

CEQA DOES NOT REQUIRE IDENTIFICATION OF SIGNIFICANT EFFECTS OF THE ENVIRONMENT (SEA LEVEL RISE) ON A PROJECT; ASSERTION OF NEW CLAIMS BARRED IN EIR REQUIRED TO BE REVISED BY JUDGMENT IN A PRIOR CASE

Ballona Wetlands Land Trust v. City of Los Angeles and Ballona Ecosystem Education Project v. City of Los Angeles, No. B231965 (Cal. Ct. App. 2d Dist., November 9, 2011)

January 6, 2012 by Michael Hansen

The Second Appellate District recently held that CEQA does not require identification of significant effects of the environment on a project, only significant effects of a project on the environment. The court also held that plaintiffs are barred from alleging new CEQA inadequacies in challenge to an EIR that is being revised pursuant to a judgment in a prior case. Plaintiffs Ballona Wetlands Trust, Anthony Morales, Surfrider Foundation, and Ballona Ecosystem Education Project ("BEEP") had challenged the revised EIR with respect to project description, the analysis of archaeological resources, the analysis of sea level rise resulting from global climate change, and the finding of no significant impact on land use consistency. In addition, they challenged the award of costs to the defendants as prevailing parties.

The court concluded that the revised EIR adequately discussed preservation of archaeological resources and sea level rise, and concluded that defendant BEEP's newly asserted challenges to the project description and the finding on land use consistency were beyond the scope of the trial court's jurisdiction after entry of judgment and issuance of a peremptory writ of mandate. In addition, the court held that the defendants the City of Los Angeles and the developer as prevailing parties were entitled to recover costs.

Project Background

The Playa Vista phase two project is a proposed mixed-use development adjacent to the previously approved Playa Vista phase one project. The City certified the final EIR for the phase two project in September 2004. In November 2004, two petitions for writ of mandate were filed challenging certification of the EIR. In January 2006, the trial court denied the petitions. On appeal, the Second Appellate District rejected several allegations to the adequacy of the EIR but concluded that (1) the land use analysis in the EIR was misleading with respect to the effect of the proposed specific plan amendments on the amount of development allowed; (2) the EIR failed to discuss preservation in place as a means to mitigate significant effects on archaeological resources; and (3) the EIR failed to adequately analyze wastewater impacts. In May 2008, the trial court issued a peremptory writ of mandate ordering the City to vacate its certification of the EIR and revise it to remedy the inadequacies.

The City then revised the EIR's executive summary, land use, archaeological, and wastewater sections, and added a new section discussing impacts of global climate change. The City then certified the revised EIR incorporating these changes in April 2010, and BEEP and Ballona Wetlands Trust filed new petitions for writ of mandate challenging the revised EIR. The trial court denied the petitions and plaintiffs appealed.

Sea Level Rise Not An Impact on the Environment

Plaintiffs alleged that the revised EIR failed to adequately address the impacts of sea level rise resulting from global climate change. The revised EIR included a new section on global climate change and briefly noted that global warming could result in a rise in sea level and the inundation of coastal areas, but provided no specific analysis of the impact on the project site. The City also responded to comments by plaintiff Ballona Wetlands Land Trust regarding sea level rise. The City's response cited a report by a professional engineer pointing out that plaintiff's comments represented an extreme worst case scenario, relied on faulty methodology, and overstated the flood risk. The court ruled that the City's response showed no abuse of discretion because the City explained its reasons for rejecting the comments in sufficient detail.

The court also ruled that the revised EIR was not required to discuss the impact of sea level rise on the project because "the purpose of an EIR is to identify the significant effects of a project on the environment, not the significant effects of the environment on the project." The court reasoned: "[w]e believe that identifying the environmental effects of attracting development and people to the an area is consistent with CEQA's legislative purpose and statutory requirements, but identifying the effects on the project and its users of locating the project in a particular

environmental setting is neither consistent with CEQA's legislative purpose nor required by the CEQA statutes."

Untimely Assertion of Issues Not Addressed in Prior Judgment

Plaintiff BEEP argued that the revised EIR's project description was deficient because the language in the statement of overriding considerations adopted for the phase one project indicated that the developer agreed to eliminate certain development rights affecting a portion of the project, and the project description is deficient for failing to disclose this. BEEP also challenged the finding of no significant impact on land use consistency. The court ruled that neither BEEP nor any other party timely asserted these arguments in the appeal in the prior case, and the prior judgment and writ did not address these issues, noting that under CEQA "a trial court evaluating a return to the writ may not consider any newly asserted challenges arising from the same material facts in existence at the time of the judgment." This would undermine the finality of the judgment, the court explained. Because plaintiffs failed to assert the project description and land use consistency claims prior to entry of judgment, they were precluded from asserting them in postjudgment proceedings concerning compliance with the writ.

Archaeological Resources

Plaintiffs alleged that the City failed to comply with the writ of mandate issued by the trial court, which ordered the City to revise the EIR to discuss preservation in place in accordance with the CEQA Guidelines. CEQA Guidelines section 15126.4, subdivision (b)(3) states that preservation in place is the preferred manner to mitigate impacts on historic archaeological resources and expressly requires a discussion of preservation in place in an EIR involving a historical archaeological site. The court rejected plaintiffs' allegation because the revised EIR stated that preservation in place was the preferred manner of mitigating impacts to archaeological sites, but that after the removal of archaeological resources from their resting places and after remediation of contamination and removal of buildings and substructures, preservation in place could not be achieved. In addition, the court held that the revised EIR properly concluded that data recovery and curation were appropriate mitigation measures and would reduce impacts to below a level of significance.

Costs Award

Plaintiffs asserted that defendants were not entitled to an award of costs in the 2010 judgment as prevailing parties because the prior 2008 judgment granted in part and denied in part the petitions for writ of mandate filed by plaintiffs. The court held that, as prevailing parties in the 2010 judgment, it was appropriate for defendants to recover their costs incurred in the 2010 proceeding.