Tentative Rulings for May 10, 2019
Department 54

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

Tentative Rulings for Department 54

(29)

Tentative Ruling

Re: ***John R. Lawson Rock & Oil, Inc. v. California Air Resources Board, et al.***
Superior Court Case No. 19CECG00331

Hearing Date: May 10, 2019 (Dept. 54)

Motion: Demurrer

Tentative Ruling:

To sustain Respondent's demurrer to the first, second, fourth, fifth, and sixth causes of action. (Code Civ. Proc. §430.10(a).) Petitioner is granted 20 days, running from service of the minute order by the clerk, to file and serve an amended pleading. All new allegations in the amended pleading are to be set in **boldface** type.

Explanation:

Jurisdiction - exhaustion of administrative remedies

"Exhaustion of administrative remedies is a jurisdictional prerequisite to maintenance of a CEQA action. Subdivision (a) of CEQA section 21177 sets forth the exhaustion requirement[.] That requirement is satisfied if the alleged grounds for noncompliance with CEQA were presented ... by any person during the public comment period provided by CEQA or prior to the close of the public hearing on the project before the issuance of the notice of determination." (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 615–616, internal

citations, quotation marks, and brackets omitted; see *Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 290 [where agency does not file notice of determination, challenging party still required to exhaust administrative remedies by presenting objections to pertinent public agency, so long as opportunity to do so is provided at public hearing held before project is approved].)

"Subdivision (a) of section 21177 states that a court action alleging a public agency's failure to comply with CEQA may be brought only if 'the alleged grounds for noncompliance with [CEQA] were presented to the public agency orally or in writing by any person during *the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination*." … Subdivision (e) of section 21177 states that the statute's exhaustion-of-administrative-remedies requirement 'does not apply to any alleged grounds for noncompliance with [CEQA] for which there was no public hearing or other opportunity for members of the public to raise those objections orally or in writing prior to the approval of the project....' As the above-italicized statutory language shows, application of subdivision (a)'s exhaustion-of-administrative-remedies provision requires either (1) a public comment period provided by CEQA (the public comment provision) or (2) an opportunity for public comment at public hearings before issuance of a notice of determination (the public hearing provision)." (*Tomlinson*, supra, 54 Cal.4th at p. 289.)

"Because the statutory language is generally the most reliable indicator of [the Legislature's] intent, we look first at the words themselves, giving them their usual and ordinary meaning and construing them in context. If the plain language of the statute is clear and unambiguous, our inquiry ends, and we need not embark on judicial construction. If the statutory language contains no ambiguity, the Legislature is presumed to have meant what it said, and the plain meaning of the statute governs." (*Stephens v. County of Tulare* (2006) 38 Cal.4th 793, 801–802, internal citations and quotation marks omitted.)

In the case at bench, CARB issued its Initial Statement of Reasons on December 19, 2017, regarding the adoption of the Tractor-Trailer Regulation amendments and CA Phase 2 ("proposed regulations"), and published a notice of public hearing. This began the 45 day public comment period, which concluded February 5, 2018. On February 8, 2018, CARB held the public hearing regarding the proposed regulations. Petitioner did not submit comments during the 45 day public comment period, or at the hearing. CARB issued Resolution 18-2 on February 8, 2018, approving for adoption the proposed regulations. (See Guidelines §15352 ["approval" means decision by public agency which commits it to definite course of action regarding a project intended to be carried out by any person]; see also *POET, LLC v. State Air Resources Bd*. (2013) 217 Cal.App.4th 1214, 719 [term "any person" includes public entities].)

Public Resources Code, section 21177, subdivision (b), provides that an action alleging non-compliance with CEQA may be brought where the litigant "objected to the approval of the project orally or in writing during the public comment period provided by this division or prior to the close of the public hearing on the project before the filing of notice of determination." The plaint wording of the statute appears to contemplate a single public comment period and single hearing, such that Petitioner's

failure to submit comments before or during the February 8, 2018, hearing precludes it from bringing the instant action.

Petitioner argues that its submission of a comment letter on July 18, 2018, in response to CARB having opened a 15 day comment period, is adequate to satisfy the requirement of section 21177, subdivision (b). Petitioner's letter, however, was submitted during the 15 day comment period mandated by the Administrative Procedures Act ("APA"), regarding certain modified regulatory language and supporting documentation. As the second public comment period and hearing were set under a separate statutory rubric, i.e., the APA and not CEQA, Petitioner's participation at that time does not appear to fall within "the public comment period" set forth in section 21177, subdivision (b) of CEQA which, again, appears by its plain language to contemplate a single public comment period. That period here lapsed in February 2018, five months before Petitioner submitted its comment letter. It appears that Petitioner failed to exhaust its administrative remedies, and therefore is without standing to bring the instant action. Accordingly, the demurrer to the first and second causes of action is sustained.

Inverse condemnation - ripeness

"The ripeness requirement, a branch of the doctrine of justiciability, prevents courts from issuing purely advisory opinions. […] [T]he ripeness doctrine is primarily bottomed on the recognition that judicial decisionmaking is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy." (*Pacific Legal Foundation v. California Coastal Com*. (1982) 33 Cal.3d 158, 170.) "Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." (*Id*. at p. 171.)

"When we review regulation, a reduction in the value of property is not necessarily equated with a taking. […] At any rate, loss of future profits - unaccompanied by any physical property restriction - provides a slender reed upon which to rest a takings claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests." (*Andrus v. Allard* (1979) 444 U.S. 51, 66, internal citations omitted.) Put another way, even a severe reduction in profit expectations is inadequate to establish a regulatory taking. (See *Yee v. Mobilehome Park Rental Review Bd*. (City of Escondido) (1998) 62 Cal.App.4th 1409, 1422; *Long Beach Equities, Inc. v. County of Ventura* (1991) 231 Cal.App.3d 1016, 1040.) "As a general matter, so long as a … regulation does not constitute a physical taking or deprive a property owner of all viable economic use of the property, such a restriction does not violate the takings clause insofar as it governs a

property owner's future use of his or her property, except in the unusual circumstance in which the use restriction is properly found to go 'too far[.]'" (*California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 462; see also *U.S. v. Pewee Coal Co*. (1951) 341 U.S. 114, 116 [taking found where government seized coal mine].)

Here, Petitioner concedes that it "cannot allege *exactly* what the cost to its business will be" (opp., 6:16, italics in original), however argues nonetheless that the "effects of the regulations are sufficiently knowable for the court to determine whether these two regulations constitute a taking[]" (id. at lines 17-18).

The petition alleges that "[t]hese regulations include both the Proposed Amendments, individually, and cumulatively, along with other related regulations affecting the trucking industry, including CARB's Tractor-Trailer Regulation; recent and ongoing amendments to CARB's Truck and Bus Regulation; proposed amendments to CARB's HDVIP and PSIP regulations, which are presently in the rulemaking process; proposed amendments to CARB's HD Warranty regulations, which are presently in the rulemaking process; proposed amendments to CARB's HD OBD regulations, which are presently in the rulemaking process; and anticipated 2019 rulemakings affecting the trucking industry[.]" (Pet., ¶72.)

It appears to the Court that the taking alleged by Petitioner is at this time so speculative that addressing the claim on its merits would constitute an advisory opinion. The claim appears unripe for adjudication. The demurrer based on this ground is therefore sustained.

Declaratory relief

"It is settled that an action for declaratory relief is not appropriate to review an administrative decision." (*State of California v. Superior Court* (1974) 12 Cal.3d 237, 249.)

Here, Petitioner has styled its petition as a verified petition for writ of mandate and complaint for inverse condemnation, declaratory relief, and injunctive relief, and has re-alleged and incorporated all preceding paragraphs into each claim. In its opposition, Petitioner does not address the demurrer to its declaratory relief claim. The controversy alleged in the claim is regarding Respondents' failure to comply with CEQA, the CEQA guidelines, and CARB's implementation of regulations without completing an environmental review and in a piecemeal fashion. Petitioner seeks a declaration of Respondent's duties under CEQA and that Respondents have failed to comply with CEQA. As this claim seeks to compel compliance with CEQA, it appears that declaratory relief is inappropriate. Accordingly, the demurrer to Petitioner's declaratory relief claim is sustained.

The opposition also does not address Respondent's demurrer to Petitioner's injunctive relief cause of action. Petitioner seeks "a permanent injunction commanding Defendants to cease violating CEQA, the CEQA Guidelines and the Board's implementing regulations … and to follow the required legal process for evaluating the environmental impacts of the Regulation." (Pet., ¶83.) As with the fifth cause of action, Petitioner's sixth cause of action seeks to ensure Respondents comply with CEQA, such

that writ relief appears to be the sole relief to which Petitioner is entitled. The demurrer to the sixth claim is sustained.

Pursuant to California Rules of Court, rule 3.1312, and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued by: ____KCK_____ on ___5/9/2019____.
(Judge's initials) (Date)