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ARTICLE

WHEN ENVIRONMENTAL REVIEW UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT BECOMES "GROUNDHOG DAY": What's A Frustrated Developer To Do?

By Arthur F. Coon and Carolyn Nelson Rowan*

I. INTRODUCTION.

Imagine you are a developer proposing a new subdivision project. Before the city council will consider your project for approval, an environmental impact report ("EIR") must be prepared under the California Environmental Quality Act ("CEQA").[1] The city enters into an agreement with an outside consultant to prepare the EIR and requires you, in turn, to agree to reimburse it for all costs of EIR preparation. The consultant begins preparing the EIR, but months, then years, pass, and it still has not finished the job. Your project cannot be approved without the city's certification and consideration of a completed EIR, prepared in compliance with CEQA. And so you wait. More time passes, and still your project is not considered or approved because the EIR is not finished. Now, imagine your frustration as the costs of environmental review—for which you are solely responsible, but powerless to control—mount while your project remains in limbo. Must you stand on the sidelines? Is there anything you can do to expedite the process? Does the law provide you with any remedies for the delay? What if the EIR is never finished?

* Arthur F. Coon is a shareholder at Miller Starr Regalia and heads the firm's land use and environmental law litigation practice group. Carolyn Nelson Rowan is an associate in Miller Starr Regalia's Walnut Creek office, with a special emphasis in environmental and land use litigation.

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Next imagine a slightly different scenario: suppose instead that the city begins the environmental review process, but half-way through—after enormous investments of time and money in planning and environmental review—it "pulls the plug" and decides to disapprove your proposed project before the EIR is complete. The city then asks you to reimburse it for the money spent preparing the EIR, per your agreement, even though that EIR was never finished. Must you reimburse the city?

For some developers, these nightmarish scenarios are all too real, and carry real—and devastating—economic consequences. Developers are, understandably, increasingly frustrated by the expense, delay, and complexity of CEQA's environmental review process as it often plays out. While CEQA review inherently injects delay, paperwork, and additional cost into the project approval process, those burdens are presumably imposed in service of laudable policy goals, namely, encouraging full analysis and consideration of a project's potential adverse effects on the environment. More than any other participant in the review process, developers (and other types of project applicants) feel the pain of CEQA's delay and cost, as they continue to carry substantial costs on their undeveloped property, including taxes, loan interest, and other carrying costs, and their projects are put on hold while an EIR is prepared at their expense. At the same time, developers sometimes have frustratingly little control over the review process; the local agency contracts with an independent outside consultant for preparation of the EIR, and the developer simply waits for that EIR to be completed.

The disconnect between the developer's limited role in and control over the review process, on the one hand, and its complete financial responsibility for that process and its significant commercial interests in the proposed project, on the other, has understandably led to increased frustration and, most recently, litigation. As discussed below, several suits have been filed against local agencies to attempt to force them to begin and/or complete the environmental review process. Another action was filed against the EIR consultant directly. Thus far, however, these types of legal challenges have been squarely rejected by the California Courts of Appeal and Supreme Court. This article will discuss those recent legal challenges, the courts' reasoning for rejecting the developers' claims, and the remedies, if any, that remain available to a developer seeking to move his project forward.

II. AN OVERVIEW OF THE ENVIRONMENTAL REVIEW PROCESS UNDER CEQA.

CEQA provides that a local agency must undertake environmental review before approving a project that could have adverse effects on

the environment, in order to make an informed decision and avoid, reduce, or prevent significant environmental impacts when it is feasible to do.[2] The primary goal of CEQA is the protection of the environment.[3] The purposes of CEQA are to:

> (1) inform governmental decision makers and the public about the potential significant environmental effects of proposed activities;
>
> (2) identify ways that environmental damage can be avoided or significantly reduced;
>
> (3) prevent significant, avoidable damage to the environment by requiring changes in projects through the use of alternatives or mitigation measures when the government agency finds the changes to be feasible; and
>
> (4) disclose to the public the reasons why a governmental agency approved the project in the manner chosen if significant environmental impacts are involved.[4]

CEQA is an environmental disclosure statute, and the EIR is the method of encouraging full environmental disclosure before a proposed project is approved.[5] The EIR is considered to be the "heart of CEQA."[6] It is "an 'environmental "alarm bell," designed to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.'"[7]

The "lead agency" is the agency having the principal responsibility for carrying out or approving a proposed project, and it has the obligation to prepare any required EIR.[8] When a project is of the type requiring environmental review, on the request of the potential applicant the agency must provide consultation before the application is filed regarding the range of actions, potential alternatives, mitigation measures, and any potential and significant effects of the proposed project on the environment.[9] The lead agency should consult with the applicant early in the process,[10] and the applicant can submit the data necessary for preparation of the report even though the agency retains the responsibility for its preparation.[11] Each public agency must establish specific time limits for the certification of a final EIR, which cannot exceed one year from the date the application is accepted by the agency.[12]

The lead agency may, and usually does, charge the applicant a fee for the preparation of the EIR.[13] The lead agency may contract with a third party consultant to prepare an EIR, and the lead agency may require

the applicant to pay the costs of the EIR for the proposed project.[14] Alternatively, the applicant may directly engage an independent firm to prepare the EIR for submission to the lead agency for independent review and certification.[15]

The environmental review process can be lengthy when an EIR is required. The first step of the CEQA process is preliminary review of a proposed project. If, after preliminary review, an agency determines that CEQA applies and no exemption applies, the agency may choose to prepare an initial study to determine whether a negative declaration or an EIR is appropriate. Where the initial study indicates that there is substantial evidence in the record to support a "fair argument" that the project may cause a significant impact on the environment, the agency must prepare an EIR.[16] Once the agency has determined an EIR is necessary, the agency must send notice to responsible agencies and others that an EIR is going to be prepared. Thereafter, there may be scoping meetings to determine the scope and content of the EIR. A draft EIR is prepared and distributed for public comment. Public notice of completion of the draft EIR must be given before the final EIR can be certified. The agency then evaluates and responds to public comments as part of the final EIR. The final EIR must be recirculated for further public and agency review and comment if it contains "significant new information," as described by statute.[17] The lead agency's decision-making body must certify the final EIR as complete and in compliance with CEQA before it may approve the project.

It does not require substantial CEQA experience to understand that this process may entail significant delays for a project and significant expense for the project applicant. Still, the process exists to ensure that potential significant environmental effects of a project are identified and analyzed before its approval, and that binding mitigation measures are imposed where appropriate.

III. PROJECT APPLICANTS' RECENT ATTEMPTS TO INFLUENCE AND EXPEDITE THE ENVIRONMENTAL REVIEW PROCESS.

For many years, project applicants such as real estate developers have experienced frustration with the CEQA process, which as observed above can be protracted and seemingly futile. This frustration has spawned numerous recent project applicant-led legal challenges, alleging failure to comply with CEQA. In 2009, the California Supreme Court and Courts of Appeal uniformly rejected all such challenges.

A. Suits Against Local Agencies To Require Completion Of A Project EIR.

Suits against local agencies to require preparation or completion of EIRs have arisen in various contexts by developers or other project proponents, some more extreme than others.

1. Sunset Sky Ranch Pilots Association v. County of Sacramento

On the more moderate end of the spectrum is *Sunset Sky Ranch Pilots Association v. County of Sacramento*,[18] which addressed the issue of whether the County of Sacramento was required to complete environmental review before denying a conditional use permit renewal application.

Sunset Sky involved the Sunset Sky Ranch Airport ("Airport"), a privately owned airport, which opened in the County of Sacramento ("County") in 1934. In 1968, the County adopted a zoning ordinance allowing airports to operate in the area with a conditional use permit ("CUP"). In 1971, Daniel Lang ("Lang") acquired the property and obtained a two-year CUP to operate a private airport, which was then primarily used for agricultural flights. In 1972, the County General Plan was amended to allow a public use airport at the location, and Lang obtained a permit from the State for that purpose. In 1973, the CUP expired. Lang did not apply for renewal but continued operating the airport. In 1999, after Lang lost his business license for failing to comply with the zoning code, the Airport applied for a ten-year CUP. The County granted only a five-year CUP, anticipating that a recent specific plan might lead to urbanization of the area.

In 2004, two weeks before the 1999 CUP expired, the Sunset Sky Ranch Pilots Association applied for renewal. The County Project Planning Commission approved a two-year renewal of the CUP with no further extension. Neighboring property owners filed an administrative appeal with the County Board of Supervisors. The Board upheld the appeal and denied the CUP renewal. In reaching its decision, the Board noted the development of new residential neighborhoods in the area, the local school district's difficulty in finding a suitable school site due to the airport's overflight zone, and the existence of other airport facilities in more appropriate locations.

The Airport sought a writ of mandate, injunctive relief, and monetary damages, contending, *inter alia*, the County had failed to comply with CEQA because it had not analyzed the environmental impacts of closing the airport. The trial court denied relief.[19] The court of appeal reversed, reasoning that the CUP denial was part of a County plan to enforce its zoning code by closing the airport and transferring pilots to other airports. As such, the court of appeal concluded the County's action amounted to a "project" under CEQA.[20]

Reversing the court of appeal's decision, the California Supreme Court held the County's denial of the CUP application was not approval of a "project" subject to CEQA's requirements.[21] Generally, CEQA applies to actions that a public agency undertakes, funds, or approves.[22] The Supreme Court agreed with the County and real parties in interest that the case *potentially* involved the latter scenario, i.e., where a public agency *approves* a project. The alleged "project," however, was the County's *refusal* to issue a CUP for continued airport operations, which fell squarely within the statutory exemption for "[p]rojects which a public agency rejects or disapproves."[23] One reason for exempting *disapproved* projects from CEQA is that public agencies should not be forced to commit their resources to a costly and time-consuming environmental review process for proposed private development projects slated for rejection.[24]

The Supreme Court disagreed with the Airport's assertion that the cessation of operations resulting from the denial of the CUP was a "project" itself because it was an activity *undertaken* by the County. The Airport argued the "project" was broader than the denial of the CUP; rather, it included not just the denial but also a broader County decision to close the airport, shift its operations elsewhere, and enforce the zoning code. The Court rejected this approach, noting it would blur the statutory distinction between projects undertaken by a government agency and those approved by it.[25] The Court further reasoned that, even assuming that was true, the County's decision not to renew the CUP did not place the County in a position of proceeding with the alleged plan. Accordingly, there was no "project" *undertaken* by the County, but a project *disapproved* by the County.[26]

Citing the CEQA Guidelines, the Court explained that private action is not subject to CEQA unless the action involves governmental participation, financing, or approval. Closing the airport was not an activity directly undertaken by the County within the meaning of CEQA. Instead, the Court agreed with the County and real parties' position that the relevant "activity" was the proposed continued operation of the Airport.[27] The court of appeal erred by deeming the *consequences* of the project to be part of the project itself.[28]

Finally, the Court rejected the Airport's position that a CUP renewal presents a special situation because there is an existing project so denying the CUP will alter the status quo. The denial of a permit for new development may also have foreseeable environmental effects in that the same kind of development may be diverted to a different site.[29] In any event, the Guidelines make no special provision for CUP denials.[30]

Taken alone, in *Sunset Sky* is not particularly controversial, as it applies the well-established principle that time and money need not be wasted on an EIR for a project that will be rejected. What happens, though, if substantial time and money ***have*** been spent on a draft EIR? That issue was taken up in another recent California case.

2. Las Lomas Land Company, LLC v. City of Los Angeles

Las Lomas Land Company, LLC v. City of Los Angeles[31] addressed a related issue: whether a local agency may terminate environmental review and reject a project after substantial work has been done, but *before* completion of a draft EIR. In that case, the City of Los Angeles ("City") had commenced efforts to expand its sphere of influence boundaries in 2000. In 2002, a developer ("Las Lomas") submitted a preliminary application to develop a 555-acre site, consisting of approximately 5,800 dwelling units, 2.3 million square feet of office space, 250,000 feet of retail space, a hotel, and other facilities, in an unincorporated area north of the City. A large part of the proposed project site was within the City's newly expanded sphere of influence. In response to the application, the City's planning department declared itself to be the lead agency, and began the process of preparing an EIR. The notice of preparation stated that the requested authorizations included annexation of the site, approval of a specific plan, zoning, and development entitlements.

In the years following the initial application for the project, the developer met with numerous agencies, provided all requested information (including a draft specific plan, preliminary draft environmental studies, and other materials), modified the project (including a reduction in the number of dwellings), paid all funds requested by the City for environmental review (including tens of thousands of dollars in permits and other service fees), and expended millions of dollars for consultants and others to prepare environmental studies.

In mid-2007, Las Lomas offered to enter into an agreement with the City to prepay the City's anticipated expenses for processing the EIR and requested project approvals. The planning department advised Las Lomas to file a formal application for entitlements. In response, Las Lomas filed its Master Land Use Permit Application in September 2007, requesting approval of a development agreement, a specific plan, and development entitlements. The planning department informed Las Lomas the application was incomplete because it was missing a final EIR.

Two council members voiced opposition to the project. Las Lomas alleged that one of those councilmembers made public statements exaggerating the environmental impacts of the project and other misrepresentations. In February 2008, that councilmember moved to suspend

the environmental review process until the City Council had made a "policy decision" to resume the process. A competing motion was also introduced by supporters of the project. The City Council considered both motions and voted to "cease all work" on the proposed project and return all materials associated with the project to Las Lomas.

Las Lomas filed a combined petition for a writ of mandate and complaint for damages, alleging violation of CEQA, denial of procedural and substantive due process and related causes of action. The trial court sustained the City's demurrer on all counts, stating in the minute order that CEQA "does not require a public agency to prepare and consider an EIR before it disapproves a project."[32] The trial court asked Las Lomas whether it was requesting leave to amend to allege a count based on misrepresentation; counsel for Las Lomas responded in the negative.[33] The trial court entered judgment in favor of the City, and Las Lomas appealed.[34]

The Second District Court of Appeal affirmed the trial court's judgment, holding that CEQA does not mandate completion of the EIR before a city can reject a project.[35] Citing Public Resources Code section 21080, the court explained that CEQA applies only to projects that a public agency proposes to carry out or approve. It does not apply to projects that the agency rejects or disapproves.[36] The court reasoned that requiring a public agency to prepare an EIR before rejecting a project would impose a substantial burden on the agency, other agencies, organizations, and individuals commenting on the proposal, and the project applicant.[37] "Such a requirement would not produce any discernible environmental benefit and would not further the goal of environmental protection."[38]

In rejecting Las Lomas's argument that the CEQA Guidelines require a public agency to reject a project either before initiating environmental review or after completing and certifying an EIR, but not at any time in between,[39] the court effectively endorsed a bright-line rule that CEQA does not mandate completion of an in-process EIR no matter how much money has been spent. Section 15270 of the CEQA Guidelines, which states that CEQA does not apply to projects which a public agency rejects or disapproves, is "intended to allow an initial screening of projects on the merits for quick disapprovals prior to the initiation of the CEQA process where the agency can determine that the project cannot be approved."[40] However, Section 15270 does not expressly state that a public agency that has initiated environmental review of a proposed project must complete and certify an EIR before rejecting the project, and the Second District concluded to the contrary.[41] The project was rejected *and* Las Lomas forfeited the amounts already spent on environmental review.

3.Schellinger Bros. v. City of Sebastopol

At the other end of the spectrum from *Sunset Sky* is *Schellinger Bros. v. City of Sebastopol*.[42] *Schellinger* involved a situation where the environmental review of a project took years and cost the developer millions of dollars, the city had not denied the project, yet the city refused to complete the EIR. The developer sought to force the city to approve the EIR and the project, arguing the city was required to certify the EIR within one year of receiving a completed application.

The facts of the case were as follows: In 2002, Schellinger, a developer, applied to the City of Sebastopol ("City") to develop half of an approximately 20 acre site known as Laguna Vista. The original application was to construct a project with 182 units of single-residence housing along with a neighborhood commercial center of 16,300 square feet. The City began preparation of an EIR for the project as described. A draft EIR was released for comment in March 2002. Between that time and June, when the draft EIR was complete, Schellinger was continually making changes to the project. By June, the project was reduced to 177 units. The size of the commercial center was also reduced. The planning commission accepted the draft EIR with modifications. In August, Schellinger again changed the project. After two public hearings, Schellinger decided to resubmit its project proposal.

Schellinger submitted a new proposal in May 2003. The project as amended included 145 units and no commercial center. The City deemed the application complete on June 23, 2003.

When it became clear that the project implicated the City's open space ordinance, which would ordinarily require an analysis of the project separate from the EIR, the City decided to fold the open space analysis into the EIR, with no objection from Schellinger. The City also decided to recirculate the draft EIR.

The recirculated draft EIR was released for public comment in August 2004. Due to substantial opposition, the City propounded a large number of requests for additional information to Schellinger. This continued through October 2005. In October and November 2005, the planning commission considered the recirculated draft EIR and recommended conditional approval. The city council took up the matter in December, and continued it to January 2006 due to the ongoing substantial opposition. In February 2006, the city council gave Schellinger an opportunity to submit a comprehensive response to questions and comments from the council and the public about the project. In response to public opposition, Schellinger again modified the project, this time reducing the number of units to 125. Before the

city council was to vote on the matter, the City and Schellinger agreed to a mediation of the project controversy.

Almost a year later, another revised proposal—the result of the mediation—was set to go before the city council. The number of units remained at 125, but the commercial center concept was revived with reduced square footage. However, majority support did not exist for the mediated proposal. Schellinger demanded that the City comply with its "legal duty to approve the 145-unit Laguna Vista Project." The city council scheduled a hearing for June 5, 2007, at which time it decided that the draft EIR should *again* be recirculated for further comment and analysis.

On August 31, 2007, clearly frustrated with this "Groundhog Day" scenario, Schellinger filed a petition with seven causes of action, including causes of action for "Violation of Anti-NIMBY statute," "Breach of Contract Regarded Processing Costs," and "Breach of Mediation Agreement." Schellinger's causes of action were based on administrative mandamus. Schellinger sought a peremptory writ of mandate directing the City to certify the EIR, among other things. At the hearing on the merits, the trial court found in favor of the City on the three causes of action, and Schellinger appealed.[43]

The First District Court of Appeal affirmed the trial court's ruling.[44] The primary issue on appeal was whether the trial court should have issued a writ of administrative mandate directing the City to approve the EIR and the project as proposed in May 2003. Relying on Public Resources Code section 21151.5, Schellinger claimed that the City had a mandatory statutory duty to complete and certify the EIR within one year.[45] Section 21151.5 provides that for projects undergoing CEQA review "each local agency shall establish, by ordinance or resolution, time limits that do not exceed the following: One year for completing and certifying environmental impact reports."[46]

The court of appeal rejected Schellinger's argument, explaining that there are no automatic approval provisions in CEQA.[47] The one-year time-frame in Section 21151.5 is merely *directory*, not mandatory.[48] In fact, by its own terms, Section 21151.5 expressly recognizes that local ordinances and resolutions "may establish different time limits for different types, or classes of projects."[49]

Schellinger relied heavily upon *Sunset Drive Corp. v. City of Redlands*,[50] which held that Section 21151.5 could be enforced by mandamus and that an order requiring the city *to complete,* rather than approve, an EIR was appropriate.

The *Schellinger* court of appeal distinguished *Sunset Drive* on three grounds. First, *Sunset Drive* involved *traditional mandate* compelling ac-

tion by a city council that was refusing to make a decision. In *Schellinger*, however, the developer claimed that the court was authorized to issue a writ of *administrative* mandamus to compel the city council to certify a proposed EIR.[51] As expressed by the court, however, the developer was "unable to muster a single authority in its brief that what it wants is available in administrative mandamus."[52] Second, the court noted that the material facts were distinguishable. Schellinger was not claiming that the City was refusing to act, but that it essentially had never stopped exercising its discretion by continually recirculating the EIR.[53] Finally, the court emphasized that Schellinger's active participation in the review process for over three years after the one-year date it claimed the City lost its discretionary jurisdiction amounted to *laches*—an acceptable ground for relaxing the directory deadline of Section 21151.5.[54]

B. Suit Against Third-Party Consultant For Breach Of Contract To Prepare An EIR.

The foregoing cases demonstrate a consistent rejection of attempts by applicants to assert claims against public entities to influence and expedite the environmental review process. In another recent case—*Lake Almanor Associates L.P. v. Huffman-Broadway Group, Inc*.[55]—the First District Court of Appeal also rejected an applicant's claim against a *third party* consultant based on its failure to timely prepare an EIR. The issue was whether the applicant had a contract or tort claim directly against the consultant.

As commonly happens after a developer submits a project application, the County of Plumas ("County") entered into a contract with a consultant to prepare an EIR after receiving an application for mixed-use development. The developer in turn agreed to reimburse the County for the money spent on preparation of the EIR. The consultant failed to meet the one-year deadline for completion of the EIR imposed by Public Resources Code section 21151.5. Refusing to extend the deadline, the County sent a notice of termination to the consultant. Following the consultant's submission of invoices for payment, the County demanded reimbursement from the developer. The developer sued the consultant for breach of contract, negligence, and negligent interference with prospective economic advantage. In addition to seeking reimbursement for monies paid, the developer also sought $50 million in damages allegedly due to the loss of a sale of the property. The trial court sustained the consultant's demurrer.[56]

The Court of Appeal affirmed, holding that the consultant owed no duty to the developer to complete the EIR in a timely fashion.[57] As for the breach of contract claim, there was no agreement between the con-

sultant and the developer, and the developer's third party beneficiary theory failed.[58] The court explained that a party can have enforceable rights under a contract as a third party beneficiary as either a creditor beneficiary or a donee beneficiary. The developer qualified as neither.[59] It was clear that the developer was not a donee beneficiary; the County's intent in entering into the agreement with the developer was to satisfy its statutory obligation to prepare an EIR—not to make a gift to the developer.[60] Relying on case law, the court of appeal also concluded that the developer was not a creditor beneficiary. As explained by the court in *Mission Oaks Ranch, Ltd. v. County of Santa Barbara*:[61]

> CEQA confers the duty upon the local lead agency to produce an adequate EIR for dissemination to the public, and the discretion to evaluate the project for the public. [Citation.] These statutory obligations may not be the consideration for a contract or promise, nor may the County bargain away its constitutional duty to regulate development. [Citations.] The County, as lead agency on the project, owes its duty to the public to release a proper EIR. [Citation.] The County owes no duty to assuage the desires of the potential developer.[62]

Referencing section 313 of the Restatement Second of Contracts (also cited in *Mission Oaks*), the *Lake Almanor* court noted, among other things, that Comment "a" provides that with respect to government contracts, individual members of the public are generally treated as incidental beneficiaries unless the contract manifests a different intention.[63] Here, there was no such language. While the contract between the County and the consultant required that the developer receive a copy of the EIR, this was insufficient to demonstrate an intent that the consultant be liable to the developer in the event of breach.[64]

The court further rejected the developer's reliance on *COAC, Inc. v. Kennedy Engineers*,[65] where the court held that a water district, as the owner of property, owed the contractor an implied contractual duty to not hinder the contractor's performance, which obligated the district to comply with EIR requirements so construction could commence. Here, the County did not own the property, and therefore lacked the contractual obligation that was present in *COAC*.[66]

The court further opined that if suits of this nature were permitted, the exposure to claims could affect the availability of consultants and the fees that they charge, and undermine independence of professional experts for fear of a retaliatory action.[67]

Likewise, the developer's negligence and negligent interference with prospective economic advantage causes of action failed.[68] The

court explained that the threshold element for a negligence cause of action is the existence of a *duty*. According to the court, finding such a duty to manage business affairs to prevent economic losses to third parties was the exception—not the rule.[69] Analyzing a number of factors for determining whether a duty of care is owed to a third party as articulated in *Biakanja v. Irving*,[70] the court of appeal concluded that the consultant owed no duty to the developer.[71]

IV. CONCLUSION.

Taken together, these recent CEQA cases demonstrate a seeming anti-developer leaning among the courts. But is that really what is going on? And is there anything a frustrated developer can do to move the environmental review process forward?

At first blush, *Sunset Sky*'s affirmation of the County's refusal to complete an EIR before denying the Airport's CUP application appears clear cut, given the exemption for projects which a public agency rejects or disapproves. However, the County's reasons for denying the CUP application were all impacts that should have been addressed in an EIR, and the County denied the CUP without the benefit of an EIR analysis. Under these circumstances, the County's decision might have benefited from an EIR. While project applicants are usually required to pay for environmental review whether or not the project is approved, full review here might have meant the difference between approval and denial. Presumably, that is why the Airport was willing to risk the expense of a full-blown EIR analysis. Still, the law is clear that when a project is denied, it is exempt from CEQA, so *Sunset Sky* is arguably consistent with the background CEQA framework and not necessarily "anti-developer" so to speak. Moreover, the Airport was at least spared the expense, delay, and uncertainty that come with preparation of an EIR.

The developers in *Las Lomas, Schellinger,* and *Lake Almanor* were not so lucky. They incurred millions of dollars of expense and years of uncertainty, without any project approvals to show for it. The *Las Lomas* court reasoned that requiring a public agency to prepare an EIR before rejecting a project would impose a substantial burden on the agency, other agencies, organizations, and individuals commenting on the proposal, and the project applicant. "Such a requirement would not produce any discernible environmental benefit and would not further the goal of environmental protection."[72] This might be true, but it does not take into account the position of the developer who has the "worst of both worlds"—i.e., little control over the environmental review process but full responsibility for the costs. In *Schellinger* and *Lake Almanor*, the project applicants not only incurred substantial costs associated

with environmental review, but also endured a great deal of uncertainty while their proposed project languished in a state of CEQA limbo.

In sum, despite recognizing that CEQA can be a frustrating process for developers, the *Schellinger* opinion, along with *Sunset Sky, Las Lomas,* and *Lake Almanor*, will likely add to, rather than ameliorate, that frustration. What's more, the Permit Streamlining Act ("PSA"),[73] which was adopted to relieve permit applicants from protracted delays by governmental agencies in processing applications, provides no relief in these scenarios. While the PSA provides that a city must approve or disapprove a development project within a certain time line, its deadlines do not begin to run until CEQA review is complete, e.g., an EIR is certified.[74] This leaves a developer whose proposed project requires environmental review in a tenuous position: it cannot use CEQA to force a local agency to approve an EIR within the one-year timeline, nor can it use the PSA to do so since the PSA does not apply until the EIR is certified.

So what is a developer to do? Since CEQA appears to be here to stay, a developer should take precautions *to protect itself* before the environmental review process is underway.

First, a stable project proposal can go a long way. The *Schellinger* opinion was arguably driven by the developer's constant project revisions and failure to raise the argument that the City lacked discretionary power until after Schellinger had engaged in the environmental review process for almost three years following the finding its project application was complete. As the court observed, "Schellinger was not a helpless bystander on a perpetual merry-go-round, but an active participant of the CEQA process as it stretched into 2004, 2005, 2006, 2007, and 2008."[75]

Second, if the local agency contracts with a third party to prepare the EIR, the developer might negotiate with the local agency to limit its indemnification obligation to situations where an EIR is completed. While developers may not have the leverage necessary to negotiate such limited obligations, they should certainly try.

Perhaps the most effective precaution a developer can take is to opt to prepare the EIR itself, which would give the developer more control over the process and would put it in a direct contractual relationship with the consultant preparing the EIR. The CEQA Guidelines permit this,[76] but in practice most local agencies do not. Even where a developer would be allowed to directly contract for the EIR, this does not completely solve the problem; local agencies must ultimately exercise their own independent judgment concerning the adequacy of an EIR,

so opting to prepare the EIR oneself does not necessarily curb fact scenarios like in *Schellinger*.

If problems do arise after environmental review is underway, *Sunset Sky, Las Lomas, Schellinger,* and *Lake Almanor* do not necessarily preclude litigation altogether. In fact, the Second District in *Las Lomas* did not reach the issue of whether or not the developer might have been entitled to relief based on a promissory estoppel or inverse condemnation claim because Las Lomas had elected not to amend its complaint when given the chance by the trial court. Going forward, while these might be difficult arguments to win against a public entity, they nonetheless remain potential avenues for relief in the face of truly egregious conduct.

Still, it is unlikely developers or other project applicants will find it very reassuring that there is a *possibility* that these causes of action *may* be available in the face of egregious conduct. And while developers may take certain precautions to protect themselves, there will no doubt be situations where developers find themselves stuck in a "Groundhog Day" of perpetual EIR preparation, never progressing to completion. This begs the question—is the purpose of CEQA really being served? By dragging out the environmental review process indefinitely (or refusing to engage in it entirely), is a local agency really protecting the environment, or is it using CEQA as a means to hold up a politically unpopular project? In at least some cases where local agencies refuse to act, driving up the cost and uncertainty of proposed projects, it would seem that local agencies' motives may be driven by the latter. Yet, as demonstrated by the recent opinions discussed above, the courts have thus far declined applicants' invitations for court intervention, even in extreme circumstances, virtually guaranteeing that developers and other applicants will continue to experience frustration with the CEQA process for years to come.

NOTES

1. Pub. Resources Code, §§21000 *et seq*.
2. Pub. Resources Code, §21080, subd. (a) (CEQA applies at the time a public agency proposes to "approve" a project).
3. Pub. Resources Code, §§21000 to 21002.
4. Cal. Code Reg., tit. 14, §15002.
5. *Emmington v. Solano County Redevelopment Agency*, 195 Cal. App. 3d 491, 502, 237 Cal. Rptr. 636 (1st Dist. 1987).
6. *Laurel Heights Improvement Assn. v. Regents of University of California*, 47 Cal. 3d 376, 392, 253 Cal. Rptr. 426, 764 P.2d 278 (1988), as modified on denial of reh'g, (Jan. 26, 1989).
7. *Id*.
8. Pub. Resources Code, §§21067, 21082.1, 21100, subd. (a), 21101 to 21151, 21165; Cal. Code Reg., tit. 14, §§15367, 15050, 15051.

9. Pub. Resources Code, §21080.1, subd. (b).
10. Pub. Resources Code, §21104, subd. (a).
11. Pub. Resources Code, §21082.1.
12. Pub. Resources Code, §§21100.2, subd. (a), 21151.5. However, as discussed in the cases below, this one-year time frame is directory, not mandatory.
13. Pub. Resources Code, §21089.
14. *Mission Oaks Ranch, Ltd. v. County of Santa Barbara*, 65 Cal. App. 4th 713, 719, 723, 77 Cal. Rptr. 2d 1 (2d Dist. 1998).
15. See Pub. Resources Code, §§21082.1, 21100, 21151; *Friends of La Vina v. County of Los Angeles*, 232 Cal. App. 3d 1446, 1452-54, 284 Cal. Rptr. 171 (2d Dist. 1991).
16. Pub. Resources Code, §21080, subd. (d); Cal. Code Regs., tit. 14, §15063.
17. Pub. Resources Code, §21092.1.
18. *Sunset Sky Ranch Pilots Ass'n v. County of Sacramento*, 47 Cal. 4th 902, 102 Cal. Rptr. 3d 894, 220 P.3d 905 (2009).
19. *Id*. at 906.
20. *Id*.
21. *Id*. at 907.
22. *Id*.
23. *Id*. at 908-09 (citing Pub. Resources Code, §21080, subd. (b)(5)).
24. *Id*. at 909.
25. *Id*. at 908.
26. *Id*.
27. *Id*.
28. *Id*. at 909.
29. *Id*. at 909.
30. *Id*.
31. *Las Lomas Land Co., LLC v. City of Los Angeles*, 177 Cal. App. 4th 837, 99 Cal. Rptr. 3d 503 (2d Dist. 2009), review denied, (Dec. 17, 2009).
32. *Id*. at 846.
33. *Id*. at 846 n.3.
34. *Id*. at 847.
35. *Id*. at 842.
36. *Id*. at 848.
37. *Id*. at 849.
38. *Id*.
39. *Id*. at 849-50.
40. *Id*. at 849 (citing CEQA Guidelines, §15270(b)).
41. The court of appeal went on to reject Las Lomas's due process and equal protection claims. With respect to the due process claims, the court of appeal explained that a land use application invokes procedural due process only if the owner has a legitimate claim of entitlement to the approval. Nor did the councilmember's conduct rise to the level of outrageous egregious conduct that might support a substantive due process claim. Finally, the court of appeal cited numerous rational reasons for the City's decision as grounds for rejecting the equal protection claim.
42. *Schellinger Bros. v. City of Sebastopol*, 179 Cal. App. 4th 1245, 102 Cal. Rptr. 3d 394 (1st Dist. 2009).
43. *Id*. at 1255-56.
44. *Id*. at 1271.
45. *Id*. at 1259-60.
46. *Id*. at 1259.
47. *Id*. at 1280.
48. *Id*.
49. *Id*. at 1261. The provisions of the Permit Streamlining Act did not change this conclusion. Just as with CEQA, the Permit Streamlining Act has no "deemed approved" provision

for EIRs. By way of similar reasoning, the Housing Accountability Act also provided no support for Schellinger's position.

50. *Sunset Drive Corp. v. City of Redlands*, 73 Cal. App. 4th 215, 86 Cal. Rptr. 2d 209 (4th Dist. 1999).
51. *Id*. at 1265.
52. *Id*. at 1266.
53. *Id*. at 1267.
54. *Id*. at 1267-68.
55. *Lake Almanor Associates L.P. v. Huffman-Broadway Group, Inc.*, 178 Cal. App. 4th 1194, 101 Cal. Rptr. 3d 71 (1st Dist. 2009).
56. *Id*. at 1197, 1198.
57. *Id*. at 1197.
58. *Id*. at 1199.
59. *Id*. at 1199-1204.
60. *Id*. at 1199.
61. *Mission Oaks Ranch, Ltd. v. County of Santa Barbara*, 65 Cal. App. 4th 713, 720, 77 Cal. Rptr. 2d 1 (2d Dist. 1998).
62. *Id.* at 723-24.
63. *Id*. at 1201.
64. *Id*. at 1201-02.
65. *COAC, Inc. v. Kennedy Engineers*, 67 Cal. App. 3d 916, 922-923, 136 Cal. Rptr. 890 (1st Dist. 1977).
66. *Id*. at 1202.
67. *Id*. at 1204.
68. *Id*. at 1206.
69. *Id*. at 1205 (citing *Quelimane Co. v. Stewart Title Guaranty Co.*, 19 Cal. 4th 26, 58, 77 Cal. Rptr. 2d 709, 960 P.2d 513 (1998), as modified, (Sept. 23, 1998)).
70. *Biakanja v. Irving*, 49 Cal. 2d 647, 650, 320 P.2d 16, 65 A.L.R.2d 1358 (1958)
71. *Id*. at 1206.
72. *Las Lomas, supra*, 177 Cal. App. 4th at 849.
73. Gov. Code, §§65920 *et seq*.
74. See Gov. Code, §65950, subd. (a). In any event, the PSA is of limited utility in larger projects requiring general plan amendments, or other legislative entitlements, as it does not apply to legislative approvals. *See Landi v. County of Monterey*, 139 Cal. App. 3d 934, 937, 189 Cal. Rptr. 55 (1st Dist. 1983).
75. *Schellinger, supra*, 179 Cal. App. 4th at 1270.
76. See Pub. Resources Code, §§21082.1, 21100, 21151; *Friends of La Vina v. County of Los Angeles*, 232 Cal. App. 3d 1446, 1452-54, 284 Cal. Rptr. 171 (2d Dist. 1991).

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