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Notice Of Exemption Triggers A 35-Day Statute Of Limitations Under CEQA Despite Flaws in Underlying Approval

Stockton Citizens for Sensible Planning v. City of Stockton _____ Cal. _____ (April 1, 2010, No. S159690)

By Phillip Tate

On April 1, 2010, the California Supreme Court unanimously ruled that flaws in the decision making process underlying a facially valid and properly filed Notice of Exemption ("NOE") do not prevent the NOE from triggering a 35-day statute of limitations period for challenging the agency's determination under the California Environmental Quality Act ("CEQA"). The decision ended a lawsuit challenging the approval of a Wal-Mart Supercenter in Stockton, California (the "City"). In overturning the lower courts, the Supreme Court held that when an NOE minimally complies with CEQA, it is sufficient to trigger the 35-day statute of limitations under CEQA, and a plaintiff can not argue the merits of the underlying approval as a means of circumventing the statute of limitations.

In 1989, the City had approved a plan for the development of the 1,239 acre A.G. Spanos Park tract in northwest Stockton, whereby the entire tract would be developed with a mix of residential, commercial, open-space and recreational uses. The A.G. Spanos Park tract is bisected by Interstate 5, forming the 586-acre Spanos Park East and the 653-acre Spanos Park West. Spanos Park West was intended to contain broad components: a commercial component and a medium to high density residential component that would contain 2,983 of the 7,460 residential units planned for the entire tract.

In 2001, after Spanos Park East was nearly completely built out and Spanos Park West had been graded for residential construction, the market conditions changed, which led A.G. Spanos Construction Company ("Spanos"), the developer, to propose changes to the plan for Spanos Park West. Under Spanos' proposal for revisions, the 138-acre area designated as the Villages at Spanos Park West (the "Villages") and originally planned as medium to high density residential, would be rezoned for single-family residential and developed with low to medium density housing. The A.G. Spanos Business Park (the "Business Park") would be rezoned to mixed-use, allowing it to be developed with a mix of high-density residential, business, professional and retail uses, as set forth in a master development plan ("MDP").

An MDP was prepared for the Business Park and approved in January, 2002 after a second supplemental EIR was prepared. The MDP prepared for the Business Park stated its intention of being the primary land use

document that establishes the course of development for a flexible planned mixed use project. Having the ability to respond to changing market conditions was a recurrent theme throughout the document, and the MDP provided ranges of uses for specific sites within the Business Park. Four of the parcels - 17, 17a, 18 and 19 - comprising approximately 48 acres were designated as primarily for multifamily residential development. Retail space of up to 225,000 square feet was listed as an optional use for parcels 17a, 18 and 19.

Once the MDP was adopted, a project that was inconsistent with the MDP could only be approved if the City's planning commission ("CPC") issued a conditional use permit ("CUP"). However, under the MDP, the Design Review Board ("DRB") and Director of Planning ("Director") were required to approve any project that was consistent with the MDP's criteria, goals and purposes. A project approval by the Director could be appealed to the CPC within 10 days.

In the fall of 2003, Wal-Mart Stores, Inc. ("Wal-Mart") submitted a proposal and plans to the DRB to build a 207,000 square foot retail store on parcels 17 and 17a of the Business Park (the "Project"). In October, 2003, the DRB advised the Director that the Project is consistent with the MDP. On December 15, 2003, the Director wrote to Wal-Mart's representatives stating that the Project is in substantial compliance with the MDP. On February 5, 2004, Wal Mart's counsel wrote to the Director asking him to confirm that his December 15, 2003 letter constituted the decision required under the MDP and that the appeal period had expired. The Director initialed the letter and returned it to counsel. On February 17, 2004, the City filed an NOE for the Project with the County Clerk. The NOE did not mention that the Project was a Wal-Mart Supercenter. Wal-Mart applied for a CUP to allow the sale of alcohol on February 24, 2004.

The plaintiffs filed a verified petition for a writ of mandate on July 22, 2004, almost four months after the 35-day statute of limitations triggered by the NOE had expired. The plaintiffs' primary cause of action was that the City and Wal-Mart had violated CEQA by proceeding with the Project without preparing a new EIR, and that staff had erred in concluding that the Project was consistent with the MDP. The City and the real parties in interest demurred to the CEQA claims and moved to strike on the basis that the suit was untimely, as it was not filed within 35-days of the posting of the NOE. The trial court rejected the statute of limitations defense on the basis that the NOE only starts the running of a shortened 35 day statute of limitations under CEQA if the NOE gave notice that the City had approved a project it deemed exempt from CEQA. The trial court ruled that the Director's determination was defective as an approval and, therefore, could not support the NOE. As such, the trial court concluded that the plaintiffs' had a six-month statue of limitations and that the suit was therefore filed timely. That determination was affirmed at the appellate level in a split decision.

The California Supreme Court overturned the Court of Appeals, stating that the plaintiffs and the Court of Appeals had confused the timeliness of the lawsuit with the merits. The court pointed to *Norgart v. Upjohn*

Co., which held that a statute of limitations “‘necessarily fix[es]’ a ‘definite period[] of time’ [citation], and hence operates conclusively across-the-board. It does so with respect to *all* causes of action, both those that do not have merit and also those that do. That it may bar meritorious causes of action as well as unmeritorious ones in the ‘price of orderly and timely processing of litigation’ [citation] – a price that may be high, but one that nevertheless must be paid.” *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 410. The court used the principles established in *Norgart* as the basis for holding that a facially valid and properly filed NOE stating that a public agency has approved a project under a CEQA exemption, automatically triggers a 35-day statute of limitations for CEQA challenges to the approval process, regardless of if the approval referenced in the NOE was defective or not.

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