In the Zone

A newsletter of the Real Estate Department and the Zoning and Land Use Practice Group

Fox Rothschild LLP
ATTORNEYS AT LAW

September 2014

Land Use Approvals in California Can Avoid CEQA If a City Directly Adopts a Voter Land Use Initiative

By Kenneth A. Kecskes

A city need not conduct an analysis of the potential environmental impacts of a proposed development if it chooses to directly adopt a voter-sponsored initiative for the project.

For developers of projects that are popular but likely to be challenged by a small minority, the California Supreme Court's decision in *Tuolumne Jobs & Small Business Alliance v. Superior Court* is good news. A popular project can skip the preparation of an Environmental Impact Report (EIR) or other environmental document pursuant to the California Environmental Quality Act (CEQA). This strategy saves time and money in two ways. First, developers can save months – sometimes years – waiting for a city to prepare technical studies analyzing the environmental impacts of proposed projects. These studies are almost always prepared at the developer's expense. Second, if there is no CEQA document, there is no CEQA litigation. The cost and delays that result from CEQA litigation are avoided. As a result, project opponents have one less arrow in their quiver to try to delay or kill a project by filing a CEQA lawsuit.

The facts of the case are straightforward. Walmart Stores, Inc. (Walmart) operated a store in the City of Sonora. Walmart sought to expand the store in order to convert it into a "Supercenter," which would sell groceries and be open 24-hours every day. The city circulated for public comment a draft EIR for the expansion. After a hearing, the city's planning commission recommended to the City Council that the EIR be certified and the project approved.

In This Issue:

Before the matter was heard by the City Council, a citizen served the city with a notice of intent to circulate an initiative petition. The "Walmart Initiative" proposed to adopt a specific plan for the contemplated expansion. The City Council postponed its vote on the EIR and project approval while the initiative petition circulated. The petition was signed by more than 20 percent of the city's registered voters, qualifying it for the ballot.

Under California law, when a city council receives a voter initiative petition with sufficient signatures, the city is required to do one of the following: (1) immediately adopt the initiative without change; (2) immediately submit it to a special election; or (3) order the preparation of a report within 30 days, which the city council uses to decide whether to adopt the initiative or submit it to a special election. In *Tuolumne*, the City Council ordered that a report be prepared to examine the initiative's consistency with previous planning commission approvals for the Walmart expansion. At its next meeting, the City Council considered the report and adopted the proposed initiative as an ordinance without further complying with CEQA.

The Tuolumne Jobs & Small Business Alliance sought a writ of mandate, claiming, among other things, that the City Council violated CEQA by adopting the ordinance without first conducting a complete environmental review. The trial court denied the CEQA claim. The Court of Appeals reversed, holding that when a land use ordinance is proposed in a voter initiative petition, full CEQA review is required if the city council adopts the ordinance rather than submitting it to an election.

The California Supreme Court disagreed. CEQA does not apply to a city council's action to adopt a voter-sponsored land use initiative. The language and legislative history behind the Elections Code statutes did not support the proposition that the city was required to comply with CEQA before adopting the voter-sponsored measure.

The project opponents argued that "developers could potentially use the initiative process to evade CEQA review, and that direct adoption by a friendly city council could be pursued as a way to avoid even the need for an election." While that may be true, the Supreme Court was not convinced: "The initiative power may be used to thwart development [too]. . . . The process itself is neutral. The possibility that interested parties may attempt to use initiatives to advance their own aims is part of the democratic process." What's more, California's election laws offer another protection from overreaching by the city: the referendum power. If voters disagree with a city council's adoption of a voter-sponsored initiative, they can file a referendum petition and a vote to block the enactment of a land use measure.

The *Tuolumne* case can be an effective tool when both a city council and the public support a popular development project. However, a well-thought-out legal and political strategy is crucial for success. For example, a city must still hold a public hearing before adopting the voter measure, affording the public an opportunity to be heard. How city council and the developer prepare for this hearing is important. Wise city council members will order a report to help develop a record in support of their decision and to show that they have considered countervailing arguments. In addition, environmental protections are still afforded by California's other environmental laws and regulations. It is crucial to develop a plan for project

approvals that must be obtained from other regulatory agencies that may have permitting authority over the proposed project. Indeed, CEQA compliance may still be required in order to obtain permits or approvals from state agencies or other governmental authorities. Developers do not get a "free pass." Before using the *Tuloumne* strategy, developers should consult counsel to understand the legal and political risks.

Author

Kenneth A. Kecskes
415.364.5529
kkecskes@foxrothschild.com

Pennsylvania Commonwealth Court Upholds Preliminary Plan Approval Where Sewer Planning Process has Commenced but has Not Been Completed

By Kimberly A. Freimuth

In the case of *Lyons Borough Municipal Authority v. Township of Maxatawny*, 2014 WL 3396538 (July 10, 2014), Lyons Borough Municipal Authority (LBMA) appealed the order of the Berks County Court of Common Pleas dismissing its appeal of Maxatawny Township's grant of a landowner's preliminary land development plan approval on the basis that the sewer planning for the development had not been completed.

In December 2012, the landowner submitted a preliminary land development plan to the township proposing to construct a 192-unit apartment complex with a 7,200-square-foot community center on the subject property. Approximately five years earlier, in March 1997, the LBMA, the township and the township's municipal authority had entered into an agreement by which the authority agreed to provide sanitary sewage collection and treatment and the township agreed to purchase a certain amount of sewage capacity from the LBMA.

Thereafter, in March 2013, the township conditionally approved the landowner's preliminary plan, subject to 161 conditions, several of which related to obtaining the required sewage collection and treatment capacity approvals, as well as required offsite sewer easements. Nonetheless, the LBMA appealed the township's conditional approval, alleging the township erred in approving the plan because the plan did not have sufficient sewage capacity pursuant to the prior 1997 agreement and because the township had not purchased the necessary additional capacity since the 1997 agreement to serve the proposed development. LBMA further alleged that there was no agreement for connection to the sewer main and no easement across neighboring properties for connection to the sewage system and, therefore, the conditional approval should not have been granted.

Landowners intervened and filed a motion to quash the appeal, along with a motion for bond, alleging LBMA's appeal was frivolous. The township joined in landowner's motion to quash. After two hearings, the trial court issued an order granting the motion to quash and dismissing LBMA's appeal. LBMA then appealed the trial court's decision to the Commonwealth Court, again alleging the land development plan should not have been approved because there was not sufficient sewage capacity for the development, there was no agreement for connection to the sewer main, and no easements had been obtained across neighboring properties to connect to LBMA's sewage system.

The Commonwealth Court aptly noted that each of the deficiencies alleged by LBMA were specifically addressed in the conditions imposed by the township in approving the landowner's plan. Therefore, citing *Morris v. South Coventry Township Bd. of Supervisors*, 836 A.2d 1015, 1020 (Pa. Commw. 2003), the court noted that it is well settled that where a preliminary plan fails to comply with the substantive requirements of the township's Subdivision and Land Development Ordinance, its rejection under Section 508(2) of the Pennsylvania Municipalities Planning Code (the MPC) or its conditional approval under Section 508(4) of the MPC is within the discretion of the governing body of the township.

As a result, the Commonwealth Court held that the township properly exercised its discretion in granting the landowner's plan conditioned on the landowner: obtaining a will serve letter from LBMA regarding connection to its system; providing additional calculations showing proposed sewage flows for capacity analysis; and obtaining the necessary easements across neighboring properties for connection to LBMA's existing sewage system. Citing *Kohr v. Lower Windsor Township Bd. of Supervisors*, 910 A.2d 152, 159 (Pa. Commw. 200), the court affirmed that there is no requirement that the sewer planning process be completed prior to the grant of preliminary plan approval, only that that the process be commenced.

Although this was an unreported decision of the Commonwealth Court, it still has persuasive value and confirms that the Commonwealth Court continues to maintain that sewage planning is not required to be finalized at the time of preliminary plan approval and any outstanding sewage matters may be appropriately addressed as conditions to approval.

Author

Kimberly A. Freimuth
215.918.3627
kfreimuth@foxrothschild.com

Legislative Update in Pennsylvania

By David H. Comer

House Bill No. 1565 proposes to, among other things, amend the Clean Streams Law pertaining to the use of riparian buffers.

In short, the proposed legislation, as per a summary of House Bill No. 1565 prepared by the House Committee on Appropriations, would add to the Clean Streams Law "a new subsection allowing the use or installation of riparian buffers and riparian forest buffers to be optional and no longer mandatory among best practices, design standards and alternatives to minimize the potential for accelerated erosion and sedimentation and to protect, maintain, reclaim and restore water quality and for existing and designated uses."

One of the members of the House who introduced House Bill No. 1565 was Representative Marcia Hahn, who represents a portion of Northampton County and has been a member of the House since 2010. In a memorandum summarizing the proposed legislation, Representative Hahn provides that "[b]usinesses and landowners alike have expressed their frustration with our 25 Pa. Code, Section 102.14 riparian buffer requirements and the negative impacts they have on development and land use in many areas of the Commonwealth. It seems to me that this regulation has resulted in a major shift of state policy, which in effect, amounts to a taking of property without legislative oversight or approval."

As to the status of House Bill No. 1565, it has not yet been passed.

Author

David H. Comer
610.397.7963
dcomer@foxrothschild.com

Transactions

Rob Gundlach and Carrie Nase-Poust represented BET Investments in obtaining preliminary/subdivision and land development approval for a new 384-unit/1,056-bed student housing project in Kutztown Borough, Berks County, PA. The project involved both apartment and carriage style homes and will be constructed in phases.

In New Castle County, DE, the Subdivision Application with a request to adjust the property line between a cemetery and a hotel was approved. The Subdivision Application, led by Michael Isaacs, paved the way for the sale of the cemetery.

In New Castle County, DE, on behalf of 22 homeowners located along the Wilmington, DE Riverfront, Michael Isaacs succeeded in obtaining significant tax savings for the entire 63 home community as a result of a mass tax appeal filed with the New Castle County Board of Adjustment.

Fox Rothschild LLP
ATTORNEYS AT LAW