CLIENT NEWS BRIEF

Public Agencies May Recover Costs of Preparing the CEQA Record Even if the Party Suing the Agency Elects to Self-Prepare the Record

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An appellate court has held that a public agency may recover administrative record preparation costs in a lawsuit filed against it under the California Environmental Quality Act (CEQA), even where the petitioner elects to prepare the record. This decision calls into question CEQA petitioners' tendency to elect to prepare the record themselves in order to avoid paying agency costs.

In CEQA lawsuits, Public Resources Code Section 21167.6 governs the record of proceedings or administrative record. That section states that at the time the action is filed, the petitioner must request that the public agency prepare the record. In the alternative, the petitioners suing the public agency under CEQA may elect to prepare the record themselves, subject to certification of its accuracy by the public agency. The statute also provides that the "parties" shall pay any reasonable costs or fees related to the preparation of the record of proceedings.

Although the cost recovery language refers to the "parties," thus including both the petitioner and the public agency, petitioners in CEQA lawsuits have long taken the position that the public agency is precluded from recovering record preparation costs after the petitioner elects to prepare the record. CEQA petitioners will typically sue the public agency, elect to prepare the record, and then simply obtain the record documents from the public agency through a Public Records Act request. In such circumstances, the public agency generally incurs the same cost as the agency would have had it prepared the record itself. However, under the Public Records Act, the agency can charge only actual and reasonable copying costs. If the petitioners elect to make the copies themselves, nothing can generally be charged under the Public Records Act.

In *Coalition for Adequate Review v. City and County of San Francisco* (September 15, 2014) __ Cal.App.4th __ 2014 WL 4537020, the Court of Appeal expressly held that the fact that a petitioner elects to prepare the record does not bar the recovery of record preparation costs by a public agency. The court recognized that the public agency may be required to incur record preparation costs notwithstanding the petitioner's election. In *Coalition for Adequate Review*, the record prepared by the petitioner was incomplete because it omitted documents that were statutorily required to be in the record, and had been provided to the petitioners by the City. As a result, the City was required to supplement the record with approximately 12 additional volumes of documents totaling 4,559 pages. The City prevailed in the CEQA lawsuit, and sought costs associated with preparing the supplemental record. The costs were denied by the trial court in their entirety, but the decision was reversed on appeal.

The Court of Appeal held that when a record prepared by the petitioner is incomplete, and an agency is forced to supplement it to ensure completeness, the statute allows the agency to recoup its costs if the agency prevails in the litigation. The court expressly acknowledged that public monies should not be used to fund CEQA challenges brought by private parties, particularly where

Harold M. Freiman
Partner and Technology & Innovation
Practice Group Co-Chair
Walnut Creek Office
hfreiman@lozanosmith.com

Kelly M. Rem
Associate
Walnut Creek Office
krem@lozanosmith.com

Lozano Smith
ATTORNEYS AT LAW

the private party loses the CEQA challenge on the merits.

This case represents a victory for public agencies, as it challenges the idea that petitioners can elect to prepare the record as a way to avoid paying agency costs. The costs claimed by the public agency must still be reasonable, which is a question of fact for the trial court. In *Coalition for Adequate Review*, the City's claim for over $64,000 in costs, including staff and paralegal time, was sent back to the trial court for a consideration of reasonableness. While the case addressed the need for a supplemental record, it is noteworthy that the court indicated a public agency may seek costs even when there is no need to supplement the record and even if the public agency does not prevail in the underlying CEQA case.

If you have any questions regarding this case or CEQA issues in general, please contact one of our eight offices located statewide. You can also visit our website, follow us on Facebook or Twitter, or download our Client News Brief App.