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A "Fare" Shake? Ninth Circuit Affirms Judgment On the Pleadings for San Francisco In Removed Action Challenging SFMTA's 2018 Taxi Regulations, Remands for Consideration of Whether to Grant Plaintiffs Leave to Amend CEQA Claim

By Arthur F. Coon on November 11, 2020

On November 9, 2020, the United States Court of Appeals for the Ninth Circuit issued a published opinion affirming a judgment on the pleadings, granted by Northern District Presiding Judge William Alsup, in a removed action filed by a group of taxicab drivers and companies against the City of San Francisco. *San Francisco Taxi Coalition, et al. v. City and County of San Francisco, et al.* (9th Cir. 2020) ___ F.3d ___. The action challenged the San Francisco Municipal Transit Agency's (SFMTA) adoption of 2018 taxi regulations which favored recent, post-2010 owners of taxi permits (called "medallions," and for which the recent owners paid $250,000 each) over longer-term permit owners by giving them priority for lucrative airport pickup rides.

The heart of the Court's decision was its affirmance of the District Court's rejection of plaintiffs' federal and state equal protection and substantive due process claims through application of the rational basis standard of review; the case did not implicate suspect or quasi-suspect classifications, and the regulations were rationally related to legitimate governmental interests of: (1) aiding post-2010 taxi drivers who had ponied up a quarter-million dollars for a medallion only to be economically crushed when ride-sharing services (i.e., Uber and Lyft) disrupted the taxi industry; and (2) reducing airport congestion. (The Court had a little fun in its opinion with rejecting plaintiffs' attempt to revive the "*Lochner* monster" of substantive due process, which it noted "submerged decades ago and should not resurface.")

Of primary interest for present purposes was the Ninth Circuit's treatment of its remand of plaintiffs' state law claims, one of which was a CEQA claim (the other being a statutory age discrimination claim). While it affirmed dismissal of those claims as pleaded, it also directed the District Court to consider whether to allow plaintiffs leave to amend the claims.

More specifically, with regard to the CEQA claim, the Ninth Circuit held plaintiffs had failed to plausibly allege that the challenged regulations constituted a "project" within the meaning of CEQA. On this issue the Court looked to the California Supreme Court's decisions in *Union of Med. Marijuana Patients, Inc. v. City of San Diego ("UMMP")* (2019) 7 Cal.5th 1171 (my post on which can be found *here*) and *Muzzy Ranch Co. v. Solano Cty. Airport Land Use Comm'n* (2007) 41 Cal.4th 372 as governing precedents. It observed that determining whether an activity constitutes a "project" at the "first tier" of CEQA review – so as to be "subject to CEQA at all" – requires an agency to look to the "general nature" of the activity to determine whether it is "capable of causing a direct or reasonably foreseeable indirect physical change in the environment" and that an "indirect effect is not reasonably foreseeable if … the postulated causal mechanism connecting the activity and the effect is so attenuated as to be 'speculative.'"

Proceeding to apply these principles, the Ninth Circuit characterized the "nub" of the plaintiff taxi drivers' argument as being that the 2018 regulations would potentially affect the environment by increasing so-called "deadhead" trips – i.e., round trips between the SFO airport and downtown carrying passengers on only one leg of the trip. They argued this would occur because pre-2010 medallion holders would still transport passengers to the airport (while being required to return to the City without passengers), and post-2010 medallion owners would make trips without passengers to the airport to secure high-paying fares shuttling riders back to the City. The Court was unconvinced that the complaint's allegations in this regard actually plausibly alleged that the 2018 regulations caused any increase in the number of taxis and fares due to the allocation of existing fares among the different classes of medallion holders. Rather, it reasoned that "the taxis will continue to operate – no matter if they are driving to and from SFO or within the City." It therefore concluded: "At least based on the complaint, the assertion of significant environmental change appears to rest on speculation. Thus, the 2018 Regulations are not a project per CEQA, and the Drivers['] pleadings fail to plausibly claim otherwise."

The Ninth Circuit's holding here – that plaintiffs' current complaint does not adequately allege the challenged regulations are a CEQA "project" – may well be correct, but its placement of the word "significant" in front of "environmental change" in the foregoing quoted language is technically a misstatement of the law. Only the reasonably foreseeable potential to indirectly cause physical change is required for an activity to meet CEQA's threshold "first tier" definition of a "project." It is up to the ensuing CEQA review process itself, which takes place at the second and third tiers and will be based on a more developed factual record, to determine whether the potential physical changes will actually or likely occur, and if so whether they will be "significant" in nature so as to require feasible mitigation or project modifications. Per the *UMMP* decision, a potential indirect environmental effect – i.e., a posited physical change in the environment – "may be rejected as speculative only if … the postulated causal mechanism underlying its occurrence is tenuous."

The Ninth Circuit also slightly misread *UMMP*, and the nature of its usually readily-satisfied test for a CEQA "project," in a footnote in which it recognized the California Supreme Court's acknowledgment in that case "that potential increased traffic arising from 30 new marijuana dispensaries may implicate CEQA." The Ninth Circuit opined that *UMMP's* holding in this respect "was in large part because [of possible] … retail construction to accommodate the businesses." (Internal quotes omitted, citing *UMMP*, at 1199.) In fact, the Supreme Court's holding did not rest as heavily on the effects of potential new retail construction as the Ninth Circuit suggests; rather, it held that the marijuana dispensary ordinance there at issue was a "project" not only because the new businesses it authorized could cause indirect physical changes through retail construction, but also through citywide changes in "traffic [patterns] from the businesses' customers, employees, and suppliers" – i.e., operational impacts of the newly established businesses could result in changes in existing traffic patterns sufficient to trigger CEQA. Per the California Supreme Court, such "theoretical effects … are sufficiently plausible to raise the possibility that

the Ordinance "may cause … a reasonably foreseeable indirect physical change in the environment" (§ 21065), warranting its consideration as a project."

So, in sum, I'd give the Ninth Circuit a B+ for its CEQA analysis (which is actually pretty good for a busy federal appellate court with so much else of importance on its mind!), and the plaintiffs get to re-plead . . . well, maybe. You may ask, is all of this akin to "counting angels on the head of a pin"? Perhaps, but such is the esoteric nature of our state's beloved CEQA. As a practical matter, to have a fighting chance of adequately alleging a CEQA claim on remand it seems to me that the taxi driver plaintiffs would need to allege a plausible causal mechanism whereby it is reasonably foreseeable that the challenged 2018 regulations could indirectly result in *more* traffic or emissions, or *demonstrably changed* traffic patterns, not just a reallocation of fares within the current traffic patterns, which would rise only to the level of an economic or social impact that is not cognizable under CEQA. How will plaintiffs "fare" in this regard? Only time will tell.

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