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Third District Dismisses Appeal In CEQA Case As Moot Where Plaintiff Failed To Timely Seek Or Obtain Preliminary Injunction And Project Construction Was Completed Before Trial

By Arthur F. Coon on September 21, 2020

In an opinion originally filed on August 26, and later certified for publication on September 16, 2020, the Third District Court of Appeal dismissed a plaintiff group's ("Parkford") appeal from an adverse judgment in a CEQA/land use case as moot. *Parkford Owners for a Better Community v. County of Placer (Silversword Properties, LLC, et al., Real Parties in Interest)* (2020) ___ Cal.App.5th ___.

Real parties were grantees of a building permit from the County for expansion of their long-existing self-storage facility. Parkford's challenges to the permit under CEQA and the Planning and Zoning Law were ultimately rejected on their merits by the trial court on the grounds that the permit was a ministerial approval not subject to CEQA, and that the 90-day statute of limitations of Government Code § 65009 barred the Planning and Zoning Law claim. Before that judgment was entered, Parkford had moved for and was denied both a TRO and a preliminary injunction; the trial court noted that construction of the project had begun in September 2016, five (5) months before Parkford filed its suit, and was nearly complete by the time Parkford sought to stop it, so it found no irreparable harm or immediate danger justifying a TRO. It also held that Parkford had established neither a likelihood of winning on the merits nor that the balance of interim harm tipped in its favor.

By the time Parkford's appeal was briefed, the storage facility expansion project was "up and running." Parkford did not address mootness in either of its briefs, although the issue was raised in respondents' brief, and the Court of Appeal was "persuaded [that] the completion of the Treelake Storage expansion has rendered moot Parkland's challenge to the building permit authorizing construction of the expansion." California courts decide only actual controversies; and the "pivotal question" in determining whether a case is moot is whether the court can grant any effectual relief; if not, and events have rendered the case moot, the court – whether trial or appellate – should generally dismiss it. (Citing *Wilson & Wilson v. City*

Council of Redwood City (2011) 191 Cal.App.4th 1559, 1574; *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1547.)

The Court found "the most analogous authority" to be *Wilson*, which held an action challenging a modified redevelopment project on CEQA and other grounds was mooted by completion of the project where plaintiff never sought injunctive relief to stop it. Among other things, *Wilson* held that a project's completion moots challenges to resolutions authorizing it and to actions seeking an EIR to study it. For the latter point, *Wilson* relied on the venerable authority of *Hixon v. County of Los Angeles* (1974) 38 Cal.App.3d 370, which affirmed trial court's refusal to order an EIR prepared for a street improvement project because the complained-of impact – removal of a substantial number of roadside trees – had already occurred: "The project is ended, the trees are cut down and the subject is now moot insofar as resort to a planning or informational document, which is what an EIR is." (*Id.* at 378.)

Wilson also distinguished *Woodward Park Homeowners Assn. v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, in which a city and developer appealed an adverse trial court judgment ordering an EIR to be prepared for a car wash project, and the developer completed the project without an EIR while the case was on appeal. Unlike in *Hixon,* where mature trees had already been cut down and could not be restored, ordering an EIR for the car wash project could provide effective relief because the project could still be modified or removed altogether to mitigate adverse impacts revealed by the EIR; further, public policy counseled against finding mootness where the developer had proceeded in this manner in defiance of the trial court's order.

In *Wilson*, like the instant case and unlike *Woodward Park*, project construction did not proceed in violation of a court order, and there was no bad faith or "unseemly race" to complete construction to moot the action; further, Parkford bore partial responsibility for its claims becoming moot because it failed to timely seek any stay of construction, instead waiting until the project was nearly completed to do so. The case was thus like *Wilson* "to the extent that [Parkford] failed to take steps to retain the status quo pending resolution of its claims by seeking injunctive relief or a stay until … the project was nearly complete." (Quoting *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1551.)

Finally, possible exceptions to mootness – such as the need to resolve "important issues of broad public interest that are likely to reoccur" – were not at issue because Parkford had not even attempted to address the issue of mootness or persuade the court that the issues were not moot in its appellate briefs.

This case underscores that nothing in CEQA (or any other law) precludes a project approval recipient from immediately proceeding to construct and complete its project unless there is a court order to the contrary. (E.g., *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 499 ["The project sponsor may proceed to carry out the project as soon as the necessary permits have been granted."].) It is the plaintiff's responsibility, if it wants to maintain the status quo and avoid its case becoming moot, to timely seek relief pendent lite by making a showing of a reasonable likelihood of success on the merits and that it would suffer greater harm if a preliminary injunction were not granted pending a decision on the merits. If a plaintiff fails to do so and allows its case to become moot, the court should generally dismiss it without reaching the merits.

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