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Developer Awarded Cost of Preparing Administrative Record in CEQA Lawsuit

Lawsuits under the California Environmental Quality Act ("CEQA") typically proceed as petitions for administrative mandamus. This means the petitioner is asking the court to review an agency's decision and ultimately issue a mandate directing the agency to set aside its decision. In this respect the court acts like an appellate court, reviewing the agency's decision. There are no witnesses or trial exhibits or jurors or opening statements. The court reads the parties' briefs, hears their arguments, and makes its decision based on the evidence in the administrative record of proceedings.

The administrative record is often voluminous. It includes not only the environmental reports, but also all project application materials, staff reports and related documents, public notices, written comments and responses, all evidence or correspondence submitted to or relied upon by the agency, hearing transcripts, written findings, and more. The cost to prepare the administrative record can be in five to six figures.

A new case from the California Court of Appeal's Fifth District (Fresno) holds that, so long as it is done right, a prevailing developer may recover the cost of preparing the administrative record in a CEQA lawsuit. The case also serves as yet another poster child illustrating just how long it can take to get real estate development projects approved in California.

Citizens for Ceres v. City of Ceres

This case involves the city's approval of a shopping center anchored by a Wal-Mart Supercenter. The shopping center comprises 300,000 square

feet of retail space, including a 190,000 square foot Wal-Mart Supercenter and 10 other retail spaces. The supercenter will replace an existing Wal-Mart store.

The application for land use approvals was submitted in 2007 – yes, 2007. The city issued a notice of intent to prepare an Environmental Impact Report ("EIR") in September, 2007. The draft EIR was circulated for public comment in 2010. The city responded to all comments and issued the final EIR nearly a year later, in 2011. The city council approved the project in September, 2011. Five years of litigation ensued.

The petitioners challenged the city's approval on multiple environmental grounds, all of which were rejected by the trial court. The court of appeal, in the unpublished portions of its opinion, affirmed the trial court's denial of the petition on those grounds, thereby clearing the project approvals.

As a prevailing party in the lawsuit, Wal-Mart applied to the trial court for recovery of its "costs of suit" totaling about $49,000, almost all of which consisted of legal fees it incurred to reimburse the city for preparation of the administrative record. The petitioners filed a motion to tax costs (i.e., a motion challenging Wal-Mart's claim for costs), and the trial court granted the motion, thereby denying Wal-Mart recovery of any costs. But the court of appeal reversed.

In reaching its decision, the court distinguished the case from *Hayward Area Planning Association v. City of Hayward* (2005) 128 Cal.App.4th 176, which denied a developer recovery of its costs of preparing the administrative record. In *Hayward Area Planning*, the petitioner requested that the city prepare the record. The city asked the law firm representing the developer to prepare the record. After prevailing the developer sought to recover $50,000 from the petitioner for the cost to prepare the record. The court in *Hayward Area Planning* denied the recovery because the record had not been prepared in accordance with CEQA. CEQA provides that the record shall be prepared by either: (1) the agency; (2) the petitioner; or (3) an alternative method agreed upon by the agency and the petitioner. Preparation by the developer, without the agreement between the agency and petitioner, is not among the

approved methods.

But in *Citizens for Ceres*, the city directed its outside counsel to prepare the record, and Wal-Mart reimbursed the city for the cost. The court in *Citizens for Ceres* agreed with the conclusion in *Hayward Area Planning* that the record must be prepared in one of the three ways specified in CEQA. But in *Citizens for Ceres* the record *was* prepared by one of the approved methods. The city prepared it. Moreover, Code of Civil Procedure section 1032 generally provides prevailing parties in litigation with a right to recover their costs of suit. Because Wal-Mart was a prevailing party in the litigation, and because the record was prepared in a manner required by CEQA, Wal-Mart was entitled to recover the amount it reimbursed the city for the cost of preparing the administrative record.

Conclusion

Given the nuances between the *Citizens for Ceres* and *Hayward Area Planning* cases, decisions as to who will prepare and pay for the administrative record must be made carefully. At the outset of a CEQA lawsuit, the developer should consult with legal counsel to review this case and other applicable law to preserve potential recovery of these significant costs.

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