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Sauce For The Gander": Second District Holds CEQA's Broad Definition Of "Project" Also Applies In Determining Scope of Activity To Which Statutory Exemption Applies

By Arthur F. Coon on June 19, 2018

In a published decision filed June 12, 2018, the Second District Court of Appeal (Div. 6) held that the same broad definition of a "project" that mandates more extensive CEQA review of activities undertaken or approved by public agencies also applies in determining the scope of statutory exemptions that serve to exempt certain projects from CEQA review. *County of Ventura v. City of Moorpark, Broad Beach Geologic Hazard Abatement District* (2018) ___ Cal.App.5th ___. The Court of Appeal affirmed the trial court's judgment to the extent it rejected Ventura County's CEQA, preemption, and extraterritorial regulation challenges to a settlement agreement between the City of Moorpark and the Broad Beach Geologic Hazard Abatement District (BBGHAD), a state law entity created to carry out a Malibu beach restoration project. But it reversed with directions to declare void (as unlawful abdications of BBGHAD's police power) certain of the settlement agreement's provisions which severely limited BBGHAD's authority to modify project haul routes in the event of changed circumstances.

The "project" at issue was BBGHAD's restoration of a 46-acre stretch of Broad Beach in the City of Malibu. This endeavor requires five major sand deposits at 5-year intervals over a 20-year period. Each major deposit will consist of 300,000 cubic yards of sand, to be delivered from specified quarries, and each will require 44,000 one-way truck trips occurring over 3 to 5 month periods.

Fearing nuisance impacts from hauling within its boundaries, the City of Moorpark expressed concerns and ultimately negotiated a settlement agreement with BBGHAD. The settlement agreement specified project haul routes, prohibited project hauling or truck staging within or immediately adjacent to Moorpark for the project's duration (with strictly limited "emergency" exceptions to the haul route prohibitions), and provided it could only be modified with Moorpark's written consent.

In the portion of the opinion relevant for purposes of this blog, the Court of Appeal applied CEQA's broad definition of "project," which refers to the "whole of an action" and broadly includes "related" activities, to hold that "[t]he settlement agreement between Moorpark and BBGHAD is part of the whole of the action of the beach restoration project." BBGHAD's statutory mandate to address Broad Beach's beach and sand dune erosion, by making "improvements" to address these geologic hazards, included necessary or incidental activities such as the settlement agreement specifying haul routes for the trucks carrying the required sand payloads. (Citing Pub. Resources Code, §§ 26505, 26574, 26580.) The Court also held "[t]he agreement is not a separate project under [the analysis of] *Banning Ranch [Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1223-1224, 1230-1231]," but is an "improvement" statutorily exempt from CEQA under Public Resources Code §§ 21080(b)(4) and 26601 as a "specific action[] necessary to prevent or mitigate an emergency."

The Court of Appeal pointedly rejected the County's argument that this result is "absurd" because "the legislature intended [CEQA] to be interpreted in such a manner as to afford the fullest possible protection to the environment[.]" (Citing *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.) It observed that it would be incorrect to assume a harmony exists between CEQA's general purposes and those of its statutory exemptions, which, on the contrary, reflect a variety of policy goals promoting interests deemed important enough to justify *foregoing* the benefits of CEQA review. Per the Court:

> Courts thus "do not balance the policies served by the statutory exemptions against the goal of environmental protection." [citation] "[T]he self-evident purpose of the [emergency] exemption is to provide an escape from the EIR requirement despite a project's clear, significant impact." [Citation.] (*CREED-21 v. City of San Diego* (2015) 234 Cal.App.4th 488, 506.) [¶] We therefore find no absurdity in holding that the broad definition of "project" employed in cases that have mandated expanded environmental review also applies in cases where, as here, using that definition will result in the broader operation of a statutory exemption. The entirety of BBGHAD's beach restoration project, including its settlement agreement with Moorpark, is exempt from CEQA.

The Court went on to hold, in the *non-CEQA* portions of its opinion, that: (1) Vehicle Code § 21 applies to preempt only local ordinances and resolutions, not local contracts like the settlement agreement (which did not, in any event, close roads to traffic in general in violation of that statute's purpose); (2) the settlement agreement was not an impermissible exercise of Moorpark's regulatory or police power to regulate outside its boundaries, but a permissible use of its contracting power to abate public nuisances from trucking within its City limits; and (3) that severable portions of the agreement were void as impermissible abdications of BBGHAD's state-derived police power, in that they purported to "contract away" its discretion to alter project haul routes in the future to respond to changed circumstances. (These non-CEQA portions of the opinion will not be analyzed in detail here, and readers are encouraged to consult the Court's opinion for further details.)

In sum, the Court's CEQA holding underscores that CEQA's general purpose to maximize environmental protection does not apply to compel either a narrow construction of its statutory exemptions or a narrow definition of the "project" that benefits from a statutory exemption. Rather, "what is sauce for the goose is sauce for the gander" in this regard, and CEQA's broad definition of "project" applies to determine both the scope of regulated *and* statutorily exempted activities.

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