REAL ESTATE

Rigorous Scrutiny of Environmental Regulators: 2011 Decisions

By Stephen T. Holzer, Esq.

Perhaps it's the economy. Perhaps it's just the normal ebb and flow of case law. Perhaps it's just coincidence.

Whatever the reason, three recent decisions show greater willingness by the judiciary to scrutinize environmental regulators.

For example, San Francisco Superior Court Judge Ernest H. Goldsmith may reject California's sweeping plan under Assembly Bill 32 (the "Global Warming Solutions Act of 2006") to regulate greenhouse gases with a cap and trade system. (Association of Irritated Residents, et al. v. California Air Resources Board, et al., Case No. CPF-09-509562). Judge Goldsmith found that California Air Resources Board ("CARB" or "ARB") failed to consider alternative implementation strategies as required by the California Environmental Quality Act ("CEQA").

Six environmental justice community groups and seven individuals represented by the San Francisco-based Center on Race, Poverty and the Environment filed suit against CARB. These plaintiffs argued that CARB's cap-and-trade system under the Act was unfairly implemented and could pollute impoverished communities.

The system is designed to set an overall cap on emitted greenhouse gasses. Companies discharging less gas than the maximum permitted could sell "carbon credits" to businesses that exceed regulatory limits. Plaintiffs claimed the net effect of this system allows high-polluting companies – often with factories located in low-income areas – to continue polluting at high levels, allegedly befouling the local air even if carbon emissions in the State are reduced. The Court said the Act cannot be implemented as intended by CARB without a full environmental study in accord with CEQA.

In Judge Goldsmith's words, "ARB seeks to create a fait accompli by premature establishment of a cap-and-trade program before alternative[s] can be exposed to public comment and properly evaluated by the ARB itself."

Following this February decision, a Sacramento Appellate Court dealt State regulatory enforcers a second blow (Thomas Bollay and Nancy Bollay vs. CSLC & OAL). The Appellate Court invalidated State Lands Commission regulations which prohibited beachfront private property owners from building on public tidelands. The Commission implemented the regulations without public hearings under the Administrative Procedure Act, contending

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that the regulations were exempt from the Act's notice requirements because they simply enforced the unambiguous mandate of State statutes.

The Third District disagreed, noting that the very definition of publicly-owned tidelands requires interpretation, thereby subjecting the proposed regulations to public comment. Pending properly following required notice and comment rules, the Court said the regulations cannot be enforced.

Finally, a 9th Circuit Court of Appeals panel held that a timber company could challenge an Environmental Protection Agency (EPA) decision to keep a creek near Eureka, California listed as an "impaired water body" under the Clean Water Act (Barnum Timber Co. v. United States Environmental Protection Agency, et al., Case No. 08-17715; (2011) --- F. 3d ---; 11 Cal. Daily Op. Serv. 1629; 2011 Daily Journal D.A.R. 2013). The timber company contended that public perception of EPA's "onerous regulation" of the company's property in the impaired water body area lessens the land's value, because EPA restrictions threaten the use of the creek to transport timber from the property.

The timber company filed an expert declaration: "The public has ready access to the Section 303(d) listings, including the listing of Redwood Creek. When a listing occurs, the public perceives—whether accurately or not—that the subject property will be subject to additional and onerous regulation. . . . In this case, the market reaction is such as to deem [the company's] property to be devalued because of the § 303(d) listing."

The District Court rejected this "market devaluation" argument; but the Appellate Court found the argument legally sufficient to allow the company to challenge the EPA. Thus, the 9th Circuit potentially opened the door wider than before to challenges to EPA regulation under the Act.

What do these decisions signal for business community property owners? Although the Courts continue to give regulatory agencies such as CARB, the State Lands Commission and federal EPA wide latitude in the substance of their regulations, the decisions signal that the regulators need to follow procedural due-process requirements.

Challenging agencies in Court remains expensive, and even if the challenge is successful on procedural grounds, there is no guarantee the agencies will not reach the same substantive decisions after doing things "right." Nonetheless, the Courts now indicate that businesses can expect well-crafted procedural due process challenges to environmental agency regulations.

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