CEQA Remedies Statute Does Not Authorize Appellate Court to Issue Writ and Supervise Compliance on Direct Appeal, Holds Second District in Partially Published Decision on Remand in Newhall Ranch Case

By Arthur F. Coon on July 13, 2016

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In the published part of a partially published opinion filed July 11, 2016, the Second Appellate District Court of Appeal held that Public Resources Code § 21168.9 does not authorize an appellate court to issue and supervise compliance with a writ of mandate on direct appeal, but, rather, such a matter must be remitted to the trial court with appropriate directions. *Center for Biological Diversity v. Department of Fish and Wildlife (The Newhall Land and Farming Company, Real Party in Interest)* (5th Dist., Div. 5, 2016) ___ Cal.App.4th ___, 2016 WL _____, Case No. B245131. The Court thus rejected the real party developer's motion (on remand of the case from the Supreme Court) arguing that CEQA's "general principle" of expediting litigation and specific language in its remedies statute (Pub. Resources Code, § 21168.9) authorized such action.

My prior post on the Supreme Court's decision in this case can be found ***here***. On remand after the Supreme Court's decision, the Court of Appeal reversed in part and affirmed in part the trial court's judgment, which had found the project EIS/EIR inadequate and set aside approvals including a resource management and development plan, a streambed alteration agreement, and two incidental take permits. Based on reasoning contained in the unpublished part of the opinion, the Court of Appeal *affirmed* the judgment's findings that two project mitigation measures violated Fish and Game Code § 5515's prohibition against the taking of the unarmored threespine stickleback, and the finding that no substantial evidence supported the EIS/EIR's conclusion that project GHG emissions would not result in a cumulatively significant impact. It *reversed* the judgment's finding that the GHG emissions reductions goals of Health & Safety Code § 38850 could not be selected by the Department as a significance criterion, *reversed* its finding that the Department could not use a hypothetical "business as usual" scenario to evaluate GHG emissions, and *reversed* its remaining findings that the EIS/EIR's analysis and

mitigation measures concerning Native American resources, San Fernando Spineflower conservation, and the effects of dissolved copper on steelhead smolt were inadequate, and that reliance on portions of the specific plan in rejecting alternatives was improper. (Because these holdings are explained in the *unpublished* portion of the opinion, they are merely provided for context and will not be discussed further in this post.)

Fearing lengthy proceedings on remand before a newly assigned trial judge completely unfamiliar with the facts of this complex CEQA case, the developer moved to have the Court of Appeal (which it argued was "intimately familiar with the case") retain jurisdiction of the remaining GHG and unarmored threespine stickleback issues, issue its own writ of mandate, and then supervise compliance with the writ. Plaintiffs argued against this proposed procedure, citing the limited powers of appellate courts to affirm, reverse, modify and remit judgments to the trial court under Code of Civil Procedure sections 43 and 912. The developer and Department argued those statutes were inapplicable and were essentially displaced by CEQA's general policy of expedited litigation and specific language in its remedies statute that states in part: "(a) *If a court finds, as a result of a* trial hearing, or *remand from an appellate court*, that any determination, finding, or decision of a public agency has been made without compliance with [CEQA], the Court shall enter an order that includes one or more of the following [mandates] …." (Pub. Resources Code, § 21168.9(a), emph. added.) They also pointed to language in the Supreme Court's opinion citing § 21168.9 and stating: "The Court of Appeal shall further decide, or remand for the Superior Court to decide, the parameters of the writ of mandate to be issued." The developer and Department reasoned that the Supreme Court is "an appellate court" and that, upon remand of a matter from the Supreme Court, a court of appeal thus possesses statutory authority to issue and supervise compliance with a writ of mandate as directed by the statute.

Given the ambiguity as to whether the statutory term "appellate court" was intended to encompass the Supreme Court in situations such as that presented in this case, and the logical plausibility of the developer's and Department's argument, the Court of Appeal undertook an in-depth analysis of § 21168.9's legislative history, as well as other relevant provisions of CEQA and appellate practice generally. Based on this analysis, it *rejected* the argument that it was empowered to issue and supervise a writ of mandate in a direct appeal. Key points of the opinion supporting the Court's holding on this issue include:

- Nothing in the sparse legislative history of SB 1079, which enacted Public Resources Code § 21168.9 in 1984, revealed any intent to "alter[] the normal processing of environmental litigation on direct appeal," or to grant appellate courts "in cases on direct appeal, authority to issue their own writ of mandate" or "to supervise the implementation of a writ of mandate."

- "Other legal and procedural provisions are inconsistent with [a] legislative intent to permit an appellate court, on direct appeal, to issue a writ of mandate directly to the lead agency." Settled CEQA practice in 1984 was (and still is) to file a CCP § 1094.5 administrative mandate petition in superior court; that statute's language was "solely consistent with the filing of administrative mandate petitions in the trial court," which necessarily referred to the superior court as the only trial court with jurisdiction to hear such petitions.

- "No statute [circa 1984] explicitly provided for filing a mandate petition to challenge an [EIR] certification in the Courts of Appeal" although CEQA actions against the PUC were required to be filed directly in the Supreme Court. Per the Court: "The 1984 legislative record indicates the Legislature was aware, when section 21168.9 was adopted, that the practice was for environmental impact report litigation to be commenced in the superior court."

- Also per the Court, citing the remittitur requirements of CCP §§ 43 and 912 cited by the plaintiffs, "[t]here is no evidence the Legislature intended when an environmental impact report's certification was litigated on appeal to alter the established procedures for remitting jurisdiction of the trial court." Under "well established principles of appellate practice" unchanged by the Legislature when it enacted § 21168.9, "an appellate court's authority [on direct appeal] extend[s] to affirmance or reversal or modification of an appeal from [a] judgment or order" after which the Court of Appeal is "required [to] remit the cause to [the] court from which the appeal was taken." By enacting § 21168.9(a), "the Legislature did not expressly grant [appellate courts] … the power to issue a writ of mandate" nor is there any basis to imply a contrary intent to repeal well-established contrary statutory procedures.

- Based on thorough analysis of the "historic nature of the structure of the California appellate process," the Court of Appeal further concluded that: "Since 1850, the powers of appellate courts have been limited 'to affirm, reverse, or modify' judgments or orders and the decision on appeal is to be remitted to the trial court."

- Finally, in rejecting the argument that it retained a power to "supervise compliance," the Court of Appeal cited the following language of § 21168.9(b) that expressly contradicts this assertion: "The trial court shall retain jurisdiction of the public agency's proceedings by way of a return to the peremptory writ until the court has determined that the public agency has complied with this division."

The Court of Appeal stressed its holdings were rendered in the context of a *direct appeal*, and that nothing in its opinion and above analyses "applies to cases where an original proceeding is initially commenced in the Court of Appeal" or in scenarios where a supersedeas petition is filed in or injunction issued by a reviewing court to preserve the status quo and, hence, effective appellate jurisdiction. Per the Court: "Our analysis is limited to the argument that, based on section 21168.9, we should issue a writ of mandate and supervise the department's compliance therewith. Section 21168.9 does not empower us to do so."

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