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Once More Into the "Brambled Thicket": Fourth District Reverses Ruling Sustaining Demurrer to Action Challenging Caltrans' Claim of Statutory CEQA Exemption For Freeway Interchange Project, Holds Streets and Highways Code § 103's Coastal Commission Exemption Does Not Apply And That Petition Adequately Pleaded Estoppel Against Caltrans to Assert 35-Day Statute of Limitations Based on NOE Filing

By Arthur F. Coon on April 1, 2020

In a published opinion filed March 24, 2020, the Fourth District Court of Appeal (Division One) reversed a judgment of dismissal with prejudice, entered by the San Diego County Superior Court after sustaining a demurrer without leave on statute of limitations grounds to a group's action challenging the CEQA review for Caltrans' Interstate 5 (I-5)/State Route 56 (SR 56) freeway interchange project (the "Project"). *Citizens for a Responsible Caltrans Decision v. Department of Transportation* (2020) ___ Cal.App.5th ___. The opinion (1) interprets, as a matter of first impression, the scope and operation of the statutory CEQA exemption in Streets and Highways Code § 103 ("Section 103"), and (2) holds that Caltrans' repeated misrepresentations and misleading conduct during and concerning the Project's CEQA and approval process precluded the trial court from finding as a matter of law that Caltrans was not estopped to assert the ban of the 35-day statute of limitations based on its filing of a Notice of Exemption (NOE) with the State Clearinghouse (SCH).

Relevant Factual and Legal Context: The "Project" Is A Project Within A Larger Project/Program In The Coastal Zone

In 2017, Caltrans issued a Final EIR (FEIR) for a project consisting of the construction of two freeway interchange ramps – the specific I-5/SR 56 interchange project at issue in the case (the "Project"). The Project is but one of multiple proposed projects by Caltrans and SANDAG to improve vehicle and railroad

transportation in the 27-mile La Jolla-Oceanside corridor, a program collectively known as the North Coastal Corridor (NCC) project.

Effective in 2012, the Legislature enacted Streets and Highways Code § 103 ("Section 103"), which provided in relevant part for the California Coastal Commission's (CCC) integrated regulatory review of a "Public Works Plan" (PWP) for the NCC project/program, instead of a project-by-project approval approach, in order to expedite and streamline the *CCC*'s review process.

In 2014, Caltrans and SANDAG issued, and the CCC approved, the PWP for the *NCC project*, which set forth a "blueprint" for implementing a comprehensive $6 billion, 40-year program of corridor improvements. While it specifically provided for adding two express lanes to I-5 in each direction, the PWP only discussed possible alternatives (and no preferred alternative) for Caltrans' Project (the I-5/SR 56 interchange ramps). It further noted: (1) the Project may be subject to future PWP amendment; (2) the PWP process was not intended to supplant CEQA review; (3) a DEIR analyzing Project alternatives was released in 2012; and (4) that specific individual development projects (such as the Project) would require CEQA documentation prior to approval.

Relevant Procedural Context: Caltrans' CEQA Review And Process For the "Project" At Issue

In 2005, Caltrans filed an NOP for the Project with OPR. Section 103 became law on January 1, 2012. In April 2012, Caltrans circulated the DEIR for the Project, which stated that "[f]ollowing circulation of the [FEIR], if the decision is made to approve the [P]roject, a Notice of Determination [NOD] will be published for compliance with CEQA. . . . "

In October 2013, Caltrans issued an EIR/EIS for its separate and distinct individual project for I-5 lane widening that stated Section 103 "is not intended to eliminate project-specific [CEQA] or [NEPA] reviews; rather, it provides for integrated regulatory review by the [CCC]." That Caltrans document further stated that the lane widening project *and the Project* "were . . . independently evaluated under CEQA and NEPA."

On June 26, 2017, Caltrans, as lead agency, released the FEIR for the Project, and the SCH assigned identification number 2005051061. The FEIR stated: "After the [FEIR] is circulated, if Caltrans decides to approve the [p]roject, a [NOD] will be published in compliance with CEQA by Caltrans . . . ." While the FEIR contained some possibly contradictory language indicating that CEQA no longer applied to the Project following enactment of Section 103, it nonetheless stated that public disclosure via an FEIR remained "desirable", that the FEIR would satisfy CEQA to the extent it were applicable, and that: "To the extent CEQA is applicable to this [P]roject, the signing of the Project Report and filing of the Notice of Determination [NOD] constitute the approval for CEQA purposes." The substance of this language was repeated in three other FEIR sections.

During the 30-day review period provided for the FEIR from July 14 to August 14, 2017, Caltrans received – and it later responded to – comments from cities, organizations, and the general public.

Despite its repeated representations that if the Project were to be approved a NOD would be issued after circulation of the FEIR marking that event, and without providing any other notice of its change in position to members of the public, on June 30, 2017, Caltrans approved a project report for the Project, and on July 12, 2017 – both dates being *before* the 30-day FEIR public review period even commenced – it filed a notice of exemption (NOE) for the Project with the SCH, which for whatever reason gave the NOE a *different* identifying number (201708159) than the EIR. Caltrans' NOE stated the Project was statutorily

exempt from CEQA pursuant to Section 103 and Public Resources Code §§ 21080.5(c) and 21080.9, and that its impacts were analyzed consistent with the CCC's certified regulatory program.

Although Petitioner's counsel alleged in its petition that it checked OPR's database for Project notices prior to August 10, 2017 – an unexplained and odd date to do so, perhaps, but that is the opinion's recited fact – it did not find the NOE at that time and first became aware of it on September 28, 2017. It ultimately filed its action on November 1, 2017, within 35 days of that date, but obviously well beyond the 35-day limitations period if measured from actual NOE filing. As noted, the trial court sustained Caltrans' demurrer to Petitioner's action without leave to amend, and Petitioner appealed the ensuing judgment of dismissal with prejudice.

The Court of Appeal's Holdings

1. Neither Streets and Highways Code Section 103 Nor CEQA Provides A Statutory Exemption for Caltrans

Interpreting Section 103 as a matter of first impression, the Court of Appeal held as a matter of law that it did not provide Caltrans with a statutory exemption from CEQA for its approval of the Project, and could thus provide no basis for sustaining Caltrans' demurrer to the CEQA action challenging its FEIR. Rather, under its plain language, construed together with Public Resources Code § 21080.5 (which provides for certified regulatory programs that are exempt from certain CEQA requirements), it "provides an exemption from certain CEQA provisions for approval *by the CCC of the PWP*."

Without belaboring the statute's intricacies or the Court's analysis, the key statutory provisions provide:

> "(b) . . . Once the public works plan for the north coast corridor has been approved and certified by the [CCC], subsequent review by the [CCC] of a notice of intent to develop for a specific project in the public works plan shall be limited to imposing conditions to ensure consistency of the project with the public works plan. . . . .
>
> (d) . . . .
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> (3) A public works plan prepared for the north coast corridor project by [Caltrans] and SANDAG shall be treated as a long-range development plan to which the provisions in Sections 21080.5 and 21080.9 of the Public Resources Code shall apply . . . ."

(Sts. & Hwys. Code, § 103(b), (d)(3).)

As California land use practitioners will recognize, the first statutory subdivision set forth above renders the CCC's role with respect to reviewing individual projects approved by Caltrans and SANDAG within approved and certified PWPs analogous to the CCC's role in reviewing approvals of individual projects by local coastal jurisdictions within CCC-approved and certified Local Coastal Programs (LCPs). The second subdivision demonstrates the Legislature's intent to treat PWPs as long-range development plans for purposes of the exemption of such plan approvals from CEQA *as part of a state agency's certified regulatory program.* In short, and critically, the CCC has a certified regulatory program, while Caltrans does not. (See Pub. Resources Code, § 21080.9; CEQA Guidelines, § 15251.) Nothing in the plain language of Section 103 expressed any intent to exempt *Caltrans* from CEQA's requirement to prepare an EIR for the Project; rather, Section 103 only authorizes the CCC to prepare substitute documents when considering certification/approval of the PWP. Had the Legislature intended to provide Caltrans with a CEQA exemption for a specific highway or freeway project, the Court observed it could easily have

done so – as it has done elsewhere. (E.g., Pub. Resources Code, § 21080.42(a).) Nothing in the caselaw or legislative history supported Caltrans' newly-devined contrary position, either.

2. Estoppel to Assert Statute of Limitations Adequately Alleged And Can't Be Ruled Out On Facts Alleged As A Matter Of Law On Demurrer

After reciting the familiar standards of review on demurrer, the Court noted that a demurrer on statute of limitations grounds "will not lie where the action may be, but is not necessarily, barred." (Quoting *Geneva Towers Ltd. Partnership v. City and County of San Francisco* (2003) 29 Cal.4th 769, 781.) Because statute of limitations claims can involve *factual* issues, and courts *assume* the truth of properly pleaded material facts for purposes of demurrer, where an action in such cases "might be, but is not necessarily time-barred, the demurrer will be overruled." (Quoting *Coalition for Clean Air v. City of Visalia* (2012) 209 Cal.App.4th 408, 420.)

"Under appropriate circumstances, equitable estoppel will preclude a defendant from pleading the bar of the statute of limitations where the plaintiff was induced to refrain from a timely action by the fraud, misrepresentation or deceptions of the defendant." (Quoting *Kleinecke v. Montecito Water Dist.* (1983) 147 Cal.App.3d 240, 245.) Equitable estoppel's elements are (1) the party to be estopped knows the facts, (2) that party intends for its conduct to be acted on, or acts such that the party asserting estoppel has a right to so believe, (3) the party asserting estoppel is ignorant of the facts, and (4) the party asserting estoppel relies on the conduct to its detriment. Equitable estoppel normally presents a question of fact, but where a complaint pleads undisputed facts establishing the doctrine does not apply, then it may be resolved on demurrer. A public agency can be equitably estopped in the same manner as a private party; but to do so not only must all the elements of estoppel be met but, in addition, "in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel [must be] of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (*Long Beach v. Mansell* (1970) 3 Cal.3d 462, 496-497.)

Applying the relevant standard of review, the Court concluded Petitioner had alleged sufficient facts, assumed true on demurrer, to show Caltrans was equitably estopped from relying on the 35-day statute of limitations for challenging NOEs. Per the Court, the petition's factual allegations and matters judicially noticed "show[] that there is, at a minimum, a disputed question of fact regarding whether the elements of equitable estoppel are satisfied [.]" Because the Court could not determine as a matter of law that equitable estoppel does not apply to preclude Caltrans' reliance on the 35-day statute of limitations, and because it held as a matter of law that Section 103 does not exempt Caltrans from preparing an EIR and filing an NOD for the Project, it held that Caltrans' demurrer must be overruled and the trial court's contrary order reversed.

Observations and Takeaways

In discussing interpretation of Section 103, the Court of Appeal could not resist dropping a footnote quoting from its own published opinion last year in *Fudge v. City of Laguna Beach* (2019) 32 Cal.App.5th 193, at page 196, regarding "the complexity of the law when an issue, as in this case, involves both CEQA and the Coastal Act," as follows:

> "We venture once again into the brambled thicket of [CEQA] – an area of the law largely governed by the unfortunate fact that complicated problems often require complicated solutions. The case is rendered more recondite by the involvement of the [CCC's] rules and procedures, effectively overlaying the enigmatic with the abstruse."

The complexity of the legal context also helps to explain the Court's ruling on the issue of estoppel, which it is normally a daunting task to establish against a public agency in the land use context. While CEQA itself does not require public hearings for the approval of a land use/development project, in the normal case where a local public agency – a city or county – is the lead agency, the State's Planning and Zoning Law and local ordinance will usually require a public hearing or hearings for project approval, such that the date and nature of the project approval decision will be readily apparent, and would-be litigants will be clearly apprised of when to start searching the County Clerk's records for the NOD or NOE that will trigger CEQA limitations periods.

Here, by contrast, in the state agency context, the Planning and Zoning Law does not apply, and there was no final public hearing at which Caltrans approved the Project; thus, assuming an interested party could not reasonably rely on Caltrans' repeated public representations that it would only approve the Project, if at all, following circulation of the FEIR and with the filing of an NOD, there was no clear event that would have alerted the public to the Project's approval and thus to when interested parties should have begun searching the SCH's records for a post-approval NOE or NOD from which to calendar CEQA challenge periods. The Court of Appeal itself appeared to allude to this when, in disagreeing with Caltrans' argument that Petitioner had not sufficiently alleged an "injustice" to support estoppel, it observed: "Caltrans does not cite any public interest or policy that supports a position that a government agency should be allowed to make misrepresentations to the public regarding its intent to comply with CEQA in approving a project and then, in effect, *secretly approve the project* without compliance with CEQA and erroneously file a NOE for the project." (Emph. added.) (Given its disposition of the estoppel pleading issue, the Court found it unnecessary to reach petitioner's additional contentions that the statute of limitations was not triggered due to the SCH's assignment of an incorrect identification number to, and improper posting of, the NOE – although clearly these were factual issues that could potentially have precluded even a diligently searching party from finding the NOE.)

While it is generally a "bright line" rule that the proper filing and posting of a facially-valid NOD or NOE following project approval provides "constructive notice" that will itself trigger CEQA's short statutes of limitations regardless of a plaintiff's actual knowledge (see, e.g., *Communities for a Better Environment v. Bay Area Air Quality Management District* (2016) 1 Cal.App.5th 715, and my ***July 26, 2016 post*** on the case), the instant case teaches that the inapplicability of the "discovery rule" in this context does not necessarily mean that *estoppel* cannot apply to preclude a public agency from relying on the statute of limitations, where all of the doctrine's exacting elements are met. Here, the extreme facts regarding Caltrans' repeated and deceptive misrepresentations to the public regarding Project approval and the CEQA process, made in numerous formal CEQA and other documents circulated to the public and pleaded in and attached to the petition, provided a basis for petitioner to adequately allege facts supporting the potential application of estoppel against a public agency that were sufficient to survive demurrer – something that CEQA and land use litigators will recognize is a rare occurrence, indeed.

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