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New CEQA Cases Approve Flexibility in Determining Environmental Baseline

The California Environmental Quality Act (“CEQA”) requires agencies to evaluate whether projects they are performing or permitting will have a significant effect on the environment. But significant compared to what? In evaluating a project’s impact on the environment, an agency must determine appropriate baseline conditions against which to compare the project. The baseline issue has become an increasingly popular issue in CEQA litigation. But two recent cases from the California court of appeal may put an end to this trend, because they give considerable discretion and flexibility to the agencies when determining existing conditions.

North County Advocates v. City of Carlsbad

In *North County Advocates v. City of Carlsbad* 241 Cal.App.4th 94 (2015), plaintiff filed a petition for writ of mandate under CEQA, challenging the city’s approval of a shopping center renovation. The trial court denied the petition, and awarded certain costs to the city. The court of appeal reversed as to some of the costs awarded to the city, but it affirmed the trial court’s denial of the petition on the baseline issue.

Plaintiff argued that the Environmental Impact Report (“EIR”) used an improper baseline in its traffic analysis, because it treated a former Robinsons-May building as fully occupied, even though Robinsons-May vacated in 2006. Plaintiff argued that the city’s approach ran afoul of both the CEQA guidelines and the California Supreme Court’s decision in *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310. Under the CEQA guidelines, the baseline is normally “the physical environmental conditions in the

vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced.” 14 Cal. Code Regs., §15125(a). In this case, the city attributed over 5,000 daily vehicle trips to a fully-occupied Robinsons-May building even though Robinsons-May vacated the building in 2006, well before the notice of preparation.

The plaintiff also relied on the California Supreme Court’s decision in *Communities for a Better Environment v. South Coast Air Quality Management District*. In that case, the Supreme Court held that the environmental baseline for a petroleum refinery’s emissions of nitrogen oxides must be the actual emissions, rather than the maximum permitted emissions. The Supreme Court held that the baseline for CEQA analysis must be the “existing physical conditions in the affected area,” that is, the “real conditions on the ground,” rather than the level of development or activity that could or should have been present according to a plan or regulation.

But the court in *North County Advocates* distinguished *Communities for a Better Environment* on the ground that it involved a situation in which the agency used the maximum permitted emissions as the baseline even though the refinery never emitted that level of nitrogen oxides; whereas in *North County Advocates* the Robinsons-May space was fully occupied for more than 30 years up until 2006, and intermittently partially occupied thereafter, consistent with the expected fluctuating occupancy of a shopping center. Thus, substantial evidence supported using a traffic baseline that assumed a fully occupied Robinsons-May building.

San Francisco Baykeeper v. California State Lands Commission

In *San Francisco Baykeeper v. California State Lands Commission*, --- Cal.Rptr.3d --- (2015) 2015 WL 7271956, plaintiff filed a petition for writ of mandate challenging the California State Lands Commission’s approval of a project to continue mining sand from San Francisco Bay. The trial court denied the petition. The court of appeal affirmed in part and reversed in part.

Among the issues, plaintiff argued that the Commission used an improper baseline in its EIR. The Commission used a five-year average of annual sand mining volumes, from 2002 to 2007, rather than the volume mined

in 2007 – the year in which the Commission issued its notice of preparation. The court of appeal found that the Commission’s decision to use the five year average volume, rather than the 2007 volume, was supported by substantial evidence. In this regard, the Commission found that the 2007 volume was not an accurate reflection of existing conditions because the “annual quantity of sand mined fluctuates substantially due to changes in demand, economic conditions, capacity, and other factors,” and the volume of sand mined in 2007 was in the low range when compared with previous years. Thus, the Commission found that the average of several years best characterizes the overall level of mining activity at the time the notice of preparation was published.

As in the *North County Advocates* case, the court of appeal held that the rule for establishing baseline conditions is not a rigid one. “Neither CEQA nor the CEQA Guidelines mandates a uniform, inflexible rule for determination of the existing conditions baseline.” Rather, the agency has discretion to decide how existing conditions can most realistically be measured, so long as its decision is supported by substantial evidence. In this case, the Commission’s decision was supported by data regarding the fluctuation and decrease in the production and value of construction aggregate, the general nature of the mining industry, and the financial crisis of 2007.

Conclusion

Thus, when defining existing baseline conditions under CEQA, an agency is not constrained by the actual conditions that exist at the time the notice of preparation is published. Rather, an agency has considerable discretion to determine how to best define existing conditions, so long as it has substantial evidence to support its decision.

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