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COX, CASTLE & NICHOLSON LLP 2011 FOURTH QUARTER CEQA CASE LAW UPDATE

The California Courts of Appeal issued six CEQA decisions in the final quarter of 2011, including two decisions that focused on the question of what constitutes the appropriate baseline for analysis in CEQA documents. Overall, 2011 was another busy year for CEQA in the courts, with 27 published appellate decisions.

Readers should note that petitions for review were filed in the California Supreme Court for five of the six cases discussed below (the *Pfeiffer*, *Ballona Wetlands*, *Quantification Settlement Agreement*, *City of San Diego*, and *Citizens for East Shore Parks* decisions), including both of the baseline decisions. The Supreme Court recently denied the petition for review in the *Pfeiffer* case. With respect to the others, their legal status will remain uncertain until the Supreme Court decides whether or not to grant review (although the vast majority of review petitions are denied).

Suspended Corporations Cannot Bring CEQA Lawsuits, Even If They Have Started the Process of Reviving Their

Corporate Status. *Friends of Shingle Springs Interchange, Inc. v. County of El Dorado* (2011) 200 Cal.App.4th 1470.

In this case, an incorporated group, Friends of Shingle Springs, challenged the county's approval of a convenience store and gas station at an offramp along Highway 50. At the time of filing, however, the corporate group was a suspended corporation that lacked legal capacity to bring a lawsuit. The trial court dismissed the lawsuit on that basis, and the Third District Court of Appeal affirmed. The court held that the group could not take advantage of its claimed "substantial compliance" with the laws governing maintenance of good corporate standing because it did not fully revive its corporate capacity until *after* the statute of limitations applicable to both its CEQA and its Planning and Zoning Law claims had expired. Thus, it was not in substantial compliance with the law.

While the general rules regarding the capacity of suspended corporations to bring or defend lawsuits are

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CASES IN THIS ISSUE:

Friends of Shingle Springs Interchange, Inc. v. County of El Dorado
Pfeiffer v. City of Sunnyvale City Council
Ballona Wetlands Land Trust v. City of Los Angeles
Quantification Settlement Agreement Cases
City of San Diego v. Board of Trustees of the California State University
Citizens for East Shore Parks v. California State Lands Commission

well established, the question of whether a suspended corporation should be able to avail itself of the judicial doctrine of substantial compliance in the context of CEQA and planning law claims had not yet been considered by California courts. The court analyzed the substantial compliance doctrine in light of the strong expression of legislative intent that the short limitations periods applicable to CEQA and planning claims are designed to give project proponents and local agencies certainty that approved projects may proceed unless promptly challenged. The court declined to apply the substantial compliance doctrine to allow the corporation to maintain its action based on its eventual revival of its corporate capacity. Until the corporate petitioner actually revived its corporate status it remained uncertain whether it would ever be able to do so, thus the fact that it started that process before the limitations period expired was not enough. To hold otherwise would run contrary to the strong policy behind short limitations periods for land use challenges because project proponents could be stuck waiting to see whether a suspended corporate petitioner eventually revives its capacity to sue.

Lead Agencies Retain Some Discretion in Determining the Required “Existing Conditions” Baseline in EIRs. *Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552.

In this case, the Sixth District Court of Appeal upheld the City of Sunnyvale’s use of an allegedly hypothetical traffic baseline in its traffic impacts analysis. The project in question was an expansion of a medical campus in Sunnyvale. The City prepared an EIR evaluating the project’s environmental impacts. After the City certified the EIR and approved the project, two neighboring homeowners challenged the EIR certification and project approval.

In evaluating traffic impacts, the EIR evaluated traffic impacts under four scenarios: existing conditions in 2007; background conditions, which were estimated by multiplying existing peak traffic volume by a growth factor and adding traffic from approved but not yet built nearby developments; project conditions, which were estimated by adding traffic generated by the project to background peak volume levels; and cumulative conditions in 2020, which were estimated by multiplying existing volumes by a growth factor and adding traffic from approved but not yet built

developments, as well as from pending developments in the area. Using all four scenarios, the EIR concluded that the project would not result in significant traffic impacts.

Citing *Sunnyvale West Neighborhood Association v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351, petitioners claimed that the City was required to use a traffic baseline that exclusively reflected traffic conditions as they existed at or before the time of project approval. Relying on *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, the court noted that lead agencies enjoy discretion in determining how existing physical conditions without a project can be best measured. The court then distinguished the traffic analysis in the instant case from that in *Sunnyvale West* by noting that, unlike it *Sunnyvale West*, the analysis in this case considered both existing traffic conditions and anticipated traffic growth. On these bases, the court upheld trial court’s denial of the petition for writ of mandate.

The court’s holding regarding traffic baseline is significant because it carves out more flexibility for agencies in their consideration of traffic impacts. *Sunnyvale West* constrained the exercise of agency discretion in evaluating traffic impacts and choosing appropriate environmental baselines. However, *Pfeiffer* acknowledges that, within certain bounds and provided the choice is supported by substantial evidence, agencies can exercise discretion in determining how best to analyze traffic impacts.

CEQA Does Not Require an EIR to Analyze the Impacts of the Environment on a Project and CEQA Guidelines Requiring Such Analyses Are Unlawful. *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 445.

The *Ballona* decision concerns a 2010 EIR for the second phase of the mixed use Playa Vista development in Los Angeles. The decision is attracting attention primarily for the clarity of its ruling, based on a line of prior CEQA cases, that CEQA is concerned with impacts of a project on the existing environment, not the existing environment’s impacts on a project. The court applied this principle to hold that an EIR was not required to discuss the impact of sea level rise on a proposed project. The court also upheld the EIR’s analysis of archeological impacts.

Environmental Impacts on a Project. Petitioners argued, among other things, that the EIR failed to adequately analyze the impacts of sea level rise (resulting from climate change) on the project. The court rejected this claim, stating that “identifying the effects on the project and its users of locating the project in a particular environmental setting is neither consistent with CEQA’s legislative purpose nor required by the CEQA statutes.” The court also held that, to the extent the CEQA Guidelines and the Appendix G environmental checklist are inconsistent with this rule, they should be rejected.

This is the fourth decision that has held that the effects of the environment on a project being outside the scope of CEQA. The decision cited and relied on the three prior cases. (*Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464; *South Orange County Wastewater Auth. v. City of Dana Point* (2011) 196 Cal.App.4th 1064; and *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889).

Adequacy of the EIR Analysis of Sea Level Rise. In addition to concluding that the EIR was not required to address the issue, the court also addressed the adequacy of the EIR’s sea level analysis on the merits. The court concluded that the EIR and its responses to comments adequately addressed sea level rise’s impact on the project. The Draft EIR briefly mentioned that global warming could result in inundation of coastal areas, and the Final EIR provided specific information in response to comments on the issue. The Final EIR evaluated a paper on sea level rise that was submitted with the comments, and included a response supported by a professional engineer’s opinion, to the effect that the submitted paper’s estimates of sea level were flawed, and that under more realistic estimates (including an estimate by the Intergovernmental Panel on Climate Change) the project area would not be subject to inundation. This ruling follows the established principle that a disagreement between experts does not render an EIR’s analysis defective.

Analysis of Archeological Impacts. The court also upheld the EIR’s analysis of impacts to archeological resources,

and particularly the analysis of preservation in place that is specified by CEQA Guideline 15126.4(b)(3). This EIR had been prepared in response to an earlier court ruling that rejected the archeology analysis because it did not discuss preservation in place. The Guidelines state that preservation in place is the preferred method of avoiding impacts to archeological resources, and specifies that preservation in place may be achieved by four means (among others) including planning the project to avoid the site, putting the site into a park, covering the site with stable soil before building over it, or placing a conservation easement on the site.

The EIR in *Ballona* discussed preservation in place, including the four options outlined in the Guidelines, but concluded that preservation in place was not feasible. The EIR identified other mitigation measures, including data recovery and curation for the identified archeological resources. The court upheld this as an adequate analysis of preservation in place, because the EIR discussed each of the four options and acknowledged that preservation in place is the preferred form of mitigation, even though it was not feasible in this case.

United States and Tribes Were Not Indispensable Parties to CEQA Challenges to Water Agreements. *Quantification Settlement Agreement Cases* (2011) 201 Cal. App.4th 758.

In this lengthy decision, the Third District Court of Appeal considered various challenges to settlement agreements designed to resolve conflicts over allocations of water from the Colorado River. One of the issues decided by the court was whether the United States and certain Native American tribes were “recipients of an approval” under the agreements, and thus required to be named in any CEQA lawsuit challenging the agreements. Public Resources Code section 21167.6.5 as formerly drafted required such recipients to be named in CEQA cases. In this case, the court found that the United States and the tribes were not necessary parties under Code of Civil Procedure section 389, and thus they were not required to be named in the CEQA lawsuits.

On a related note, the statute at issue in this case, Public Resources Code 21167.6.5, was amended effective January 1, 2012, to specify generally that the lead agency must identify in the notice of exemption or notice of determination any recipients of approval that are required to be named in a legal challenge. With this amendment, the chance of a challenger failing to name an indispensable party should be reduced going forward.

Court Rejects State University's Determination that Funding Uncertainties Rendered Traffic Mitigation Measures Infeasible. *City of San Diego v. Board of Trustees of the California State University*, (2011) 201 Cal.App.4th 1134.

In *City of San Diego v. Board of Trustees of the California State University*, the Fourth District Court of Appeal ruled that the California State University ("CSU") could not use budgetary uncertainty as a basis for determining that mitigation measures were infeasible.

After the trial court set aside CSU's 2005 EIR, CSU revised its plan to expand San Diego State University and prepared a new EIR. Among other things, the new EIR found that there were no feasible mitigation measures to reduce the project's significant off-site traffic impacts to a less than significant level. Consistent with the EIR's statement, the resolution approving the project and certifying the EIR required CSU to request the necessary funding for its fair share of off-campus traffic and transit-related improvements from the State Legislature, but did not require CSU to receive the funds before beginning the project. Instead, the resolution stated that CSU could not guarantee that the Legislature would allocate sufficient funds in a timely manner or that local agencies would fund transit measures that could potentially mitigate CSU's impacts because such measures are the sole responsibility of those agencies. The resolution concluded that due to funding uncertainties, the off-campus traffic impacts would remain significant and unavoidable, but are outweighed by the factors cited in CSU's Statement of Overriding Considerations.

Several local agencies challenged the EIR, claiming that CSU failed to evaluate potential alternative funding sources for traffic mitigation, failed to evaluate on-campus actions or alternatives that could reduce or avoid off-campus traffic

impacts, and unlawfully disclaimed its responsibility and ability to mitigate the significant environmental effects of its project. The trial court found that CSU had complied with the law as stated in *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341 ("*Marina*"), and entered judgment for CSU.

On appeal, CSU relied on *Marina's* statement that "a state agency's power to mitigate its project's effects through voluntary mitigation payments is ultimately subject to legislative control; if the Legislature does not appropriate the money, the power does not exist." (*Marina, supra*, 39 Cal.4th at p. 367.) *Marina* had chastised CSU for attempting "to disclaim responsibility for making such payments before they have complied with their statutory obligation to ask the Legislature for the necessary funds." (*Ibid.*) CSU argued that it was obligated to ask the Legislature for funds to pay for its "fair share" of transportation improvements necessary to reduce its off-campus traffic impacts, and that making this request fulfilled its obligation under CEQA to undertake feasible measures to mitigate significant impacts.

The court disagreed with CSU's reasoning, finding that the language in *Marina* that CSU relied on was "dictum." The court observed that allowing CSU's "unavoidable uncertainties" regarding budgeting to equate to infeasibility would effectively sanction a State agency's ability to avoid its obligation under CEQA to take feasible measures to mitigate significant off-site environmental effects of the project. This would allow the agency to obtain the benefits of the project while leaving other public agencies with the entire burden of paying to mitigate the project's off-site environmental effects, which is contrary to CEQA's fundamental goals.

According to the court nothing in CEQA, the Education Code, or any other statutes prevented CSU from using non-legislatively appropriated funding to pay third parties to mitigate the significant effects of CSU's project. Thus, the lack of certainty of legislative funding did not make a mitigation measure infeasible. Instead, the court stated that CSU needed to demonstrate infeasibility in other ways, such as by showing that the City of San Diego or other public agencies would not take measures to fund and implement mitigation measures within their respective jurisdictions and control.

EIR Baseline Should Reflect Actual Physical Conditions and Lead Agencies Have Discretion to Change Baseline During Environmental Review; Analysis Properly Limited to Alternatives that Would Reduce Project Impacts: *Citizens for East Shore Parks v. California State Lands Commission* (2011) 202 Cal.App. 4th 549.

The First District Court of Appeal closed out the year with a December 30 CEQA decision. In *Citizens for East Shore Parks*, the court upheld an EIR evaluating a marine terminal lease renewal against claims that the EIR relied on an incorrect baseline and that the State Lands Commission, acting as lead agency, violated the public trust doctrine. The court upheld the lead agency's decision to change the baseline during the environmental review process, holding it is within the agency's discretion to do so. The court reiterated that an EIR need not study alternatives designed to avoid impacts that are not identified in the EIR.

Baseline. The court rejected claims that the baseline for a renewal project must exclude current conditions because the approving agency may eliminate the existing project by refusing the renewal. The court relied on *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310 and explained that the "normal rule" is that the baseline must reflect actual physical conditions at the time the environmental analysis begins. The court held that the agency's baseline examining impacts compared to the environment as it exists at the time of *project approval* was not contrary to law. The court further held that it was not an abuse of discretion for the agency to redefine the baseline some five years into the nearly ten year environmental review process. Lead agencies have the discretion to, and should, make adjustments during the environmental review process, including to the baseline if appropriate.

Alternatives. The court held that an EIR's alternatives analysis should focus on alternatives that lessen or eliminate impacts associated with the project. Petitioners claimed that the EIR should have considered removal of a causeway and burying pipelines between the existing marine terminal and a nearby refinery, arguing this alternative would reduce the impacts of the proposed lease renewal by providing new

recreational uses on the bay. The court rejected this analysis, holding that the existing structures were properly included in the baseline for the project and the final EIR correctly concluded the claimed impact on recreational uses was not a significant impact of the lease renewal project. Project proponents are not required to consider or mitigate impacts that are not the effect of the individual project.

Public Trust Doctrine. The court rejected claims that the Lands Commission violated the public trust by renewing the marine terminal lease. Petitioners argued that the CEQA process insufficiently considered other public trust uses of the property, and that the Lands Commission was required to undertake additional review and impose additional mitigation conditions. The court held that where the Lands Commission has conducted adequate review under CEQA, there is no violation of the public trust doctrine.