

Moss v. County of Humboldt (May 7, 2008) 162 Cal.App.4th 1041

In 1997, the County approved a tentative subdivision map and adopted a mitigated negative declaration for a 4-lot subdivision along Luffenholtz Creek. The creek supplies water for the City of Trinidad downstream and would supply three of the parcels with water. Moss subsequently allowed the tentative map to expire and was unsuccessful in subsequent litigation to have it reactivated.

In 2004, Moss filed a new subdivision application that was essentially identical to his expired tentative map. The County concluded that this was a new project requiring a new CEQA review. After an initial study, the County concluded that an EIR was required. Moss appealed this decision to the Board of Supervisors, but his appeal was denied. The County Board cited new evidence from the City of Trinidad indicating that the city's water use had increased substantially from the time the MND was adopted, that a water shortage would increase fire danger in the city, and that project runoff might affect water quality. The Board also contended that Luffenholtz Creek was within the mapped habitat area for the listed coho salmon and that the main fork of the creek is habitat for coastal cutthroat trout, as species of special concern.

Moss filed a petition for writ of mandate challenging the Board's decision to require an EIR. The trial court found that Moss' subdivision was not a new project, but that substantial evidence supported the need to prepare a subsequent EIR. Moss appealed the decision requiring an EIR; the County appealed the ruling that the application was not a new project.

In a consolidated decision, the Court of Appeal found that the subdivision application was not a new project. Moss submitted the same tentative map and it was undisputed that the proposed subdivision had not changed in any substantial way. The Court noted that case law is in conflict over whether the determination that a project is "new" or not is a question of fact (as held by *Mani Brothers Real Estate Group v. City of Los Angeles* [2007] 153 Cal.App.4th 1385) or a question of law (as held by *Save Our Neighborhood v. Lishman* [2006] 140 Cal.App.4th 1288). It differentiated the Moss case from both prior cases because it revolves around the effect of the expiration of the tentative map rather than changes in the project or the applicant. The Court held that the legal effect of the expiration of a tentative map on CEQA review is a question of law.

After examining the question of whether the expiration of the tentative map effectively erased the prior CEQA analysis, the Court concluded that it did not. CEQA and the Subdivision Map Act operate independently. Based on CEQA's broad definition of "project," the expiration of the tentative map didn't convert the subdivision into a new project for CEQA purposes.

Because this was the same project, Public Resources Code Section 21166 applied to the County's determination of whether to prepare a subsequent EIR. Consequently, a subsequent EIR would only be required when there is substantial evidence that there is a new significant effect or more severe significant effect not disclosed in the original CEQA document. This determination is not subject to the "fair argument" test applied to

the preparation of an initial CEQA document. The Court held that the County was incorrect in determining that the resubmitted map should be subject to full CEQA review.

To hedge its bets on this issue, in addition to contending that this was a new project, the County had also found that under Section 21166 the resubmitted application triggered the need for additional CEQA review based on new information that was not available at the time the 1997 MND was adopted. There was the evidence presented by the City regarding impacts on water supply and quality, and the purported evidence of impacts on special status fish in Luffenholtz Creek. The Court examined the evidence to determine whether it constituted “substantial evidence” of the type needed to support preparation of a subsequent EIR. The evidence showed that water use had increased by 74 percent since preparation of a 1995 study of the capacity of Trinidad’s water treatment plant. However, the ability of the creek to supply adequate water to both the project and the city had not been previously studied. This justified the County’s determination that further study was needed in a subsequent analysis.

The Court did not find substantial evidence to support purported impacts on either water quality or fire safety. The testimony of the city’s mayor to the Board was based on speculation, not facts. At the same time, the Court recommended that the supplemental analysis of water supply impacts consider the issue of water supply for fire fighting.

The Court carefully reviewed the evidence of impacts on coho salmon and found that, in reality, the County had no evidence that the creek was within the critical habitat area of that species of salmon, nor that salmon could even negotiate the mouth of the creek to access it. With regard to the coastal cutthroat trout, there was substantial evidence (albeit anecdotal) that a population was present in the creek.

Court concluded that the County may require a supplemental review under Section 21166, but only on the project’s impacts on water supply to Trinidad and the population of cutthroat trout.