Water Law Review

Volume 9 | Issue 2 Article 52

1-1-2006

Aden v. City of Ontario, No. E036826, 2006 Cal. App. LEXIS 640 (Cal. Ct. App. Jan. 25, 2006)

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("Fortyunes") post-judgment motion to intervene. The Fortyunes appealed to the California Court of Appeals.

The court first stated that post-judgment intervention required that the requesting party establish a right under the judgment's terms to receive the judgment's benefits. Next, the court noted that establishing a right in this case required a showing of a legal right to produce water and a substantial reasonable beneficial use or a substantial investment in a reasonable beneficial use between 1986 and 1990. The Fortyunes conceded that they did not produce water for a reasonable beneficial use during that time, but contended that they should have a FPA based on their beneficial use during the 1970s. The court found the 1986-1990 period used in stipulating apportionment of water production among users in an over-drafted basin appropriate because it fairly allocated based on the usage on which users could show actual reliance. The court held that five years of beneficial use justifies prescriptive rights to water while lack of beneficial use for five years abandons prescriptive water rights in California. The Fortyunes did not beneficially use water for the five-year period between 1986 and 1990, therefore the court found that they abandoned their prescriptive water rights and could not establish a post-judgment intervention right.

The court affirmed the trial court order denying the Fortyunes's post-judgment intervention motion.

Jonathan P. Long

Aden v. City of Ontario, No. E036826, 2006 Cal. App. LEXIS 640 (Cal. Ct. App. Jan. 25, 2006) (holding that an amendment to a land development project does not need a supplemental Environmental Impact Report ("EIR") when the amended land development project does not include substantial changes to the water supply, among other environmental issues).

The city council of Ontario approved the Ontario International Center General Plan Amendment ("General Plan") in December 1980, which included an Environmental Impact Report ("EIR"). The General Plan covered a 1,540-acre area. On December 20, 1983, the Ontario city council adopted a specific plan, then known as the Parkcenter Specific Plan ("PS Plan"), within the General Plan area that included the 32 acres now planned for development by Meer Capital Partners ("Meer") and the approximately 5 1/2 acres covered by Scott G. Aden's strip mall. The PS Plan contemplated two land use categories: Urban Commercial and Garden Commercial. Aden's shopping center, known as Airport Square Shopping Center, was the only portion of the land within the PS Plan actually developed. The remaining land, approximately 32 acres, remained largely vacant since the adoption of the PS Plan. In August 2003, Meer applied for an amendment to the PS Plan to develop the 32 acres designated for high intensity

commercial with a more environmentally benign residential development use. Ontario conducted an initial study of the proposed amended PS Plan pursuant to § 15063 of the California Environmental Quality Act ("CEQA") and concluded that the amended PS Plan raised no environmental issues unaddressed in the original EIR. The study found that the environmental effects of the amended PS Plan were substantially less than those of the original PS Plan. Accordingly, Ontario prepared an addendum to the original EIR rather than a new EIR. Aden filed a petition for writ of mandate in the Fourth Appellate District Court of Appeal of California challenging the determination by Ontario that an addendum be prepared, arguing that it needed to prepare a supplemental EIR for the amended PS Plan.

The court held that when an agency has already prepared an EIR and there has been a decision not to prepare a supplemental EIR for a later project, the standard of review is the deferential substantial evidence standard. No supplemental EIR is required unless there are substantial changes in the project or the circumstances surrounding the project. This differential standard is a reflection of the fact that in-depth review has already occurred. The Ontario staff concluded in the initial study that the amended PS Plan raised no environmental issues unaddressed in the original EIR. Under CEQA, a subsequent EIR is only necessary to explore the environmental ramifications of a substantial change not considered in the original EIR.

Aden argued that the amended PS Plan would put an additional demand on Ontario's water supply because of a limited ability to increase groundwater extraction, that the amended PS Plan would rely increasingly on the State Water Project as a source, and that a supplemental EIR was proper. The EIR conducted for the General Plan noted that regional supplies were adequate to serve the site. Ontario conducted a Water Master Plan ("WMP") in 2000 that specifically analyzed the impact of all the development contemplated in Ontario's General Plan, including the amended PS Plan, and concluded that there was sufficient water with the implementation of several water infrastructure improvement projects.

The 2000 WMP found that there would be an approximate 10 percent surplus water delivery capacity. With the water infrastructure improvement projects, the source capacity would total 53 million gallons per day ("MGD") and the water demand would be 48 MGD. With the amended PS Plan, the approximate increase in water demand would constitute a 0.13611 percent increase. This minimal change in water demand would not create a significant adverse impact because Ontario's water supplies were sufficient to service the amended PS Plan area.

The court concluded that the amended PS Plan did not need a supplemental EIR because it would not include substantial changes to

the environmental impacts from the original PS Plan. The court affirmed the lower court's decision.

Michael S. Samelson

City of Rancho Cucamonga v. Reg'l Water Quality Control Bd. for the Santa Ana Region, 38 Cal. Rptr. 3d 450 (Cal. Ct. App. 2006) (holding that municipalities are required to obtain and comply with a federal regulatory permit limiting the quantity and quality of water runoff that can be discharged from these storm sewer systems, and holding: (1) wastewater discharge permit did not exceed federal requirements to necessitate analysis of economic factors, and (2) there is no statutory right to a "safe harbor" provision to be included as a term of the permit).

The National Pollutant Discharge Elimination System ("NPDES") is part of the federal Clean Water Act and is the primary means for enforcing effluent limitations and standards under the Clean Water Act. The NPDES sets out the conditions under which the federal Environmental Protection Agency or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law.

The City of Rancho Cucamonga ("Cucamonga") filed a petition for writ of mandate to challenge the procedure under which the Regional Water Quality Control Board for the Santa Ana Region ("Regional Board") issued a 2002 municipal storm sewer permit, the conditions imposed by permit, and the expense of permit requirements. The Superior Court of San Bernardino County granted the Regional Board's motion to strike and denied Cucamonga's petition for writ of mandate. Cucamonga appealed to the Court of Appeal of California, Fourth Appellate District, Division Two, pleading that the Regional Board acted illegally and in excess of their jurisdiction in developing, adopting, and implementing the 2002 wastewater discharge permit.

The Regional Board issued the first NPDES permit for Cucamonga in 1996 based on a Report of Waste Discharge ("ROWD") prepared by Cucamonga. The 1996 permit proposed inspections of industrial and commercial sources; policies for development and redevelopment; better public education; and implementation of a monitoring program. It offered a commitment to reduce pollutants to the "maximum extent practicable." In 2000, Cucamonga submitted another ROWD to renew their NPDES permit. The 2000 ROWD proposed continuing to implement and develop water quality management and monitoring programs. Based on the 2000 ROWD, the Regional Board staff created the disputed 2002 permit.