First District Holds CEQA Challenge To Shooting Range Project On City-Owned Land In Unincorporated County Was Not Mooted By Project's Construction During Trial Court Proceedings Despite Petitioner's Failure To Seek Preliminary Injunction

By Arthur F. Coon on April 4, 2024

In a partially published opinion filed March 29, 2024, the First District Court of Appeal (Div. 4) rejected contentions that the pre-judgment completion of construction of a shooting range mooted a CEQA challenge to the project; it held an effective remedy in the form of various mitigation measures alleged in the CEQA petition remained available and reversed the trial court's judgment entered in favor of respondents and real party after sustaining their demurrers and granting their motions to strike and for judgment on the pleadings. In addition to applying established mootness principles, the Court resolved a number of other issues in holding petitioner Vichy Springs Resort, Inc. ("Vichy") had sufficiently alleged a CEQA claim at the pleadings stage against both the City of Ukiah ("City") and the County of Mendocino ("County") in a unique factual and legal context presenting novel issues of land use regulatory authority and intergovernmental immunity. *Vichy Springs Resort, Inc. v. City of Ukiah, et al. (Ukiah Rifle and Pistol Club, Inc., Real Party in Interest)* (2024) ___ Cal.App.5th ___.

The Shooting Range Project And the Litigation

Real party Ukiah Rifle and Pistol Club, Inc. ("Club") operates a shooting range on land owned by the City that is located in unincorporated Mendocino County and leased by the City to the Club. The Club planned to demolish its existing main shooting range and replace it with a larger, more modern facility. Nearby resort and spa Vichy was concerned the project would have significant environmental impacts including lead contamination from "increased bullets," and increased noise and traffic. Due to uncertainty over which entity regulated the Club's land use activities, Vichy sued both the City and the County under CEQA and for alleged general plan and local ordinance violations in connection with City's issuance of a

building permit to its lessee for the project, and the failure of County (or any governmental entity) to issue a use permit.

Vichy did not seek relief pendent lite to enjoin construction of the Project. While the action was pending in the trial court, the Project was completed and the City and County also entered into a Joint Powers Agreement ("JPA") to resolve the uncertainty over their respective land use/building code regulatory authority. The Attorney General also issued an opinion (Opinion 14-403; 80 Ops. Cal. Atty. Gen. 88 (2018)), in response to the County's request and during the action's pendency, clarifying relevant legal principles, i.e., that a city's private lessee is exempt from a county's land use regulatory authority, pursuant to statutorily-provided intergovernmental immunity (see Gov. Code, §§ 53090, 53091), if the lessee's use primarily serves the city's public purposes, but not if the lessee's use primarily serves its own private interests. The AG did not, however, opine on the specific issue whether the Club's use of the City's land in this case was primarily for a public or private purpose.

A series of motions by the City and County culminated in the trial court's dismissal of the entire action as moot, and that court also denied Vichy's motion for attorneys' fees made on the theory that its action "catalyzed" respondents' entry into the JPA.

Vichy appealed. While the Court of Appeal affirmed dismissal of local law claims against the City for issuance of the building permit, and agreed with the trial court that the JPA mooted a declaratory relief claim regarding Respondents' respective regulatory authority, it reversed the judgment to the extent that it found the CEQA claim moot, and remanded to the trial court for further proceedings.

The Court of Appeal's Opinion

The published portion of the Court's opinion dealt with the case's CEQA issues. It first set forth the applicable standards of review, under which the Court reviews de novo trial court orders sustaining demurrers, exercising its independent judgment on whether the petition states a legally viable cause of action, and also reviews de novo justiciability issues such as mootness. It noted, however, that the deferential abuse of discretion standard arguably applies to review of a trial court's ruling rejecting the public interest exception to mootness.

After observing that CEQA does not grant a public agency new powers, but works in conjunction with discretionary powers granted to public agencies by other laws (citing CEQA Guidelines, § 15040), the Court reviewed in relevant part CEQA's definition of a "project" within its scope as "an activity which may cause a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is … [a]n activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies" or "an activity directly undertaken by any public agency." (Quoting and citing Pub. Resources Code, § 21065(a), (c).) The "project" must also implicate "discretionary," not "ministerial," approval authority of the public agency for CEQA to apply. (Citing § 21080(b)(1); *Mission Peak Conservancy v. State Water Resources Control Bd.* (2021) 72 Cal.App.5th 873, 880; and *Protecting Our Water & Environmental Resources v. County of Stanislaus* (2020) 10 Cal.5th 479, 489, my 8/28/20 post on which can be found here.)

The Court rejected the Club's and City's arguments that the CEQA claim was mooted because completion of the Project precluded the grant of any effective relief. Rather, even projects which are completed and in operation can be subjected to additional mitigation measures, or modification, reconfiguration, or even removal as a result of an agency's further required CEQA compliance. (Citing *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1203-1204; *Woodward Park Homeowners Assn. v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, 888.)

Finding these authorities applicable to the issue of mootness of the CEQA claim in the Petition before it, the Court observed that the claim alleged the Project would increase use of the shooting range, resulting in increased lead-contaminated water runoff, and increased noise and traffic. The Petitioner also alleged that numerous mitigation measures were available to reduce or avoid the significant effects, such as the Club's engaging in a lead removal program, implementing a pollution prevention plan, employing lead-free ammunition, and limiting hours and uses of the main range. Per the Court: "Thus, while the Project may be complete, mitigation measures could still be imposed to reduce or avoid the significant environmental impacts alleged in the Petition. The [building] permit and certificate of occupancy issued by the City could be revoked and held in abeyance while the County completes its [CEQA] review."

The Court distinguished both *Parkford Owners for a Better Community v. County of Placer* (2020) 54 Cal.App.5th 714 (my 9/21/20 post on which can be found *here*), and *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, as cases in which the CEQA challenger made only generalized and unelaborated and/or unpursued or abandoned arguments that completed projects could be modified or removed to mitigate impacts, whereas Vichy's Petition included specific allegations (as noted above) about available post-completion mitigation measures. (Moreover, it was not but might have been noted by the Court that where, as in *Santa Monica Baykeeper*, a project's "construction impacts" are the environmental effects complained of, a project's physical completion of construction and advancement to the operations stage would appear to present a classic mootness scenario.)

The Court also rejected the Club's argument that mootness should be found based on Vichy's failure to seek a preliminary injunction staying construction, stating:

> "Doubtless it would have been preferable for Vichy to ask for temporary injunctive relief; the progress of a project can impact the feasibility of mitigation measures and in some cases can indeed mean there is no longer anything the court could reasonably order as a remedy. Although the Club knew Vichy was challenging the City's determination that the Project was not subject to CEQA or qualified for an exemption, we cannot fault it for proceeding with construction given Vichy's inaction. But we see no legal basis for concluding that a petitioner's earlier failure to seek injunctive relief requires a court to find a CEQA claim moot in a situation in which effective relief remains available."

The Court also distinguished *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, which rejected the argument that a developer proceeded with construction at its own risk, as involving a non-CEQA, reverse validation action in which the Court "did not consider any argument that the trial court could or should have ordered mitigation measures notwithstanding the completion of construction." (Citing *id.* at 1579-1580.)

Vichy's allegations that County's local ordinances required a discretionary use permit for a Project which had reasonably foreseeable environmental impacts, thus requiring CEQA review, also stated a cause of action sufficient to survive demurrer. The Court rejected County's "narrow" and "overly formalistic" reading of Public Resources Code, section 21168.5 as excluding petitioner's action because it was grounded in County's alleged misapplication of intergovernmental immunity statutes rather than "noncompliance with CEQA"; ultimately, the Court held, Vichy complains of "County's resulting failure to follow any of CEQA's requirements."

Nor was the trial court correct in concluding the Petitioner failed to challenge a CEQA "project" because the County issued no permit. Public Resources Code § 21065's definition of "project" does not require that a permit be issued, only that the proposed activity "involve[] the issuance to a person of a … permit"

and here the Petitioner alleges that if the activity was subject to County's authority a permit would be required, and thus sufficiently alleges the Club purported to carry out a "project" within CEQA's definition.

The Court also rejected County's argument that CEQA only applies to project *approvals* and not to governmental *inaction*, such as its "nonapproval" of the Project here. To the contrary, the Petition alleged, with supporting documentation, that the County determined the Project was not subject to CEQA because it lacked authority to regulate the Club's activities taken under a lease of City-owned land. The Court assumed for purposes of its analysis on demurrer, and based on the Petition's uncontradicted allegation, that the County possessed regulatory authority over the Project even before entering the JPA with the City, but noted it was not adjudicating that question, nor the related issue whether the Club's shooting range use was primarily for a private purpose. Further, unlike a prior decision holding a CEQA challenge was unripe because there was no project for the agency's consideration, here the Petition alleged the existence of a Project that the County determined it lacked authority to regulate – an "unusual circumstance" where "the County's determination meant that the Project was allowed to proceed without environmental review, which directly conflicts with the stated purpose of CEQA."

Finally, for the same reason, the Court rejected County's argument "that it cannot violate CEQA through inaction," which was based on *Lake Norconian Club Foundation v. Department of Corrections & Rehabilitation* (2019) 39 Cal.App.5th 1044 (my 9/17/19 post on which can be found here). That case held a public agency's failure to repair a historic building was not a CEQA "project" because "the failure to act is not itself an activity, even if, as may commonly be true, there are consequences, possibly including environmental consequences, resulting from the inactivity." (*Id.* at 1051.) In distinguishing *Lake Norconian*, the Court stated:

> "The project at issue here, however, is not the County's inaction; it is the Club's demolition and construction of the main range. Because the County does not dispute that the Project would have been subject to its environmental review if the County had regulatory authority, the Petition properly alleges a violation of CEQA with its allegations that the County erroneously concluded it had no responsibility for issuing a discretionary permit that would have triggered its review obligations."

Conclusions and Implications

This was an unusual CEQA case, involving a jurisdictional "hot potato" project and property – a gun range on a City-owned island of land in the unincorporated County – and no actual discretionary approval issued so as to clearly trigger a CEQA compliance obligation. Given the case's legal and factual complexities – underscored by the AG opinion requested by the County to clarify its legal obligations – and the high stakes involved in seeking a preliminary injunction at the outset of a CEQA action (both in terms of substantial front-loaded litigation expense and the risk of a case "going sideways" as a result of an early adverse ruling, probably made on an incomplete record, finding no reasonable likelihood of success), it is completely understandable to me why Vichy's counsel did not seek a preliminary injunction here, particularly in light of the fact that there was already an existing operating shooting range on the site with or without the Project. That said, and as the Court recognized, project proponents with all necessary approvals (obvious asterisk here) also cannot be faulted for proceeding to construct their authorized (again, asterisk) projects unless enjoined by a court order. The complexities of this particular case aside, the biggest takeaway here may be that CEQA petitioners' counsel who do not obtain a voluntary stay and do not plan to seek a preliminary injunction, and who are thus willing to risk completion of a challenged project's construction prior to adjudication of their claims, should be sure to plead specific, feasible, and effective operational-phase mitigation measures in their petition to guard against their action becoming moot.

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