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A Case of Mistaken Identity?

Michael Patrick Durkee is a partner in the Walnut Creek office of Allen Matkins Leck Gamble Mallory & Natsis LLP and is co-chair of the firm's California Land Use Practice. He can be reached at mdurkee@allenmatkins.com.



Thomas P. Tunny is senior counsel in the Walnut Creek office of Allen Matkins Leck Gamble Mallory & Natsis LLP, where his practice focuses on litigation and transactions in all aspects of land use and planning law. He can be reached at ttunny@allenmatkins.com.



It is no great insight to say that the entire land use community is keenly focused on issues concerning the analysis of greenhouse gas emissions under the California Environmental Quality Act (CEQA). Even the tiniest morsels of new information are eagerly devoured. Take, for example, the recently published decision by Division One of the 4th District Court of Appeal in *Citizens for Responsible Equitable Environmental Development (CREED) v. City of San Diego* (2011 DJDAR 8556, June 10, 2011). Many observers are pointing to this decision as an important pro-development

victory. Maybe. Maybe not.

In our view, although much of the discussion of the *CREED* decision thus far has centered on greenhouse gas emissions issues, the decision ultimately does very little to help with greenhouse gas emissions analysis under CEQA. Instead, the lasting impact of the *CREED* decision will be its application of the "exhaustion of administrative remedies" doctrine.

To begin, a brief primer on the "exhaustion of administrative remedies" doctrine: Any petitioner who seeks to legally challenge a local agency act or decision under CEQA (and in land use law generally) must first present their specific legal claim to that local agency to give the agency an opportunity to address and resolve the claim *prior* to judicial review; the decision-making body is entitled to respond to objections and correct errors before the courts intervene. If an administrative appeal is available, it too must be pursued to conclusion. This "exhaustion" requirement is fundamental and jurisdictional: If a petitioner does not properly exhaust, the court lacks jurisdiction and therefore must dismiss the claim.

In *CREED*, the city council certified an environmental impact report (EIR) in 1994 for a 664.8-acre mixed-use development consisting of more than 4,000 dwelling units allocated among several planning areas. In 2008, the developer applied to the city for the approval of a portion of one of the last planning areas to be developed. Because the city already had certified an EIR for the project, it utilized a process under CEQA that allowed it to update the EIR with an "addendum" as its environmental review of the 2008 project. (Public Resources Code Section 21166; California Code Regulations, Title 14, Section 15164.)

As required by CEQA, in October 2008 the city published a notice that the addendum and EIR were available for public review. One month later, the planning commission had a public hearing on the project and its environmental review, and recommended approval to the city council. In January 2009, the city council held its public hearing. According to the court in its published decision, *CREED* submitted a "cursory letter" to the city clerk urging the city council not to approve the project on various grounds, including the claim that the project would "cause direct and indirect greenhouse-gas emissions that, when considered cumulatively, are significant."

Feedback

NEWS RULINGS VERDICTS

Tuesday, June 21, 2011

Labor/Employment Bill Would Allow Alternative Labor Organization

A bill that would allow farm workers to organize by submitting a petition to the state instead of holding a secret ballot election is awaiting the governor's action.

California Supreme Court Chief Sides With Game Wardens in Search Case

In her first opinion as chief justice, Tani Cantil-Sakauye sided with California game wardens Monday in a case implicating constitutional rights against unlawful search and seizure.

Large Firms Howrey Creditors Get Attorney

Sacramento bankruptcy attorney Thomas A. Willoughby was selected late last week to represent the committee of unsecured creditors in the Howrey LLP bankruptcy.

Government Patent Office Funds Up for Grabs

A key provision in the patent reform bill that would prevent Congress from grabbing funds from the U.S. Patent and Trademark Office may be eliminated as the legislation approaches a possible House vote this week.

U.S. Supreme Court High Court to Review Diagnostic Methods Patent Case

The U.S. Supreme Court agreed Monday to take up a closely watched case dealing with method patents, its first such case since it issued a landmark ruling on the patentability of business methods last year.

Mergers & Acquisitions Dealmakers

A roundup of recent M&A and financing activity and the lawyers involved.

U.S. Supreme Court Court Rules on Police Chief's Firing Claim

A former Pennsylvania police chief cannot to sue the local government over an employment dispute on free-speech grounds, the U.S. Supreme Court unanimously ruled Monday.

Court Rules in Child Support Case

The U.S. Supreme Court ruled Monday that the incarceration of South Carolina man for overdue child support payments violated his due process rights.

Court to Hear Pilot's Distress Claim

The U.S. Supreme Court agreed Monday to hear a case involving a San Francisco pilot's suit against the government for the emotional distress caused by disclosing his HIV-positive condition.

The lasting impact of the CREED decision will be its application of the 'exhaustion of administrative remedies' doctrine.

The court stated that CREED also submitted "a digital video disk (DVD) that contained more than four thousand pages of documents and data.... It appears that the DVD contained no table of contents, no particular organization, no summary of information, and no explanation of how the copious materials may pertain to the proposed...project." CREED did not appear at the January hearing to offer any elaboration. For unrelated reasons, the city council continued the hearing to February.

CREED also did not appear at the continued hearing in February, but again submitted a "cursory letter" to the city clerk that "briefly outlined objections to the project." The city council approved the addendum to the EIR and approved the project. The court upheld the city council approvals and the environmental review in their entirety.

The court rejected CREED's greenhouse gas claims in particular because CREED had not exhausted its administrative remedies. In applying the exhaustion doctrine, the court not only concluded that CREED did not properly raise its greenhouse gas claims before the city council at its 2009 meetings, but that CREED did not properly raise the claims before the city council in 1994 (and should have) when the council certified the original EIR (and therefore failed to exhaust and was time-barred). It is on this latter conclusion that many CEQA practitioners have focused their attention.

The temptation of this particular conclusion for pro-development forces is that it could be used as a powerful litigation weapon. This part of the ruling could be used to dismiss nearly any greenhouse gas-related claim that is brought when local agencies rely on earlier environmental documents for later-in-time project approvals, even when that earlier environmental document was certified as far back as 1994. The court arguably created a massive exemption for greenhouse gas emissions from CEQA review. While this part of the court's ruling certainly is a provocative one, it was not necessary to the court's holding and ultimately may be legally flawed. Yes, it is true that greenhouse gas emissions were known to be harmful as far back as 1994, and indeed much earlier than that. However, the possibility of studying the environmental impacts of these emissions from residential development under CEQA was not at all common prior to the passage of AB 32 in 2006. Therefore, it seems unreasonable for the court to have required the petitioners to have raised (and then litigated) their greenhouse gas claims in the CEQA context in 1994.

More importantly, these issues should not distract modern practitioners from seeing the aspect of the court's ruling that stands on much firmer ground, and ultimately, in our view, that will have a much greater impact on CEQA jurisprudence.

As stated above, the court's first rationale for dismissing CREED's greenhouse gas claims was that CREED had not exhausted these claims at the council's 2009 meetings. The court so ruled even though CREED had submitted two letters raising these claims, and had "supplemented" those letters with 4,000 documents on DVD. Experienced CEQA practitioners no doubt are familiar with such last minute "late hits" and "doc dumps" in city council proceedings. Many petitioners' counsel, including the attorneys in the CREED case, frequently employ this tactic in order to lay the ground work for a lawsuit. This can be very frustrating for project proponents, local agency staff and elected officials, and the public when, after having undergone months or years of public processing and review, at the last minute they are faced with the no-win choice of either spending many more hours determining whether legitimate legal issues exist, or risking a lawsuit on an issue they did not properly respond to (given the last minute nature of the submission).

The CREED court has at least raised the bar regarding the quality and clarity of message that the exhaustion doctrine requires. According to the court, the city could not be expected to "pore through thousands of documents to find something that arguably supports CREED's belief the project should not go forward." The court then chastised CREED for its tactics: "It was never contemplated that a party to an administrative hearing should...make only a perfunctory or 'skeleton' showing in the hearing and thereafter obtain an unlimited trial de novo, on expanded issues, in the reviewing court."

Nor was the court persuaded by CREED's letters: "The letter accompanying the DVD made only general, unelaborated objections...." To exhaust administrative remedies, concluded the Court, the objections "must be sufficiently specific so that the agency has the opportunity to evaluate and respond to them... If that were not the case, virtually

Court to Consider Standing Question

The U.S. Supreme Court announced Monday that they will consider if plaintiffs who suffered no injury can sue under a law policing corruption in the real estate market.

Court To Take Up Water Dispute

The U.S. Supreme Court agreed Monday to step into a high-stakes dispute over water rights between a power company and the state of Montana.

Litigation

Ruling Strengthens Tribes' Sovereignty

In a closely watched case that legal observers said helps strengthen Indian tribal sovereignty, an appellate court established the right of a tribe to file suit in its own court against a nonmember in a fiercely contested eviction dispute.

Criminal

Taking the Initiative: The Voters Role in California's Death Penalty Debacle

When California voters went to the polls in 1978 to decide whether to reinstitute capital punishment, what were they thinking? By **Paula Mitchell** of Loyola Law School

Constitutional Law

Taking Care of Our Wounded Warriors

Congress and various presidents have only paid lip service to protecting our veterans. By **Michael Waterstone** of Loyola Law School

Criminal

Laughter as a Defense Mechanism in the Criminal Justice System

In the courtroom, laughter can tie all of the parties together, despite their drastically different circumstances. By **Richard M. Chacon**

Alternative Dispute Resolution

How to Undermine the Mediation Process Without Really Trying

If you rely on mediators to help you settle cases, read this. By **Michael H. Leb**

Environmental

A Case of Mistaken Identity?

Consensus that a 4th District case helps with greenhouse gas emissions analysis under CEQA is mistaken. By **Michael P. Durkee** and **Thomas P. Tunny** of Allen Matkins Leck Gamble Mallory & Natsis LLP

Letter to the Editor

9th Circuit Amends Mediation Confidentiality Case

Reader comments on Shirish Gupta's article, "The 9th Circuit Calls Into Doubt the District Court's Mediation Confidentiality Rules."

Judicial Profile

David R. Lampe

Superior Court Judge Kern County (Bakersfield)

Corporate Counsel

Donald J. Rosenberg

Executive vice president, general counsel and corporate secretary for Qualcomm Inc. San Diego

U.S. Supreme Court

every project approval would be subject to litigation on new or expanded issues."

The court's ruling underscores that poorly executed attempts to exhaust one's administrative remedies run the risk of failure. In this way, the *CREED* decision goes a long way toward clarifying and reinforcing the strict requirements of the exhaustion doctrine under CEQA. As to the broader issue of greenhouse gas emissions analysis under CEQA, the *CREED* decision is not as helpful.

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Wal-Mart Class Action Blocked

In a decision that shields employers from nationwide discrimination class actions, the U.S. Supreme Court blocked a lawsuit brought against Wal-Mart Stores Inc. by more than 1.5 million female workers.

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