Remedial Legal Logic: Fifth District Doubles Down On Split with Other Districts in Holding CEQA Doesn't Allow Limited Writ Remedy of Partial EIR Decertification – But Does It Really Matter?

By Arthur F. Coon on November 29, 2020

"The life of the law has not been logic: it has been experience." – Oliver Wendell Holmes, Jr., *The Common Law* (1881)

"CEQA discourse has become increasingly abstract, almost medieval in its scholasticism." – former California Governor Edmund G. ("Jerry") Brown, Jr.

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On November 24, 2020, the Fifth District Court of Appeal filed its partially published opinion in the latest installment of the long-running CEQA litigation over Fresno County's approval of the Friant Ranch project. *Sierra Club v. County of Fresno (Friant Ranch, L.P., Real Party in Interest)* (2020) ____ Cal.App.5th ____. The litigation involves a 942-acre mixed-use development project (2500 residential units, 250,000 square feet of commercial space, 460 acres of open space) for which the Notice of Preparation (NOP) of the EIR was issued in 2007; it has generated an earlier appellate opinion (see my 6/16/14 post *here*) and a Supreme Court opinion (see my 12/28/18 post *here*) addressing important standard of review issues centered on the adequacy of the project EIR's air quality impacts discussion.

The Court of Appeal's most recent 34-page opinion (19 pages of which are unpublished) affirms the trial court's 2019 judgment issuing a writ of mandate following the post-Supreme Court decision remands from the Supreme Court and Court of Appeal, respectively. The crux of the published decision is its rejection – on two alternative grounds – of the of the project developer's appeal and arguments that the trial court

erred by not ordering a "limited writ" remedy, i.e., one that included a "partial decertification" of the project EIR and left "severable" project approvals in place pending full CEQA compliance. In this respect, the Court held: (1) as a matter of law CEQA does not allow partial decertification of an EIR as a remedy because its statutory language requires a public agency to certify "the completion of" the EIR (Pub. Resources Code, §§ 21100(a), 21151(a)) and "an EIR is either completed in compliance with CEQA or it is not so completed" (citing *LandValue 77, LLC v. Board of Trustees of California State University* (2011) 193 Cal.App.4th 675, 682 ("*LandValue 77*"); and (2) in any event, even if CEQA allows a partial decertification remedy, such a remedy would be inappropriate in this case as a matter of fact because the necessary severance findings under Public Resources Code § 21168.9(b) cannot appropriately be made. Because the Fifth District's analysis supporting its conclusion that severance findings could not be made – and thus supporting its alternative holding – was located in the unpublished part of its opinion, it seems the main reason for it to publish its opinion was to "double down" on its much-criticized *LandValue 77* holding that partial EIR decertification is legally unavailable as a CEQA remedy, thus underscoring its disagreement with the Second and Fourth Districts on this issue.

The Fifth District's holding following its earlier *LandValue 77* decision is based on reasoning that CEQA requires agencies to "certify the completion of[] an environmental impact report" for projects that may have a significant environmental impact (Pub. Resources Code, §§ 21100(a), 21151(a)), and that prior to project approval agencies must "certify . . . [that] [t]he Final EIR has been completed in compliance with CEQA." (CEQA Guidelines, § 15090(a)(1); *see id.* at § 15090(a)(2), (3) [also requiring lead agency to certify final EIR was presented to, reviewed and considered by decision-making body, and that FEIR reflects lead agency's independent judgment and analysis].) *LandValue 77*'s statutory interpretation led it to "reject the idea of partial certification" by a lead agency – and, apparently by extension, the *remedy* of partial *decertification* by a *court* – because "the concept of completeness is not compatible with partial certification. In short, an EIR is either complete or it is not." (Citing *LandValue 77*, at 682.)

But the Court's reasoning seems to be a classic example of the fallacy of bifurcation – are the only two choices complete decertification or no decertification at all? Just as instructions for initially assembling or building a vehicle or structure may have little or nothing to do with how the same thing is most sensibly deconstructed, demolished or repaired when the need arises, CEQA's prohibition of partial certification by a lead agency during the project approval process does not textually or logically preclude partial decertification by a court at the end of the post-approval litigation process.

The Second and Fourth Districts apparently share my inability to grasp the Fifth District's "logic" in this regard. Thus, in *Preserve Wild Santee v. City of Santee* (4th Dist. 2012) 210 Cal.App.4th 260, (my 11/28/12 post on which can be found here), the Court of Appeal addressed the plain language of CEQA's remedies statute, Public Resources Code § 21168.9, requiring a corrective writ of mandate to "contain one or more of three specified mandates," including, as one authorized option, a remedial mandate to "void the determination, finding, or decision [of the agency] in whole *or in part.*" (*See* Pub. Resources Code, § 21168.9(a), emph. added.) Coupled with the statute's limitation of the remedy to *only* those mandates needed to achieve CEQA compliance, when severability findings can be made (*id.,* § 21168.9(b)), the Fourth District read the statute's "in part" language "which specifically allows a Court to direct its mandates to parts of determinations, findings or decisions," to allow a partial writ remedy directed to only a portion of a determination, finding or decision (including a certification decision), and thus criticized and rejected as inapposite and nonauthoritative the contrary "rigid construction" of *LandValue 77.*

Similarly, *Center for Biological Diversity v. California Department of Fish and Wildlife (The Newhall Land and Farming Company, RPI)* (2d Dist. 2017) 17 Cal.App.5th 1245, ("*CBD*"), (my 12/11/17 post on which can be found here), followed *Preserve Wild Santee*'s "reasonable, commonsense reading of Section

21189.9" and rejected plaintiffs' "rigid" and "restrictive" contrary view derived from *LandValue 77*. It noted that severability findings are required when voiding agency actions in part, but that: "As an EIR certification is an agency determination, it may be voided in part by a trial court following such findings." The Second District validly reasoned that while an agency must *initially* certify an entire EIR before approving a project, "a court has additional options [under § 21168.9] once it has found an agency's EIR certification noncompliant."

The Fifth District's continuing stubborn fixation on CEQA's non-remedial statutory provisions requiring agencies to certify an EIR's completion in compliance with CEQA, in the first instance, and insistence that these somehow logically preclude a partial decertification remedy under CEQA's directly controlling remedies statute (§ 21168.9) continues to baffle me; it seems to lack support in either law or logic (as the Second and Fourth Districts appear to agree). But is this just more of the CEQA "scholasticism" of which Governor Brown complained? Viewed pragmatically, does it even really matter? Probably not in the instant case, given that the opinion observes that, even under the Second District's reasoning in *CBD,* partial decertification is only available where severance findings can be made, and it held such findings could not be made in this case.

But could the court's posited unavailability of a partial decertification remedy as a matter of law lead to harm in other cases where severance findings could be made? The Court was unconvinced that a partial decertification remedy was needed to protect the appellant developer in the case before it from adverse consequences should further litigation ensue. Invoking the protections of res judicata, collateral estoppel and the requirement to exhaust administrative remedies as analyzed in *Ione Valley Land, Air, & Water Defense Alliance, LLC v. County of Amador* (2019) 33 Cal.App.5th 165, (my 3/27/19 post on which can be found *here*), the Court was unpersuaded that these protections were inadequate and thus found no need to "reach the issue of whether the concept of partial certification is useful to ameliorate any inadequacies, in the protection provided by the principles identified in *Ione Valley*." (*See also Ione Valley, supra,* 33 Cal.App.5th at 172 [rejecting plaintiffs' arguments that trial court's failure to utilize available remedy of partial decertification meant that its full decertification of EIR allowed new challenges even to parts of EIR already upheld by trial court "because whether the EIR has been decertified does not alter the fact that the sufficiency of a component of the EIR has been litigated and resolved."].)

While this may be so, the Fifth District's puzzling insistence on perpetuating its own poorly reasoned and judicially criticized precedent on this remedies issue is unfortunate, not only as a matter of logic, but experience. Allowing partial decertification of an EIR by a writ of mandate could allow a trial court to clearly specify which portions of an EIR are CEQA-compliant and which require revision to achieve compliance in cases where such guidance could be useful as a practical matter, both to lead agencies and developers seeking to comply with a writ, and to plaintiffs seeking to further challenge compliance after a return to the writ has been made. The Fifth District's opinion correctly notes that res judicata and collateral estoppel are backstops that will bar re-litigation of issues regarding alleged EIR deficiencies that were actually litigated or could have been litigated in the initial pre-writ litigation. But is there really a compelling need to force parties to invoke these doctrines when, under the best interpretation of the statutory language adopted by a majority of appellate districts that have considered the issue, the writ itself could provide a clearer road map preempting future disputes?

Questions? Please contact Arthur F. Coon of Miller Starr Regalia. Miller Starr Regalia has had a well-established reputation as a leading real estate law firm for more than fifty years. For nearly all that time, the firm also has written Miller & Starr, California Real Estate 4th, a 12-volume treatise on California real

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