SIERRA CLUB v. COUNTY OF FRESNO

S219783

Supreme Court of California

July 8, 2014

Reporter
2014 CA S. Ct. Briefs LEXIS 987

SIERRA CLUB, REVIVE THE SAN JOAQUIN, and LEAGUE OF WOMEN VOTERS OF FRESNO, Plaintiffs and Appellants v. COUNTY OF FRESNO, Defendant and Respondent; FRIANT RANCH, L.P., Real Party in Interest and Respondent

Type: Petition for Appeal

Prior History: After a Published Decision by the Court of Appeal, filed May 27, 2014. Fifth Appellate District Case No. F066798. Appeal from the Superior Court of California, County of Fresno. Case No. 11CECG00726. Honorable Rosendo A. Pena.

Counsel

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Title

Petition for Review

Text

I.

II.

WHY REVIEW IS WARRANTED

Review is warranted on the first issue presented for two reasons. First, review is needed to secure uniformity of decision. In this case, the Fifth Appellate District concluded that the determination of whether an EIR includes sufficient information on a topic required by CEQA is a question of law subject to independent review by the courts. (Opinion, p. 23.) [1] In contrast, most other Courts of Appeal have applied the deferential substantial evidence standard to such claims because decisions about the amount, type, and [*3] scope of information to include in an EIR on a required topic are factual decisions best left to the discretion of the agency. [2]
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[1] The Court of Appeal's opinion is attached hereto as **Exhibit A**, and is cited "Opn." The Administrative Record of Proceedings is cited as "AR." The Appellants' Appendix is cited as "AA." The Reporter's Transcript is cited as "RT."

[2] See, e.g., Barthelemy v. Chino Basin Municipal Water District (1995) 38 Cal.App.4th 1609, 1616-1621 ("*Barthelemy*"); National Parks and Conservation Assn. v. County of Riverside (1999) 71 Cal.App.4th 1341, 1353 ("*National Parks*"); Santa Monica Baykeeper v. City of Malibu (2011) 193 Cal.App.4th 1538, 1546 ("*Baykeeper*"); California Native Plant Society v. City of Santa Cruz (2009) 177 Cal.App.4th 957, 986 ("*CNPS*"); and North Coast Rivers Alliance v. Municipal Water Dist. Bd. of Directors (2013) 216 Cal.App.4th 614, 637 ("*North Coast Rivers Alliance*").

Review of this first issue is also appropriate because the Fifth Appellate District reached the incorrect conclusion on this very important issue of law. A public agency makes decisions regarding the amount, type, and scope of information to include in an EIR based on its experience and expertise, consultation with other agencies and outside experts, and through CEQA's public and agency scoping process. In contrast, as this Court has emphasized, judges ″have neither the resources nor scientific expertise to engage in such analysis.″ (*Laurel Heights Improvement Assn. v. Regents of University of California (1988) 47 Cal.3d 376, 393* (″*Laurel Heights I*″).) As a result, when courts try to sort through complex technical information to assess its sufficiency, even highly intelligent judges frequently fail to fully understand either the scientific and technical information before them or the limits of the analytical tools available to experts. This is exactly what happened here, as demonstrated in the second issue presented.

Review is warranted on the second issue - whether an EIR must *correlate* a project's air emissions to specific health impacts - to settle an [*5] important question of law. The Opinion incorrectly concludes that the EIR for the Friant Community Plan Update and Friant Ranch Specific Plan (the ″Friant Ranch″ project) violates CEQA for failing to include a health impact analysis *correlating* the project's air emissions with the specific health impacts that will result. Alarmingly, the court reached this conclusion despite the facts that: (i) the analysis imagined by the court is not explicitly required by either CEQA or the CEQA Guidelines, [3] (ii) no evidence in the record suggests a ″correlation″ analysis is even possible to conduct with available analytical tools, and (iii) the EIR *does* disclose the general health effects of the project's impacts to air quality, thereby providing the public and decisionmakers with relevant information on this topic.

Review is warranted on the third and fourth issues - regarding standards of adequacy of mitigation [*6] measures adopted pursuant to CEQA - to secure uniformity of decision and to settle important issues of law. The lower courts are all over the map regarding what constitute adequate mitigation measures under CEQA. In this case, although the Defendant County of Fresno (the ″County″) readily acknowledges that the mitigation measure adopted for the project's air quality impact was not effective enough to reduce the impact to a less-than-significant level, the Opinion holds the County's mitigation measure to unprecedented standards of perfection - much higher than many courts have applied even to mitigation measures that agencies concludes will mitigate impacts to less-than-significant levels. For instance, the Opinion concludes that because the County expressly retains the discretion to replace out-of-date components of the air quality mitigation measure with equally or more effective components in the future as better technology becomes available, the County impermissibly deferred formulating mitigation. The Opinion also concludes that because the mitigation measure does not satisfy a standard of specificity similar to the standard the courts apply to Constitutional due process ″vagueness″ [*7] claims, the mitigation measure violates CEQA. Few, if any, other published decisions hold mitigation measures to such exacting standards, although it is difficult to ascertain from the published decisions precisely what constitutes adequate mitigation under CEQA, particularly with respect to deferred mitigation.

Although this Court's decision in *Laurel Heights I* strongly suggests that the Opinion reaches the wrong conclusions on all of these issues, that case was decided more than 25 years ago and the lower courts (including the court in this case) have since chipped away at many of the vital principles the Court articulated in that case. This Court's more recent decisions, while helpful in clarifying other aspects of CEQA, have not resolved these issues, and many of the Courts of Appeal are applying inconsistent, confusing, and unwise standards is assessing the adequacy of EIRs and mitigation measures. As a result, the rules for preparing an adequate EIR are highly uncertain, a state of affairs that makes CEQA compliance a guessing game.

III.

STATEMENT OF THE CASE

Real Party In Interest and Respondent Friant Ranch, L.P., adopts the Court of Appeal's recitation [*8] of the factual and procedural background. (Opn. 3-7, 43-44.) Additional relevant facts regarding the Friant Ranch EIR's air quality analysis and operational air quality mitigation measure are presented, as relevant, in Sections IV.B and IV.C of the ″Legal Discussion″ below.

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[3] The CEQA Guidelines are codified in California Code of Regulations, title 14, section 15000 et seq.

As discussed in the Opinion, on appeal Plaintiffs and Appellants Sierra Club, Revive the San Joaquin, and League of Women Voters of Fresno (collectively, ″Plaintiffs″) abandoned many of their arguments from the trial court and raised new arguments for the first time on appeal. (See Opn. 38, 59.) The Court of Appeal nevertheless chose to reach the merits of these issues, concluding that they raised important questions of law affecting the public interest. (*Ibid*.)

The court rejected Plaintiffs' claims that: (i) the Friant Ranch project is inconsistent with the County's General Plan, (ii) the EIR violates CEQA for lacking sufficient information regarding the project's proposed wastewater treatment plant; and (iii) the Final EIR inadequately responds to comments suggesting off-site air quality mitigation measures. The court held, however, that the EIR's discussion of health impacts of the project's air emissions [*9] is insufficient (Opn. 43-50), and that the project's operational air quality mitigation measure, Mitigation Measure 3.3.2 (″MM 3.3.2″), violates CEQA (Opn.51-63). The full text of MM 3.3.2 (i.e., AR 824-826) is attached hereto as **Exhibit B**. [4] Plaintiffs petitioned for rehearing, which the court denied.

IV.

LEGAL DISCUSSION

A. The Court Should Grant Review to Secure Uniformity of Decision and to Settle the Important Issue of Law Regarding the Standard of Review that Applies to a Claim that an EIR's Discussion of a Topic Required by CEQA is Insufficient.

1. The appellate districts are divided on what standard of review to apply to a claim that an EIR lacks sufficient information on a required topic.

An issue that '″frequently″' arises in CEQA litigation is '″whether relevant information was omitted from the EIR'″ on a given topic required by statute or regulation. (*CNPS, supra, 177 Cal.App.4th 957, 986-987,* [*10] quoting *National Parks, supra, 71 Cal.App.4th at p. 1236.)* Since at least 2003, the Court of Appeal districts have disagreed as to what standard of review applies to such claims, with the Fourth, Second, and, more recently, Sixth and First Districts generally deferring to lead agencies on such claims, and the Fifth District reviewing the sufficiency of the information contained in an EIR independently.

V.

CONCLUSION

Review is warranted to resolve the conflict in the appellate districts over the standard of review the courts apply to claims that an EIR lacks insufficient information. As a result of the court's [*48] application of the wrong standard of review, the Opinion imposes new informational requirements under CEQA, in violation of *section 21083.1 of the Public Resources Code*. Furthermore, review is necessary to provide guidance and uniformity of decision regarding the adequacy of mitigation measures adopted pursuant to CEQA. For the reasons set forth herein, the Court should grant review of the Opinion.

Respectfully submitted,

REMY MOOSE MANLEY, LLP

/s/ James G. Moose
JAMES G. MOOSE
Attorneys for Real Party in Interest and Respondent
FRIANT RANCH, L.P.

Dated: July 7, 2014

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[4] The EIR's Air Quality Chapter is at AR 793-826 and 4941-4970.

CERTIFICATE OF WORD COUNT

Pursuant to *Rule 8.504(d) of the California Rules of Court*, I hereby certify that this PETITION FOR REVIEW contains 8,397 words, according to the word counting function of the word processing program used to prepare this petition.

Executed on this 7th day of July 2014, at Sacramento, California.

/s/ James G. Moose
JAMEA G. MOOSE

PROOF OF SERVICE

I, Bonnie Thorne, am a citizen of the United States, employed in the City and County of Sacramento. My business address is 555 Capitol Mall, Suite 800, Sacramento, California 95814 and email address [*49] is bthorne@rmmenvirolaw.com. I am over the age of 18 years and not a party to the above-entitled action.

I am familiar with Remy Moose Manley, LLP's practice whereby the mail is sealed, given the appropriate postage and placed in a designated mail collection area. Each day's mail is collected and deposited in a U.S. mailbox after the close of each day's business.

On July 7, 2014, I served the following:

PETITION FOR REVIEW

[[checkmark]] On the parties in this action by causing a true copy thereof to be placed in a sealed envelope with postage thereon fully prepaid in the designated area for outgoing mail addressed as follows; or

[[checkmark]] On the parties in this action by causing a true copy thereof to be delivered via Federal Express to the following person(s) or their representative at the address(es) listed below; or

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SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct and [*50] that this Proof of Service was executed this 7th day of July 2014, at Sacramento, California.

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[SEE EXHIBIT A IN ORIGINAL]

[SEE EXHIBIT B IN ORIGINAL]