees, which the Court of Appeal reversed. Relying on *Karuk Tribe of Northern California v. California Regional Water Quality Control Board, North Coast Region*, which held that Code of Civil Procedure section 1021.5 does not support an award of attorneys' fees for a remand to an agency to reconsider a matter for a perceived procedural defect, the Court of Appeal looked to the "impact of the action, not the manner of its resolution" and found that because the trial court's remand order to the Commission was on purely procedural grounds, no fee award was justified.

Lead Agencies that Supply Water May Integrate Required Water Supply Assessments Into their CEQA Process, Petitioners Cannot Rely on Last Minute "Document Dumps" to Exhaust Administrative Remedies and Climate Change Generally Does Not Require Preparation of a Supplemental EIR When a Project Has Already Been Reviewed Under CEQA: *Citizens for Responsible Equitable Environmental Development v. City of San Diego*, 196 Cal.App.4th 515 (petition for review filed July 18, 2011; request for depublication also pending).

This is an important decision with significant holdings related to exhaustion of administrative remedies, greenhouse gas emissions, and water supply assessments. The Fourth District Court of Appeal considered a challenge to the City of San Diego's certification of an addendum to a 1994 EIR for a residential development. The new project was one of the last phases of the overall development evaluated in 1994. The appellant contended the City did not follow the Water Code statutory procedure for adopting a water supply assessment (WSA) and that new information on drought and the effect of greenhouse gas emissions on climate required preparation of a supplemental EIR.

First, the Court held it was appropriate for the City to approve the WSA as an integrated part of the City's CEQA review, because the City also served as the water supplier for the project. The decision clarifies how cities and counties should implement Water Code section 10910(g), which requires the governing body of a public water system for a project to approve a WSA and provide that WSA to the lead agency. Although the WSA contemplates two agencies being involved in the approval of a public water system, often the public water system for the project and the CEQA lead agency are one and the same, as was the case here. Here, the City prepared the WSA, included the WSA in the addendum, and considered the WSA along with the addendum without a separate hearing or separate process. The Court held it was appropriate for the WSA to be integrated into the CEQA addendum process. Consistent with this ruling, the Court also held that it is not necessary for the City to provide separate notice of consideration of

the WSA, or to separately approve a WSA, where the lead agency proceeds by a single, integrated, noticed public process.

Next, the Court addressed an increasingly common situation in CEQA practice, where a party waits until the last minute in the CEQA and public hearing process to submit voluminous documents to support its objections to a project. In this case, the appellant never appeared at the lead agency's two CEQA hearings, and submitted two generalized comment letters. At the first of those hearings, however, the appellant also submitted a DVD with 4,000 pages of electronic documents, and the appellant later claimed this submission was sufficient to exhaust administrative remedies on claims that drought issues required a subsequent EIR. Citing prior rulings that issues must be "fairly presented," and noting that the group never cited to the DVD documents or explained them, the Court stated that the City cannot be expected to review thousands of pages to find support for the generalized claim than an SEIR was required. On the drought issue, the Court similarly held that the appellant had forfeited that issue in their briefing because they did provide evidence that supported the agency's decision and show how that evidence was lacking. In sum, the Court found that the issue was not fairly presented either to the City or to the Court.

Finally, the Court addressed whether claims concerning climate change constitute new information that can require a supplemental EIR under Public Resources Code section 21166. The Court first noted that the climate change issue was also only presented in the DVD documents, so the appellant failed to exhaust their remedies. The Court addressed the merits of the issue, however, and rejected the argument that a supplemental EIR was required because of "new information on the nexus between greenhouse gas emissions and climate change." The Court found that "information on the effect of greenhouse gas emissions on climate was known long before the City certified the EIR in 1994." Based on this, the Court held that information regarding climate change was not new information "which was not known and could not have been known at the time the [EIR] was certified as complete" under Public Resources Code section 21166(c).

The Court's holdings on exhaustion of remedies and climate change are significant. A number of trial courts have rejected claims that climate change is sufficient in itself to require supplemental EIR, but this is the first appellate ruling to so hold. Also, the "document dump" tactic has become increasingly common, and the decision recognizes that tactic for what it is – an attempt to trap a public agency by presenting issues in a manner that is calculated to make it as difficult as possible for the agency to evaluate and respond to the submitted information.

Note: This decision was initially unpublished, and publication requests were filed by numerous public agencies and agency groups as well as homebuilders. Sarah Owsowitz of Cox Castle & Nicholson represented homebuilding organizations in seeking publication of the decision, and is representing those same organizations in opposing the pending request for depublication.

CEQA Protects the Environment from Project Impacts; It Does Not Protect the Project from the Existing Environment: *South Orange County Wastewater Authority v. City of Dana Point*, --- Cal.Rptr.3d ----, 2011 WL 2576837, Cal.App. 4 Dist., June 30, 2011 (No. G044059).

This decision by the Fourth District Court of Appeal is the latest in a long-running debate about the extent to which CEQA requires analysis and mitigation of existing environmental conditions that affect a proposed project, as opposed to the impacts of the new project. This debate generally focuses on the interplay between CEQA Guideline 15126.2(a), which states that an EIR must analyze any significant effects a project may cause by bringing people to an area affected by an existing conditions, and the decision in *Baird v Contra Costa* (1995) 32 Cal.App.4th 1464, where the court rejected a claim that an EIR was required for an addiction treatment facility on the basis of pre-existing soil contamination in the area. Baird and its progeny have often been described as establishing the rule that CEQA is intended to protect the environment against the impact of projects, and not vice versa.

The *South Orange* decision follows and strengthens the *Baird* line of cases. The case arises out of a plan to develop nine acres adjacent to a sewage treatment plant in the City of

Dana Point. The City approved designations and entitlements to increase residential density and permit mixed use development. The South Orange County Water District objected because the new residents would be exposed to obnoxious odors and noise from its existing sewage treatment plant. The court stressed that the District's real concern was to protect itself from nuisance complaints by potential neighbors, while forcing the developer to pay millions for the cost of improvements to the plant in the guise of mitigation.

The Court upheld the City's use of a mitigated negative declaration and rejected the District's claim that an EIR was required, based largely on the *Baird* principle that CEQA protects the environment from projects, not vice versa. The Court found that the District cited no case law and no statutory authority to extend the EIR requirement to situations where the environment has an effect on a project. In so ruling, the Court suggested that CEQA Guideline Section 15126.2, which requires an EIR to analyze any significant environmental effects the project might cause by bringing development and people to the area affected by a project, may be inconsistent with the CEQA statute to the extent it is used as authority to require analysis of impacts of the existing environment on the project. Generally, the Court noted that the Legislature did not enact CEQA to protect people from the existing environment, as that function is fulfilled by a variety of other statutes and regulations, including substantive restrictions on development in or near hazardous wastes sites, earthquake faults, and floodways.

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