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No Room At the Table: Second District Upholds Denial of Intervention in CEQA/Coastal Act Litigation Where Nonparties Failed to Make "Compelling Showing of Inadequate Representation".

By Arthur F. Coon on May 15, 2023

In consolidated litigation challenging on CEQA and Coastal Act grounds the Coastal Commission's amendment of a coastal development permit (CDP) to (among other new use restrictions) completely phase out off-highway vehicle (OHV) use at the apparently inaptly-named Oceano Dunes State Vehicular Recreation Area (Oceano Dunes), the Second District Court of Appeal (Div. 6) affirmed the trial court's order denying a motion to intervene filed by a number of interested nonparties (the Northern Chumash Tribal Council, Oceano Beach Community Association, and Center for Biological Diversity, or "Appellants"). *Friends of Oceano Dunes, et al. v. California Coastal Commission, et al.* (2023) ___ Cal.App.5th _____. In so doing, the Court applied and explained numerous principles governing both motions for intervention as of right and motions for permissive intervention.

Intervention as of Right

The overarching principle underlying the Court's affirmance of the order denying by-right intervention is "that where a nonparty has interests in the outcome of a civil action that are identical to those of a party to the action, the nonparty must make a compelling showing of inadequate representation to be permitted to intervene as of right." Here, the trial court found Appellants had failed to make this showing, reasoning that they had the "same ultimate objective"—defending the CDP amendment—as the State defendants; did not intend to raise new arguments or claim the State defendants would fail to vigorously defend the CDP amendment; did not contend the State defendants were considering a scaled-back amendment adverse to their interests; and had no "special expertise" concerning the Coastal Commission's CDP amendment authority and related procedures, which were the sole issues raised in the writ litigation.

The Court of Appeal agreed, reaching the same conclusion regardless of whether it considered the issue under a de novo or abuse of discretion standard of review. (The Court noted the authorities are in conflict

over the proper standard, but that it need "not weigh in on the standard-of-review debate here because there was no error under either standard.")

The substantive elements required to be shown by a nonparty for intervention as of right are: (1) a timely application; (2) "an interest relating to the property or transaction that is the subject of the action"; (3) being "so situated that the disposition of the action may impair or impede [their] ability to protect that interest"; and (4) that their interest is not "adequately represented by one or more of the existing parties." (Citing to and quoting Code Civ.Proc. ("CCP"), § 387(d)(1)(B).) The Court noted only the fourth element was at issue in the case before it and that it has received a liberal construction, with California courts resolving doubts in favor of intervention, and looking to federal authorities and practical and equitable considerations for guidance in determining whether it is met.

The Court recited three factors as determining whether a party will adequately represent a non-party's interest: (1) whether the party's interest "is such that it will undoubtedly make all of [the nonparty's] arguments"; (2) whether the party "is capable and willing to make such arguments"; and (3) whether the nonparty would offer "necessary elements . . . that other parties would neglect." Generally, the burden to meet this test is "minimal" and satisfied if it is shown the party's representation of the nonparty's interest "may be" inadequate. However, if the nonparty's interest is "identical" to a party's, "a compelling showing is required to demonstrate inadequate representation." (Citing *Callahan v. Brookdale Senior Living Communities, Inc.* (9th Cir. 2022) 42 F.4th 1013, 1020-21, internal quotations and brackets omitted.)

The Court found this last proviso dispositive since Appellants' interest was identical to the State defendants' interest, which was defending the Commission's authority to amend the CDP and the amendment process's compliance with the Coastal Act and CEQA. Per the Court: "[I]f the CDP amendment takes effect, the Commission's decision to ban OHVs at Oceano Dunes will completely protect Appellants' concerns about negative impacts on the environment, local citizens, and the Northern Chumash."

Appellants were thus required to make a compelling showing the State defendants' representation would be inadequate, but they failed to do so. The Court rejected their arguments that such a showing was unnecessary because the pubic agencies' interests were actually different in that the agencies were required to balance environmental and health considerations against competing resource constraints and the interests of other constituencies; to the contrary, any such balancing already occurred before the Commission issued the CDP, and the litigation only involved defending that CDP, not determining its content. Further, Appellants' argument misconstrued the nature of the relevant inquiry, which was not the State defendants' and Appellants' respective interests in general, but their interests in this specific litigation. The Court found the litigation posed only narrow jurisdictional and procedural issues as to whether the State defendants had authority to amend the CDP and, if so, whether they complied with applicable laws in so doing. As to those issues, Appellants' and the State defendants' interests were the same; thus, the "compelling showing" standard applied.

Appellants failed to make the required "compelling showing" of inadequate representation because they did not propose to raise new legal arguments, and the State defendants were thus willing and able to make all Appellants' arguments. The State defendants did not propose to consider a "scaled-back" CDP amendment at odds with Appellants' interests or assert some other undesirable position, and Appellants conceded they lacked any "specialized legal expertise" as to the relevant litigation issues. Appellants' assertion that they would have opposed a stipulation staying implementation of the CDP amendment agreed to by the parties did not demonstrate inadequacy of representation and amounted only to a disagreement over litigation strategy or legal tactics, rather than a substantive disagreement justifying intervention. (Citing *Callahan*, 42 F.4th at 1021.) Appellants' claim that "the State defendants *may*

advance different arguments than they would like to see at trial" was also insufficient and, in any event, intervention requires more than offering "a different angle" on a lawsuit's legal questions. Per the Court: "Conflicting views on legal strategy do not amount to inadequate representation." (*Id.*)

Nor was the Court persuaded by Appellants' arguments "that the State defendants have not committed to supporting all their goals" and that "they possess cultural and ecological knowledge the State defendants do not." While those things may be true, the relevant inquiry for purposes of the adequacy-of-representation test is the alignment of the parties' interests, knowledge and expertise as they relate to the CDP amendment, and the State defendants' authority and process for the same; that they "may have diverging interests and expertise on other issues is not a compelling showing of inadequate representation."

Permissive Intervention

The Court likewise affirmed the trial court's order denying permissive intervention, under which a nonparty with an interest in the matter in litigation or the success of the parties may be permitted to intervene if (1) proper procedures are followed, (2) the nonparty's interest is direct and immediate, (3) intervention will not enlarge the issues in the litigation, and (4) the reasons supporting intervention outweigh any opposition by the present parties. (Citing *City and County of San Francisco v. State of California* (2005) 128 Cal.App.4th 1030, 1036.) Permissive intervention invokes a balancing of the interests of nonparties affected by a judgment against those "of the original parties in pursuing their case unburdened by others," and the trial court has "broad discretion" to strike this balance and its decision will be overturned for abuse of that discretion only where "its decision exceeds the bounds of reason." (Citations omitted.)

Here, the trial court's order did not exceed the bounds of reason because the original parties' rights to conduct the lawsuit on their own terms outweighed the reasons for intervention where Appellants' and the State defendants' litigation positions were "duplicative." (Citing *South Coast Air Quality Management District v. City of Los Angeles* (2021) 71 Cal.App.5th 314, 320, my 11/4/21 post on which can be found *here*.) Further, allowing Appellants to intervene "would add to an already-expansive action, one with four consolidated writ petitions; multiple plaintiffs, defendants, and real parties in interest; and significant burdens on the trial court." (Citing *South Coast*, 71 Cal.App.5th at 319, for proposition that intervention is properly denied where "seating at the table already is crowded" (cleaned up).) The case will be decided on the administrative record, and Appellants can offer no new evidence, and plan to offer no new arguments; but, per the Court, if Respondents' challenges to the CDP amendment are successful, Appellants will be able to offer such evidence and arguments in any reopened environmental review process. "The balance of relevant factors thus weighs against permissive intervention, as the trial court correctly concluded."

Conclusion and Implications

Where a nonparty has an interest in defending litigation challenging an agency's decision that is identical to the defendant agency's, it must make a compelling showing of inadequacy of representation to support intervention as of right; and where, as here, the nonparty offers no new arguments or other evidence that the defendant agency will not make its arguments, or will inadequately represent its interests with respect to the specific issues being litigated, it fails to make the required showing. A trial court also has broad discretion to deny permissive intervention in already complex litigation involving multiple parties and burdens on the trial court where the participation of the nonparty (or nonparties) would be duplicative.

One might wonder why Appellants pursued intervention so vigorously here when they likely could have provided their largely duplicative "me, too" legal input as amici curiae. Not directly addressed in the

Court's opinion, but perhaps lurking just beneath the surface, is the key principle that parties to litigation, unlike amici, have the right to independently pursue claims and defenses and thus presumptively a "seat at the table" not only in the litigation, but in any settlement negotiations, which may be valuable if nonparties like Appellants here fear the government defendants may "give away the store" in a settlement agreement or consent judgment or decree. The biggest takeaway here seems to be that would-be intervenors in CEQA or other writ litigation challenging governmental land use approval actions need to bring something significantly new to the table, not just duplicative "me, too" arguments, to gain a seat at it.

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