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COUNTY OUTSIDE COUNSEL WORK PRODUCT NOT PART OF CEQA RECORD EVEN IF DISCLOSED TO REAL PARTY IN INTEREST

California Oak Foundation v. County of Tehama et al. (Del Webb California Corp. et al.), ____ Cal. App. 4th ____ (June 11, 2009, No. CI58258)

By Katharine E. Allen

Four letters sent to the County of Tehama and the Tehama County Board of Supervisors (collectively "Tehama") and disclosed to real parties in interest by a law firm retained as outside counsel for the purpose of providing advice on compliance with the California Environmental Quality Act ("CEQA") maintained their privileged status under the attorney-client and work product privileges despite the disclosure and thus did not need to be included in the administrative record. In so holding, the Court of Appeal for the Third Appellate District relied on the common interest doctrine to maintain the privileged status of the letters. The court did, however, reverse the judgment of the Superior Court of Tehama County on a separate issue related to the investigation of the financial feasibility of certain mitigation fees, with directions that the superior court enter a judgment requiring Tehama to reconsider the standard used in determining the economic feasibility of the underlying project.

Background

The project at issue in this case was a specific plan for residential and commercial development on a parcel of approximately 3,320 acres of land adjacent to Interstate Highway 5 ("I-5") between Red Bluff and Redding known as the Sun City Tehama Specific Plan. The primary impacts of the project were the net loss of roughly 774 acres of blue oak woodlands and the increase in traffic on certain nearby portions of I-5. The Final Environmental Impact Report ("FEIR") for the project concluded that (i) even with a net loss of 774 acres of blue oak woodlands, the use of a perpetual conservation easement over 1,398 acres of woodlands within the general specific plan area was sufficiently proportionate to the impact and thus no additional mitigation (namely the contribution of money to the Oak Woodlands Conservation Fund) was required, and (ii) given the lack of an established funding program for necessary infrastructure improvements to I-5 to accommodate the increased traffic, there may be impacts if the improvements were not built but increased mitigation fees for the residential portion of the project were not economically feasible. In connection with the later issue, Tehama used a generally applied standard to determine that increasing the traffic impact fees above the existing percentage of each home's sales price would render the project financially infeasible and noted that CEQA does not require mitigation that is financially infeasible. Tehama subsequently approved the project. The California Oak Federation ("COF") petitioned for a writ of administrative mandamus to overturn approval of the project and the FEIR. When the superior court denied its petition, COF appealed contending that Tehama erred on a number of fronts in its application of CEQA requirements for mitigation and that the superior court also erred in denying COF's motion to include certain letters in the administrative record on the grounds.

Privileged Documents Excluded From Administrative Record

The most pertinent part of the Court of Appeal's decision centered on its consideration of whether the attorney-client and work product privileges under the California Evidence Code were applicable in light of Section 21167.3 of CEQA and, if so, whether those privileges were destroyed by the disclosure of the letters to counsel for the other real parties in interest. COF first asserted that Section 21167.3(e) of CEQA abrogated the applicability of the attorney-client and work product privileges to the letters. COF then claimed that if there was no abrogation of the privileges by CEQA, the privileges were nonetheless rendered inapplicable because the letters had been shared with third parties.

The Court of Appeal rejected COF's claim that Section 21167.3(e) of CEQA eliminated the privileged nature of the letters outright. The court noted that in order to eliminate a recognized evidentiary privilege, CEQA would have to constitute an implied repeal of the existing statute governing the privilege. An implied repeal will only be construed where it is clear that the later statute was intended to supersede the existing law. This in turn only occurs when there is an unavoidable conflict between the two laws. While Section 21167.3(e) of CEQA contains extensive disclosure requirements with respect to items to be included in the administrative record, it does not mention either privilege. As a result, the Court of Appeal found this insufficient to construe an implied repeal of the privileges by CEQA and found the letters to be protected by the privileges.

The Court of Appeal similarly rejected COF's second claim that certain disclosures of the letters to various third parties negated the application of either the attorney-client or work product privileges to the letters. In doing so, the court relied on the common interest doctrine. In particular, it noted that while disclosure to an unnecessary third party would destroy communication, disclosure to a third party to whom the disclosure is reasonably necessary to further the purpose for which the legal representation was initially sought preserved both privileges. The court held that disclosing advice related to compliance with CEQA requirements to codefendants in a joint endeavor to defend an underlying environmental impact report in litigation was reasonably necessary for the purpose for which the legal representation was initially sought, which was to achieve compliance with CEQA. Thus, the privileges were still intact with respect to these letters and they were not required to be made part of the administrative record.

Mitigation of Loss of Blue Oak Woodlands

COF also took issue with the level or required mitigation with respect to the loss of blue oak woodlands. COF claimed that Tehama and the superior court incorrectly relied on Section 21083.4 of the California Public Resources Code to justify not requiring full mitigation of the impact of the project, as was otherwise mandated by Section 21081. The Court of Appeal rejected this argument, finding that there was no indication in the FEIR that Tehama used Section 21083.4 as an exception to the general rule in CEQA to mitigate. On the contrary, Tehama's reasoning, as evidenced by the contents of the FEIR, was that the conservation easement was proportional to the impact, but that the loss of habitat remained a significant unavoidable impact. As such, Tehama found no mitigation measure could avoid a net loss of habitat and thus there was no feasible mitigation to reduce the impact to a less than significant level. The court applauded Tehama's admission of the actual impact of the project in the FEIR as being “true to the spirit of CEQA.”

Mitigation of Impact of Increased Traffic on I-5

COF also contested the findings with respect to the increase in traffic on I-5 under the FEIR. COF claimed that Tehama erred in a number of ways in reaching its determination that these impacts were unavoidable and that mitigation in the form of traffic impact fees must be limited to the amount of such fees that were determined to be financially feasible in the FEIR. In particular, COF claimed that Tehama improperly concluded that a higher traffic mitigation fee was financially infeasible because Tehama: (i) failed to account for the ability of the commercial portion of the project to contribute; (ii) failed to conduct an independent review of financial feasibility and instead relied on information provided by the developer; (iii) improperly relied on a finding that greater fees were financially infeasible because there was no existing funding program in place; (iv) failed to disclose an analysis from the residential developer on financial feasibility; (v) failed to include several financial analyses from the developer in the FEIR; and (vi) failed to disclose doubts by its economic consultant over the use of a commonly used standard to determine feasibility.

The Court of Appeal struck down a number of COF's contentions under the doctrine of exhaustion of administrative proceedings, finding that since certain claims were not raised in the applicable administrative proceedings, they could not be asserted for the first time during judicial review. The court further noted that an agency is not barred from relying on analyses provided by a project's developers if those analyses are otherwise sufficient. However, the court did agree with COF on one assertion and found that Tehama had a duty to conduct a reasonable investigation of the financial feasibility of traffic impact mitigation measures, which included disclosure of any points of contention regarding the standards employed by its consultants. It remanded the case so that Tehama could make such further investigations.

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