Client Alert

July 31, 2013

Nothing in Common: Fifth District Court of Appeal Rejects City-Applicant Protections for Pre-Project Approval CEQA Communications

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Inserting uncertainty in the already murky area of the scope of the administrative record under the California Environmental Quality Act (CEQA), California's Fifth District Court of Appeal has held that pre-project approval communications between a lead agency and a project proponent are not protected under the attorney-client privilege and must be included in the record. This decision creates a split within the appellate courts, conflicts with established land use practice and creates much uncertainty for lead agencies and project proponents with regard to the scope of the administrative record and how to communicate during the CEQA process.

The decision, *Citizens for Ceres v. Superior Court of Stanislaus County* (Case No. F065690 (Cal. Ct. App. 5th, July 8, 2013)) (*Ceres*), rejects the position that there is any "common interest" between a lead agency and developer at the pre-approval stage and thus any communication between agency counsel and an applicant waives any privilege and such communication must be included in the record.

BAD FACTS MAKE BAD LAW

Ceres involved a multi-year dispute over the construction of a Wal-Mart store in the City of Ceres, California. Citizens for Ceres, a group of residents who opposed the development, filed a CEQA suit in October 2011. In preparing the administrative record for the CEQA lawsuit, the City withheld more than 3,000 documents (many consisting of emails between the City and Wal-Mart legal counsel) under the claim that the common interest doctrine prevented the "waiver" of privilege. The fact that the use of this doctrine appeared to cover such a substantial number of communications appears to have weighed on this decision.

The "common interest doctrine" can be viewed as a doctrine of "non-waiver," essentially extending attorney-client privilege to confidential communications made to third parties if those communications cover matters of joint concern and if disclosure is reasonably necessary to further the purposes of legal consultation. The petitioners argued that the communications between the City and Wal-Mart were not protected under the doctrine and should be included in the administrative record for the project. After the trial court ruled against the petitioners, they sought immediate review with the Fifth District.

In its unanimous decision, the Fifth District rejected petitioner's argument that CEQA administrative record requirements abrogate the attorney-client privilege and attorney work product doctrine. Nonetheless, the court held that attorney-client privilege under the common-interest doctrine arises only *after* project approval—thus, pre-project approval communications between the lead agency and project applicant (including correspondence between legal counsel) are *not* protected and must be disclosed as part of the administrative record. The court

reasoned that while both parties desire a legally defensible Environmental Impact Report (EIR) a project applicant's primary interest is that the lead agency will produce a legally defensible EIR that supports its proposed project, but the lead agency must be neutral and, at times, may be adverse to the applicant. Therefore, only post-approval do the parties share a "united interest" in defending the project against possible litigation. As result, the court found that attorney-client privilege was waived for all communications between the agency and the applicant prior to project approval and those documents must be included in the administrative record.

APPELLATE SPLIT CREATES UNCERTAINTY FOR PROJECT APPLICANTS

The Fifth District's decision is a wholesale rejection of the Third District's 2009 decision in *California Oak Foundation v. County of Tehama*, 174 Cal. App. 4th 1217 (2009), which held that documents shared between agency and project applicant lawyers were protected under the common interest doctrine. That appellate court held that the exchange of information between the lead agency and project proponent was made in a joint endeavor to defend environmental documents and, thus, was reasonably necessary to further the purpose of the original legal consultation.

Until the Fifth District's decision, lead agencies and developer applicants have looked to *California Oak* for the principle that communications between counsel did not waive the attorney-client privilege and such communications could properly be excluded from the record. Indeed, it is common practice for attorneys from both sides to exchange draft studies, technical information and legal input to assist in preparing legally defensible CEQA documents. However, *Ceres* expressly limits the application of the common interest doctrine and the split in authority at the appellate level muddies the water between CEQA document preparation and ultimate agency project decision-making.

The League of Cities and other organizations are assessing whether to seek depublication or an appeal to the California Supreme Court. However, until other courts clarify these conflicting decisions, project applicants and agencies should err on the side of caution when developing pre-approval communication protocols, given the potential that such communications may be included in the administrative record for future CEQA litigation or disclosed in response to California Public Records Act requests. As a practical matter, attorneys may retreat from written communications in favor of more verbal communications.

CEQA has been the target of frequent calls for reform to streamline the process and minimize abusive litigation. This decision will likely have the unintended effects of making the process even more cumbersome and creating additional "sideshow" litigation on the scope of the record, while doing little to promote public disclosure.

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