CEQA Doesn't Require The Killing of Mice With Missiles: Non-Prejudicial Notice Errors Do Not Require Project Set-Aside

By Arthur F. Coon on October 25th, 2011

CEQA's information disclosure provisions are so integral to its statutory scheme that conventional harmless error analysis does not apply. It is the rare violation of CEQA that will not be found a prejudicial and reversible abuse of discretion. Public Resources Code section 21005(a) declares state policy "that non-compliance with the information disclosure provisions of this division which precludes relevant information from being presented to the public agency, or noncompliance with substantive requirements of this division, may constitute a prejudicial abuse of discretion … regardless of whether a different outcome would have resulted if the public agency had complied …." Case law teaches that CEQA violations resulting in omission of "material necessary to informed [agency] decision-making and informed public participation" are prejudicial errors. (*Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351, 1392.)

A recent decision illustrates that CEQA error can still be found non-prejudicial, and development project approvals can survive, even under this exacting standard. (*Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949.) In *Schenck*, after a series of administrative hearings, two administrative appeals, and five iterations of a mitigated native declaration (MND), Sonoma County adopted an MND and approved a large warehouse and distribution facility project. The development was a relocation of an existing facility of the applicant, beverage company Mesa, to a parcel within County's airport industrial area adjacent to a creek.

In response to plaintiff Schenck's petition for writ of mandate challenging the approval, the trial court found just a single CEQA violation: the County had not given notice to the Bay Area Air Quality Management District (BAAQMD) of the hearing and intent to adopt the final MND. The trial court issued a writ ordering notice to be given, retaining jurisdiction to determine compliance. County gave the notice, the BAAQMD responded that County's air quality analysis met appropriate standards, that the project's operational emissions fell below BAAQMD's thresholds of significance, and that it supported the adopted mitigation measures. The County filed a return showing compliance, the trial court entered final judgment, and plaintiff Schenck appealed.

The Court of Appeal affirmed and in the key published portions of its opinion set forth its "prejudicial error" analysis as follows:

[T]he failure to send notice to the BAAQMD was not prejudicial under the governing standard and the facts presented. First, the BAAQMD was given notice of the application for design review, but did not offer any input. The County then assumed the role of the BAAQMD by implementing the published CEQA quantitative criteria in the initial study to determine that the project had far fewer vehicle trips per day than the threshold level of cumulative significance. Further traffic studies did not alter the conclusion of no significant impact on air quality under the established BAAQMD criteria, which was repeatedly articulated and explained in the series of revised mitigated negative declarations.

The critical factor is that even without notice to the BAAQMD the information gathering and presentation mechanisms of CEQA were not subverted or even compromised. Before approval of the project, the County and the public was [sic] provided with the disclosures necessary make an

informed assessment of air quality impacts. The lack of notice did not result in the omission of relevant information from the review and decisionmaking process. Finally, after review of the notice of intent to adopt the revised mitigated negative declaration the BAAQMD confirmed that the project's "estimated operational criteria emissions are below the Air District's existing thresholds of significance." The failure to provide notice to the BAAQMD was not prejudicial.

(*Schenck* at p. 960.)

County also rejected plaintiff's challenge to the scope of the writ and her argument that a full set-aside of the approval was required by CEQA. To the contrary, Public Resources Code section 21168.9 provides alternative remedies allowing consideration of equitable principles and tailoring of the remedy to fit the violations; the agency's noncompliant determination, finding or decision may be voided in whole or part, or the agency may be ordered to take such "specific action as may be necessary to [achieve] compliance [with CEQA]." (*Id.* at 960-961.) Justice Werdegar, the California Supreme Court's CEQA maven, recently emphasized (in a concurring opinion in a non-CEQA case) these same provisions of CEQA's "detailed and balanced remedial scheme, offering protections for both agencies and those challenging agency action under CEQA." (*Voices of Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 539-540, Conc. Opn. of Werdegar, J. joined by Cantil-Sakauye, C.J.)

CEQA doesn't mandate the killing of mice with missiles; the *Schenck* court approved the trial "court's order [observing it] was consistent with equitable principles and section 21168.9…(a)(3), as a specific lesser remedy needed to bring the agency's action into compliance with CEQA."