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STATUTORY EXEMPTION NOT WAIVED BY CONDUCTING EIR; CAN BE INVOKED EVEN AFTER LITIGATION COMMENCES

Del Cerro Mobile Estates v. City of Placentia (July 7, 2011, G043709)

August 5, 2011 By James Pugh & Shoshana Zimmerman

In this case, the Court of Appeal for the Fourth District held that a city may defend itself against a California Environmental Quality Act challenge by invoking a statutory exemption even if the city has prepared an EIR for the project. The court also rejected the argument that because the exemption was written in the singular, it could not apply to a project involving multiple railway crossings. Section 21080.13 exempts from CEQA "any railroad grade separation project which eliminates an existing grade crossing or which reconstructs an existing grade separation." Finally, the petitioner's non-CEQA claims that the City of Placentia ("City") and Orange Country Transportation Authority ("OCTA") were planning to possibly violate the City's resolutions, were held not ripe for adjudication.

The EIR was prepared for the Orange County Gateway Project ("the Project"). The EIR specified the purpose of the Project was increasing public safety, improving traffic, increasing the efficiency of the local transportation system, reducing train noise and whistles, reducing emergency vehicle response time, and reducing air pollution from idling vehicles at rail crossings. Once the City approved the EIR it then approved an implementation alternative, which involved constructing six railway overcrossings and one undercrossing.

Petitioner filed suit, alleging a mobile home park it owned and operated would be "impacted" in an undefined way by the Project. Petitioner sought declaratory judgment that the City's approval of the project, including a faulty EIR, violated CEQA. Further, the petitioner argued that by preparing the EIR, the City had concluded that CEQA applied to the Project. OCTA intervened and, joined by the City, filed a demurrer under section 21080.13, claiming that the Project was statutorily exempt from CEQA.

The Court of Appeal agreed that the City could defend itself against claims the EIR was inadequate by asserting CEQA did not apply. Additionally, the court held that the City could raise the section 21080.13 exemption after the start of litigation challenging the EIR. Where the exemption is embodied in statute, and nothing suggests the City prevented the petitioner from becoming aware of the exemption, the exemption is not waived by preparation of an EIR.

The court also held that *County of Santa Barbara Flower & Nursery Growers Assn. v. County of Santa Barbara* allowed a governmental agency to invoke an exemption, despite conducting an EIR, regardless of whether the agency was the "lead agency" with final authority to accept or reject the EIR. Further, where no facts are in dispute and no hearing or finding is required by CEQA, no express exemption finding by the City was required to claim the exemption.

Petitioner next argued that because section 21080.13 is written in the singular, it cannot be applied to projects eliminating multiple railway crossings. However, the court rejected this argument as a matter of law because section 13 of the Public Resources Code provides that "the singular number includes the plural, and the plural the singular." Moreover, the trial court was not required to balance the exemption's policies against CEQA's goals. Rather, "a project that falls within a statutory exemption is not subject to CEQA even if it has the potential to significantly affect the environment."

Finally, the petitioner asserted it had stated viable non-CEQA claims alleging the city "had made public its intention to significantly change and accelerate the

Project" and thereby "disregard and abandon" previously adopted resolutions. However, the court found the City and OCTA had only "float[ed] a potential course of action." Here, because a court may not assume an official will refuse to take required action, despite planned refusal, mandamus relief was inappropriate. The court also held that the claims were not ripe because the petitioner never provided a timetable or other evidence that its non-CEQA claims would soon ripen.

Authored By:

James E. Pugh
(213) 617-4284
JPugh@sheppardmullin.com

and

Shoshana Zimmerman, *Summer Associate*