Blogs
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Pre-Approval Disclosures Between Agency and Applicant Waive Privileges In CEQA Cases.

The Fifth Appellate District has issued another in a series of decisions regarding administrative records in CEQA cases. The court held that the "common interest doctrine" does not protect otherwise privileged communications shared by a developer and an agency prior to approval of a project because the two cannot be considered to be advancing any shared interest at the preapproval stage. *Citizens for Ceres v. Superior Court of Stanislaus County*, No. F065690 (Fifth District, July 8, 2013).

At issue in *Ceres* was a shopping center anchored by a Wal-Mart store. Opponents brought a CEQA lawsuit, and a dispute arose over the contents of the administrative record. The City and Wal-Mart contended that attorney-client and work-product documents they had exchanged during preparation of the EIR advanced a shared interest in ensuring a legally adequate CEQA document and hence were privileged under the common interest doctrine. They relied on *California Oak Foundation v. County of Tehama*, 174 Cal. App. 4th 1217 (2009), which held that the goal of preparing an EIR that will withstand legal challenge constitutes a sufficient common interest to protect from disclosure attorney-client and work-product information shared by an agency and a developer. The court in *California Oak* relied on the well-established common-interest doctrine reflected in Evidence Code section 952 under which a disclosure reasonably necessary to achieve the purposes for which the lawyer is consulted does not waive privileges.

The *Ceres* court drew a bright-line distinction between privileged information shared *before* and *after* project approval, ruling that the developer and the agency had no preapproval common interest:

[T]he common-interest doctrine, which is designed to preserve privileges from waiver by disclosure under some circumstances, does not protect otherwise privileged communications disclosed by the developer to the city or by the city to the developer *prior* to approval of the project. This is because, when environmental review is in progress, the interests of the lead agency and a project applicant are fundamentally divergent. While the applicant seeks the agency's approval on the most favorable, least burdensome terms possible, the agency is duty bound to analyze the project's environmental impacts objectively. An agency must require feasible mitigation measures for all significant impacts and consider seriously and without bias whether the project should be rejected if mitigation is infeasible or approved in light of overriding considerations.

The court acknowledged that prior caselaw had upheld the common interest doctrine as to parties with interests that were partly common and partly opposed. The court concluded, however, that "the relationship between a lead agency and project applicant is unique" in that before project approval, "the agency must *objectively judge* whether the project as proposed is environmentally acceptable and therefore must make a decision about *whether* it will align itself with the applicant in part, in whole, or not at all." (Emphasis original). Accordingly, "the agency does not have even partially common interests with the applicant. The nature of its interest is held in abeyance until it decides whether to approve the project." After project approval, by contrast, there was "no longer any conflict between an agency's role as an ally of the project and its role as an objective evaluator of the project." The court disagreed with *California Oak Foundation* to the extent it could be construed as holding that preapproval communications between an agency and an applicant qualified for the common interest exemption.

The court also ruled that the provisions of CEQA that state that documents shall be included in the record "notwithstanding any other provision of law" do not abrogate the attorney-client privilege or work product doctrine protection.

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