CDCR's Inaction In Failing To Maintain Historic Former Hotel Not A "Project" Subject To CEQA, Holds First District

By Arthur F. Coon on September 17, 2019

In a short published opinion filed September 13, 2019, the First District Court of Appeal (Div. 4) affirmed the trial court's judgment denying a historic preservation group's mandate petition seeking to compel preparation of an EIR by the California Department of Corrections and Rehabilitation (CDCR or department). Plaintiff The Lake Norconian Club Foundation (foundation) argued CDCR was required to analyze its decision *not* to repair and maintain the Lake Norconian Club, an unoccupied and severely deteriorated former luxury resort hotel that sits on CDCR's property adjacent to a medium-security prison. The hotel, which once catered to Hollywood stars and sports celebrities, was opened in 1929, closed in 1941, and was thereafter variously used as a military hospital, drug rehabilitation center, and CDCR administrative offices; now vacant, the building is listed on the National Register of Historic Places. The trial court denied the writ on statute of limitations grounds, but the First District affirmed "on the ground that the department's inaction is not a project subject to CEQA." *The Lake Norconian Club Foundation v. Department of Corrections and Rehabilitation (City of Norco, Real Party in Interest)* (2019) ___ Cal.App.5th ___.

Background and Trial Court's Decision

A 2013 EIR analyzing the then-contemplated closure of CDCR's prison indicated there was no funding to repair or rehabilitate the historic hotel building in light of CDCR's other priorities and that its continued deterioration was expected. After its 2006 formation, the foundation repeatedly urged the department to repair the building. It ultimately filed its CEQA action in 2014, alleging CDCR's years of failure to maintain the building was a "continuous discretionary action" and abuse of discretion which caused the building's extensive deterioration and effectively its "demolition by neglect." As observed by the court of appeal: "The foundation does not allege that any permits for repair, maintenance or demolition were issued. To the contrary, it asserts the failure to maintain the property is the equivalent of issuing a demolition permit." The trial court agreed CDCR's failure to seek or allocate funding to preserve the hotel, when it knew this failure would inevitably lead to destruction of the historic resource, was a CEQA "project," but it denied

the writ petition as time barred, reasoning the statute of limitations began running with the 2013 EIR's certification.

The Court of Appeal's Decision

The court of appeal affirmed the judgment denying the writ, but on a different ground – that CDCR's "failure to act does not constitute a "project," either in common parlance or as the term is used in CEQA." In relevant part, CEQA and its Guidelines define "project" as an "activity" which may cause a direct or reasonably foreseeable indirect physical change in the environment, and that is directly undertaken or assisted a public agency or "that involves the issuance of a lease, permit, license, certificate, or other entitlement for use[.]" (Pub. Resources Code, § 21065; CEQA Guidelines, § 15378(a).) Noting that "CEQA is not to be stretched beyond the 'reasonable scope of the statutory language,' " and must "receive a practical, commonsense construction" (quoting *Martin v. City and County of San Francisco* (2005) 135 Cal.App.4th 392, 402), the court of appeal "agree[d] [with CDCR] that the failure to act is not itself an activity, even if, as many commonly be true, there are consequences, possibly including environmental consequences, resulting from the inactivity."

The court of appeal found further support for its holding in persuasive federal decisions repeatedly refusing to hold agency *inaction* subject to NEPA review requirements, and in the "unworkability" of attempting to apply the statute of limitations to an agency's "inactivity." The court observed that the federal NEPA guidelines and interpretive case law – unlike CEQA – do define federal agency "actions" subject to NEPA to include failure to act when there is a mandatory legal duty to act that is judicially reviewable under the APA. But it held in the alternative that even "assuming without deciding that a project for purposes of CEQA may include an agency's failure to act when it has a mandatory duty to do so, the department has no such duty to maintain the former hotel." Per the court: "The foundation has not cited, and we have not identified, any statute that requires the department to maintain or repair the former hotel at issue in this case. …. Were there a statute directing the department to maintain or repair the former hotel, the failure to do so would be correctible by a writ of mandate. But absent any such statutory duty, the department's failure to act cannot be deemed a project or challenged for noncompliance with CEQA."

Conclusion and Implications

CEQA applies to the "approval" of a "project," which is defined in relevant part as an "activity" either directly undertaken or assisted by a public agency or authorized by a permit, approval or other entitlement for use issued by an agency, and a "project" is further defined to mean the "whole of an action" that has the potential to change the physical environment. (CEQA Guideline, § 15378.) But, by definition, it must include some affirmative "activity" or "action" and mere inaction or inactivity on an agency's part therefore cannot trigger CEQA compliance obligations, at least where there is no mandatory legal duty to act.

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