May 24, 2024

Third District Reverses Order Prematurely Discharging CEQA Writ for Failure to Address Objections That Certified Revised EIR Was Still Noncompliant, Holds Project Opponents Could Properly Opt to Raise Challenge Through Objections to Return Without Filing Separate Action

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In an opinion filed April 18, and belatedly ordered published on May 15, 2024, the Third District Court of Appeal reversed the trial court's order discharging the peremptory writ of mandate that was issued following the Court of Appeal's earlier direction in *Save Our Capitol! v. Department of General Services* (2023) 87 Cal.App.5th 655, 711 (a case previously analyzed in my blog posts of January 2, 2023, found *here*, and January 23, 2023, found *here*). This latest chapter in the CEQA litigation over California's efforts to update its historic State Capitol Complex centers

on the issue whether the trial court properly discharged the writ upon the Department of General Services ("DGS") simply filing a return showing it had certified a revised EIR, or whether, in response to a petitioner's objections to the return's adequacy, DGS needed to further demonstrate that its revised EIR actually fixed the deficiencies identified in the appellate opinion.

DGS contended Petitioner Save the Capitol, Save the Trees ("STC"), a party to the underlying writ litigation, was required to file a new action if it wanted to challenge the EIR's adequacy. The Court of Appeal disagreed and reversed, holding the order discharging the writ was issued prematurely and in error because it did not resolve the EIR's adequacy. *Save the Capitol, Save the Trees v. Department of General Services (Joint Committee on Rules of the California State Senate and Assembly, Real Party in Interest*) (2024) ____ Cal.App.5th ____. The Court did, however, reject appellant STC's argument that the discharge was also premature because DGS approved a modified and "narrower" version of the project—eliminating the visitor center that was one of its three original components—while noting that if that component were to be approved in the future such approval decision would trigger a new deadline to bring a CEQA challenge as to it.

Relevant Factual and Procedural Background, the Parties' Writ Return Dispute, and the Trial Court's Writ Discharge Order.

The background facts of the case were set forth in detail in my prior posts (see hyperlinks above) and needn't be fully reiterated here to understand the relatively discrete issues at play in the new opinion. The project considered in the earlier installments of the litigation had three basic parts: (1) demolish the existing Annex attached to the Historic Capitol's east side and construct a new attached Annex; (2) construct a new underground visitor center on the Historic Capitol's west side; and (3) construct a new underground parking garage.

The trial court denied the writ petition challenging the project's EIR. The Court of Appeal reversed, holding the EIR's project description, and analyses of historic resources, aesthetic impacts and alternatives were deficient under CEQA, and it directed the trial court "to issue a peremptory writ of mandate directing DGS to vacate partially its certification of the EIR and to revise and recirculate the deficient portions

of the EIR *consistent with this opinion* before it considers recertifying the EIR." (*Save Our Capitol!, supra*, 87 Cal.App.5th at 711, emph. added.)

On remand, in June 2023, the trial court vacated its judgment, entered a new judgment granting the writ in part, and issued a writ directing DGS to (1) partially vacate its EIR certification and all associated approvals consistent with the Third District's opinion and file an initial return within 30 days showing this compliance; (2) suspend all project activities (other than Annex demolition) that will physically alter the project site and refrain from issuing further discretionary approvals reliant on the EIR's decertified portions until discharge of the writ; and (3) file a final return to the writ "upon certification of a revised EIR."

In July 2023, DGS filed its preliminary return stating it partially decertified the EIR and vacated approvals consistent with the judgment, and in September 2023, DGS certified a revised final EIR, partially reapproved the project (minus the visitor center), and filed its final return. In October 2023, Appellant STC filed notice of its intent to file objections to the return and requested a hearing, while asserting that briefing its objections was premature until DGS produced a supplemental administrative record evidencing its CEQA compliance.

Amidst apparent skirmishing over the record and an appropriate briefing schedule, and the filing of SCT's objections to the return in November 2023, a profound and fundamental dispute between the parties over exactly what the writ required—along with associated procedural ramifications—emerged with more clarity. STC contended that "case law allowed it to challenge DGS's purported compliance with the writ either by writ return challenge or a new case" and that since "it elected to proceed by writ return challenge, . . . in order for the writ to be discharged, DGS was required to demonstrate that the revised final EIR remedied the CEQA deficiencies identified in [the Court of Appeal's] *Save Our Capitol* [opinion]."

On the other hand, DGS argued the writ's language did not require the trial court to determine that the revised EIR remedied the deficiencies identified in the appellate opinion, only that a revised EIR had been certified, prior to discharging the writ; it further took the position that any challenge to the revised EIR's adequacy had to be brought via a new action.

Following supplemental briefing on these issues, and on whether discharge was precluded because only part of the original project was re-approved, the trial court discharged the writ in December 2023, and STC appealed that discharge order.

The Court of Appeal's Opinion

The Court of Appeal reversed, agreeing with STC's position that "discharge of the writ was premature" and that "certification of the revised final EIR was not enough to discharge the writ because there has not yet been an adjudication as to the adequacy of the revised EIR." After a preliminary discussion of the three types of mandates a trial court may issue on remand after an appellate court's decision that an agency violated CEQA, and the rules under Public Resources Code § 21168.9 guiding and governing those remedial mandates, the Court discussed the relevant facts and law concerning the peremptory writ, the agency's return thereto, and the processes for challenging the return.

Per the Court: "Where the peremptory writ directs the public agency to take specific action and the return states that the court's mandate has been carried out, the petitioner may challenge the validity of that claim by new or supplemental writ; but the petitioner is not required to proceed by writ and may challenge the writ return as failing to demonstrate compliance with CEQA." (Citing *City of Carmel-by-the-Sea v. Board of Supervisors* (1982) 137 Cal.App.3d 964, 971; *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 203.)

After further briefly discussing the relevant standards of review—i.e., independent interpretation of CEQA's remedies statute and the terms of a peremptory writ as questions of law, and review of the trial court's choice of remedial mandate and the adequacy of an agency's return for abuse of discretion—the Court of Appeal focused on the details of its prior decision and the trial court's ensuing peremptory writ. The writ contained all three of the statutorily authorized mandate types—i.e., vacating EIR certification and project approvals, suspending project activities pending CEQA compliance, and mandating specific action needed to achieve compliance—but the dispute involved only the meaning of the third directive, which required filing a final return "upon certification of a revised EIR." Regarding that mandate, the Court disagreed with DGS's position that discharge of the writ was proper once DGS certified

a revised EIR regardless of whether that EIR cured the deficiencies previously identified in the *Save Our Capitol!* opinion.

Observing that the statute contemplates the third mandate type will direct specific action to bring the project into compliance with CEQA (Pub. Resources Code, § 21168.9(a)(3)), and requires the trial court to retain jurisdiction by way of a return to the writ until it determines the agency has complied with CEQA (§ 21168.9(b)), the Court stated: "Those provisions advance the manifest purpose of a peremptory writ in this context, which is to ensure CEQA compliance after violations have been identified." (Citing *Natural Resources Defense Council, Inc. v. City of Los Angeles* (2023) 98 Cal.App.5th 1176, 1236.) Given these purposes, its prior opinion and directions to the trial court, the writ's other directives, and applicable presumptions that the trial court followed its directions and the law, the Court of Appeal held "the peremptory writ required DGS to certify a revised EIR consistent with this court's [*Save Our Capitol!*] opinion before the writ could be discharged." It distinguished *McCann v. City of San Diego* (2023) 94 Cal.App.5th 284, 292 (my 8/14/23 post on which can be found *here*) as a case where "the court of appeal's prior direction to the trial court did not order remedial action in compliance with CEQA."

The Court had little trouble rejecting DGS's remaining contrary arguments. While the petitioner-drafted peremptory writ could have been clearer and more explicit, its language nonetheless "encompassed applicable law, the purpose of the writ in this context, and the court's order, and could not properly deviate from those things." A remedial requirement in the writ return context would not be "unworkable" due to creation of the potential for separate challenges and, hence, inconsistent procedures and adjudications; even if some petitioners pursued objections to the writ return and others pursued separate actions, the trial court could avoid any problems with potential inconsistencies through an order consolidating the matters and then issuing a single decision. Nor, per the Court, would allowing STC to challenge the revised EIR's adequacy through objections to the writ return open the door to any new merits challenges addressing new issues beyond what had been required by the writ. (Citing *County of Inyo, supra*, 71 Cal.App.3d at 204.)

Conclusion and Implications

Writ language matters. A lot. Those drafting writs should be as clear and explicit as possible in spelling out what the lead agency must do to comply prior to seeking a discharge of the writ that will terminate the trial court's continuing jurisdiction to ensure compliance with the writ. This case teaches that where a Court of Appeal directs issuance of a writ requiring vacation of certification, and revision and recirculation, of deficient portions of an EIR consistent with its opinion before an agency considers recertification, the agency must be prepared to demonstrate in its return to the writ that its revised and recertified EIR fully and adequately addresses any deficiencies identified in the opinion; if it does not, petitioners can oppose the return by objections based on the revised EIR's noncompliance and prevent discharge of the writ—without need of filing any separate action—until the EIR's adjudicated deficiencies have been adjudicated as cured.

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