CEQA Reform in the Courts – Public Agency Can Recover Costs Despite Petitioner's Election

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After Governor Brown took office for the second time, CEQA reform through the Legislature seemed like a distinct possibility. While that possibility has all but evaporated, recent rulings suggest that courts are taking a more active role in the matter by rejecting tactics that stymie agency decisionmaking while also unreasonably shifting litigation costs to the public agency. For example, in the most recent CEQA decision issued by the Court of Appeal for the First Appellate District, the Court held that a public agency is entitled to recover reasonable costs incurred in supplementing a petitioner's proposed record even when the petitioner has elected to prepare the administrative proceedings. (***Coalition for Adequate Review v. City and County of San Francisco*** (No. A135512 Sept. 15, 2014) ("*CAR v. SF*").)

CEQA provides petitioners with three options for preparing an administrative record: (1) the petitioners can request that the public agency prepare the administrative record; (2) the petitioners can elect to prepare the record themselves; or (3) the parties can agree to an alternative method of record preparation. (Pub. Resources Code, § 21167.6, subd. (b)(1) & (2).) It is common practice for petitioners to elect to prepare an administrative record and then submit a Public Records Act request for all documents that comprise the administrative record. The intent behind this tactic is, in part, to reduce the petitioners' cost of preparing the record by placing more of the burden on the public agency. The courts have now held, however, that petitioners cannot shift the burden of preparing a complete record onto a public agency without also providing reasonable compensation.

In *CAR v. SF*, the City, after successfully opposing petitioner's CEQA challenge, filed a memorandum of costs totaling $64,144. The majority of these costs were associated with reviewing and supplementing the administrative record prepared by petitioner. Petitioner filed a motion to tax costs, arguing that because they

had elected to prepare the administrative record, the City was not entitled to any record preparation costs. The lower court granted the motion to tax costs in its entirety, concluding that "extraordinary" circumstances did not exist so as to justify an award of costs, and that allowing a public agency to otherwise recover costs would have a chilling effect on future CEQA actions. The Court of Appeal found these conclusions to be unsupported by the law.

Extraordinary Circumstances Not Required

Interpreting *St. Vincent's School for Boys, Catholic Charities CYO v. City of San Rafael* (2008) 161 Cal. App.4th 989, the lower court found that when a petitioner elects to prepare the administrative record, the public agency is precluded from recovering record preparation costs except in "extraordinary" circumstances. The Court of Appeal in *CAR v. SF* explained, however, that in *St. Vincent's* the court was merely addressing the facts before it, and therefore the decision does not identify the sole circumstance in which a public agency may recover record preparation costs. Further, the Court of Appeal found, contrary to petitioner's argument, that St. Vincent's stands for the general proposition that "the fact [that] a petitioner elects to prepare the record under section 22167.6, subdivision (b)(2), does not *ipso facto* bar the recovery of record preparation costs by a public agency."

Turning to the facts in *CAR v. SF*, the Court of Appeal found that the petitioner had produced an incomplete record and refused to supplement the record with the additional materials requested by the City, and that the lower court had appropriately granted the City's motion to supplement the record with the additional materials. In light of these facts, the Court concluded that the City was entitled to recover reasonable record preparation costs. Notably, in reaching this conclusion the Court expressly rejected the lower court's policy argument that awarding costs to the public agency when petitioner elects to prepare the record would chill future CEQA lawsuits and is, therefore, inappropriate. The Court emphasized that CEQA "expressly provides that the parties, not the public agency, are to pay record preparation costs[,]" and that "[t]his *statutory obligation* implements a different, but equally important policy—that public monies should not be used to fund CEQA challenges brought by private parties."

The Scope of Recovery

In addition to addressing the threshold issue of whether a public agency can recover record preparation costs at all, the Court of Appeal also briefly addressed what types of costs a public agency could recover. With respect to paralegal costs, the Court of Appeal found that while a public agency cannot recover the costs associated with the review of the record petitioner prepared for completeness, the public agency can recover the costs "for work reasonably required to prepare the supplemental record (e.g., locating, copying, indexing, and assembling documents)[.]"