1-2016

Our Supreme Court Tackles Greenhouse Gas Analysis in EIRs

Alan Ramo
Golden Gate University School of Law, alan_ramo@att.net

even notice—to evade the well-established materiality requirement, which is designed to protect tenants from losing their homes and businesses for trivial breaches. In rent control jurisdictions, the decision might provide a convenient means to evict tenants paying below-market rent, in order to raise rents to market levels—thereby undermining the ordinance's requirement that landlords have just cause to evict. See, *e.g.*, Landlord-Tenant, chap 7.

There are many other California court of appeal decisions not allowing an eviction for a trivial breach of the lease. See, *e.g.*, Landlord-Tenant §§8.58–8.60, 7.57.

Our Supreme Court Tackles Greenhouse Gas Analysis in EIRs

Alan Ramo

Introduction

The California Supreme Court probably surprised a few observers when it rejected the California Department of Fish and Wildlife's greenhouse gas analysis of the Newhall Ranch development in its recent decision in *Center for Biological Diversity v Department of Fish & Wildlife* (2015) 62 C4th 204 (reported at p 13). State appellate courts have been rather deferential to challenges to the implementation of California's Global Warming Solutions Act (known as AB 32). See *Our Children's Earth Found. v California Air Resources Bd.* (2015) 234 CA4th 870; *Association of Irritated Residents v Air Resources Bd.* (2012) 206 CA4th 1487, reported at 35 CEB RPLR 135 (Sept. 2012). Courts hesitate to wade into technical expert analyses such as greenhouse gas emissions analysis.

Nevertheless, the supreme court's large majority (5–2) did not hesitate to dive into the CEQA "significance" analysis contained in the project's environmental impact report (EIR) and find a fundamental flaw in the project's attempt to use as guidance the state Air Resources Board's (ARB) approach to greenhouse gas regulation. Perhaps even more alarming to proponents of greenhouse gas-emitting projects, the court, while accepting ARB's AB 32 emission reduction goal as a CEQA "threshold" for significance, at the same time questioned the threshold's continued utility after 2020, when more dramatic reductions will be required under state climate change laws. Lurking in the court's willingness to question the project-level compliance with the AB 32 significance threshold calculation is the court's skepticism toward game-playing with such baselines. For an analogous situation, though not cited by the court, see *Neighbors for Smart Rail v Exposition Metro Line Constr. Auth.* (2013) 57 C4th 439, discussed by Golden Gate University Professor Paul S. Kibel in *Sea Level Rise, Saltwater Intrusion and Endangered Fisheries—Shifting Baselines for the Bay Delta Conservation Plan*, 38 Environs: Envt'l L & Pol'y J 259, 260 (Spring 2015). See also Ramo, *The California Offset Game: Who Wins and Who Loses?*, 20 Hastings W-NW J Envt'l L & Pol'y 109 (2014).

Analysis

Because this case was brought under CEQA, the court's analysis is through a CEQA lens rather than simply a policy analysis. The legal issue before the court was whether the EIR properly analyzed whether the greenhouse gases from the proposed development (anticipated to house more than 50,000 people) are significant and thus require mitigation. Alternatively, if there are unavoidable impacts after deploying all feasible and reasonable mitigations, a statement of overriding considerations would be required if the project's benefits are deemed to outweigh its impacts.

The court first analyzed what kind of a cumulative impact problem is presented by greenhouse gas emissions in California. It recognized that California emissions have global impact and that any individual project's impacts are uncertain. However, the question was whether this project, together with present and future projects, is cumulatively considerable. The court then determined that it was appropriate to reference state policies that are attempting to address California's reasonable contribution to a solution to climate change, which led it to accept ARB's plan to achieve AB 32's goal of a reduction to 1990 emission levels as a suitable significance threshold. That plan requires a 29 percent reduction of emissions from what the level of emissions would have been in 2020—the so-called "business as usual" scenario. In developing its analysis, the court cited extensively to an article authored by Sandy Crockett, the Bay Area Air Quality Management District's counsel, published by the GGU Environmental Law Journal—an article every practitioner representing a project proponent or opponent should review. See Crockett, *Addressing the Significance of Greenhouse Gas Emissions Under CEQA: California's Search for Regulatory Certainty in an Uncertain World*, 4 Golden Gate U Envt'l LJ 203 (July 2011).

The court found that while the project would add greenhouse gases to the environment, the issue was whether the added emissions were less than what would happen without the project. After all, the population that would live in the city would live somewhere else; somewhere else may lead to even more emissions. Further, the project should be designed to contribute its appropriate share of reductions consistent with ARB's AB 32 plan.

But here is the rub: Although one might simplistically leap to the conclusion (as the Department of Fish and Wildlife (DFW) and the appellate court in this case did) that any project that achieves a reduction greater than 29 percent from a business-as-usual scenario is not significant (Newhall projected a 31 percent reduction from its assumed business-as-usual calculation), it turns out this determination is more complicated.

First, what is the business-as-usual scenario for the population that would end up living in Newhall? That turns out to be a somewhat murky question. While the minority was ready to hold up their hands and say, "That is one for the experts," the majority said that, as with all CEQA findings, this must be explained with reasoned analysis that is based on facts. The court here found that DFW failed to do so and suggested that, in fact, by making unsupported assumptions about the impacts of the density of the project versus the density of living sites for the business-as-usual population used by ARB, the agency may have skewed the result.

Even more importantly, the court recognized that ARB's business-as-usual scenario and its 29 percent reduction were an across-the-board average. That is, for example, there may be some projects in the future that can be expected to reduce their emissions by only 15 percent while others can be reasonably expected to reduce by 45 percent. The fact that this project was reducing its emissions by 31 percent may or may not undermine the business-as-usual projections, depending on ARB's assumptions and projections. The court argued that applying ARB's projected reduction to an individual project requires a project-specific analysis of how the project fits into the statewide analysis.

The court identified at least three ways that ARB might correct its analysis:

- *Evaluate the assumptions behind ARB's business-as-usual analysis and link those to the individual project.* This approach may or may not be as simple as it sounds and would clearly require expert analysis.
- *Demonstrate the project is using mitigation measures consistent with requirements under AB 32.* The court noted that these requirements may be limited to specific impacts. It would be better if local or regional agencies developed greenhouse gas plans consistent with AB 32 that would incorporate the project. If these agencies have not created sufficiently detailed and comprehensive plans, this route may be limited.
- *To the extent regional agencies have developed numerical thresholds for individual project greenhouse gas emissions (the example used by the court is BAAQMD's thresholds), abide by those numbers.* If the project exceeds those thresholds, or no thresholds have been adopted, then the project may adopt all feasible mitigation measures and, if impacts are still significant, issue a statement of overriding considerations. Considering that Newhall's project already has a statement of overriding considerations for other impacts, this may be the simplest and most defensible approach, especially given Newhall's representation it has designed a green project with the latest and best mitigations.

Conclusion

The larger implications of this decision are quite profound. A simple analysis based on the ARB 29 percent reduction calculation will not be sufficient. Further, the court opined that this figure may soon be outdated; far greater reductions will be required for large greenhouse gas emitters. Indeed, the state has new goals for 2030; the original Schwarzenegger climate change Executive Order (S-03–05, June 2005) called for more drastic reductions by 2050.

Perhaps most importantly, the California Supreme Court's majority has shown it is not afraid to engage in the more technical aspects of greenhouse gas-emission regulatory programs and baseline and business-as-usual calculations. While it can be expected that the court will show due deference to agencies such as ARB, fundamental gaps or gaming in the use of baselines or projections that could undermine environmental protections will not automatically be ignored.

Using a Long Arm to Undo a Fraudulent Conveyance

Roger Bernhardt

Marc Greenberg

Introduction

In Buchanan v Soto (2015) 241 CA4th 1353 (reported at p 17), two weeks after Diana Buchanan filed suit to collect money that Maria Soto owed her, Maria transferred her interest in her Olive Avenue properties to one of her co-owners, Ramon Soto, thereby ostensibly putting it beyond the reach of Buchanan's subsequent efforts to collect on the money judgment that she was later to obtain. Ramon Soto was not only Maria's husband, but had also been deported to Mexico (and appears to have been hiding), making it difficult for Buchanan to serve him in her action to set aside Maria's conveyance. The case mainly involves jurisdictional questions, which I have asked my colleague, Marc Greenberg, to comment on, but I have also used the decision as a vehicle for allowing me to update readers on some new developments in fraudulent conveyance law. (As a mortgage lawyer, I