



Environmental Review Required for Subdivision Map Approvals

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On September 9, the Third District Court of Appeal held that tentative subdivision map approvals "always have at least the *potential* to cause" a direct or indirect physical change in the environment and thus are categorically considered "projects" under the California Environmental Quality Act ("CEQA"). The Court held that Colusa County violated CEQA in approving a Mitigated Negative Declaration (MND) for a tentative subdivision map for sixteen lots because petitioners made a "fair argument" that the project may have significant traffic impacts. *Rominger v. County of Colusa*, No. C083815 (Sept. 9, 2014). The Court also found that the MND comment period ended on a holiday and thus was invalid, but concluded that the error was not prejudicial.

This decision has several important implications for future and pending land use projects. First, the Court interpreted the CEQA to categorically state that a tentative subdivision map approval is a project under CEQA and, therefore, always requires some level of CEQA review. Second, the decision clarifies that a lead agency may, even after preparing and certifying an environmental document, successfully defend an approval from a CEQA challenge by demonstrating either (i) that the approval is not a project or (ii) qualifies for an exemption from CEQA. Third, the decision establishes that CEQA's public notice and comment procedures prohibit a lead agency from specifying a comment period that terminates on a weekend or holiday, when the lead agency's offices are closed, because the public may be unable to provide comments or review the project materials on this day.

The case arose out of Colusa County's approval of a tentative subdivision map application and MND for four parcels on a 159-acre site. In 2009, real party in interest Adams Group Inc. submitted an application to the County proposing to subdivide the properties into 16 parcels of varying sizes for the purpose of future expansion where separate financing may be needed. The application indicated that no specific plan for future expansion was available and that the Adams Group intended to allow continued use of the property for agriculture-related industry. Although the County maintained that the tentative map application was not a

project because the application presented no particular development proposal, and therefore no CEQA review was required, the County elected to prepare an MND for informational purposes. The County subsequently adopted the MND and approved the tentative map application.

Petitioner asserted that the County violated CEQA by: failing to prepare an Environmental Impact Report (EIR); failing to prepare an adequate MND; failing to incorporate adequate mitigation measures in the MND; impermissibly piecemealing environmental review of reasonably foreseeable future development that could occur on the site; and failing to comply with CEQA's public notice and comment requirements prior to adopting the MND and approving the application.

The trial court found that the County's application approval was not a project and no CEQA review was required. The Third District Court of Appeal reversed in part, holding that the approval of a tentative subdivision map is categorically a project under CEQA and was not exempt under the so-called "common sense" exception set forth in the CEQA Guidelines. The Court also held that the County was required to prepare an EIR because the record supported a fair argument that the project may result in potentially significant traffic impacts, and that the County failed to comply with CEQA's public notice requirements.

A Subdivision Map Approval Is A Project

The Court interpreted CEQA to categorically state that a subdivision map approval is a project and, therefore, always requires some level of CEQA review. The Court's conclusion was guided by Public Resources Code section 21080, which states that CEQA applies to tentative subdivision maps, and a prior California Supreme Court decision in *Muzzy Ranch Co. v. Solano County Airport Land Use Commission* (2007) 41 Cal.4th 372. In *Muzzy Ranch*, the Supreme Court held that whether an activity constitutes a project for purposes of CEQA is a categorical question that is answered by determining whether the activity is of a general kind that the Legislature sought to address in enacting CEQA, not whether the activity will actually have an environmental impact.

Never Too Late

Petitioner argued that because the County treated the approval as a CEQA project at the administrative level, the County was barred from asserting that the subdivision map approval was not a project. The Court disagreed, noting that the County had consistently taken the position that "it was *gratuitously* conducting a CEQA analysis of the subdivision when the law did not actually require it[.]"

Public Notice and Comment

In the instant case, the last three days of the 30-day public comment period coincided with the three-day Labor Day holiday. The Court concluded that the County failed to make the MND available for public review and comment for the 30 days specified in the notice because the County offices were closed on the last three days of the comment period. The court observed that while weekends and holidays occurring within a comment period may count toward the 30-day period, the end of the comment period cannot fall on a day when a lead agency's offices are closed.

Importantly, the Court limited the application of this holding through the operation of the harmless error rule, which provides that to state a cause of action for which relief can be granted, the challenger is required to demonstrate not only legal error but that the error was prejudicial. In the case of CEQA's public notice and comment requirements, the Court held that the challenger is required to demonstrate that the public was, as

a matter of fact, prevented from participating in environmental review. This caveat considerably limits the effect of the *Rominger* decision because in many cases – and the *Rominger* case is among these – the lead agency will continue to accept public comments after the noticed CEQA comment period has ended and through the final hearing on the project.