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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

NORTH COUNTY WATCH et al.,

Plaintiffs and Appellants,

v.

COUNTY OF SAN LUIS OBISPO et al.,

Defendants and Respondents;

PAUL VIBORG et al.,

Real Party in Interest and Appellant;

MICHAEL R. JENCKS,

Objector and Appellant.

2d Civil No. B231090
(Super. Ct. No. 98023)
(San Luis Obispo County)

North County Watch (NCW) appeals from the judgment on its petition for writ of mandate and complaint for declaratory relief against respondent County of San Luis Obispo (County) and the San Luis Obispo County Board of Supervisors (Board) challenging a decision approving a conditional use permit (CUP) that allows real parties in interest, Paul Viborg and Viborg Sand & Gravel (Viborg), to continue operating a sand

and gravel mine in an agricultural zone.¹ NCW's counsel, Michael R. Jencks, appeals from an order imposing sanctions against him personally for unwarranted delay and failure to comply with court rules in prosecution of NCW's petition. We reverse the sanctions order for lack of notice to counsel that sanctions would be imposed against him personally. We otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 2006, Viborg applied for a CUP to conduct sand and gravel extraction from a dry bed of the Estrella River in San Luis Obispo County. The County conducted an initial study of environmental impacts pursuant to the California Environmental Quality Act (CEQA). (Pub. Res. Code, § 21000 et seq.)² It concluded that all environmental impacts could be mitigated, and it prepared a mitigated negative declaration.

Members of the public submitted requests for review, and the County's Planning Commission (Commission) conducted hearings. The Commission decided that an environmental impact report was required. Viborg appealed the decision to the Board.

After conducting public hearings, the Board reversed the decision of the Commission. The Board adopted a resolution declaring that all environmental impacts could be mitigated, and it approved Viborg's CUP on conditions that included mitigation measures.

NCW filed in superior court a petition for writ of mandate and complaint for declaratory and injunctive relief challenging the Board's resolution. Four causes of action sought to set aside the CUP based on the County's alleged violations of CEQA and local environmental quality act guidelines (local EQA). (§ 21082; Cal.Code Regs. tit. 14, § 15022, subd. (a).) A fifth cause of action sought to set the CUP aside based on

¹ In a companion case, NCW challenged another County decision approving a conditional use permit that allows Viborg to continue operating a concrete recycling facility. (*North County Watch v. County of San Luis Obispo*, Case No. B230637, *North County Watch I.*)

² All statutory references are to the Public Resource Code unless otherwise stated.

unspecified conflicts with the County's general plan, the County's clean air plan, and County land use ordinances (the "zoning law" cause of action). A sixth cause of action sought to set it aside based on unspecified noncompliance with the Surface Mining and Reclamation Act (SMARA). (§ 2710 et seq.) A seventh cause of action sought a declaration that Viborg's sand and gravel operation interferes with a public trust easement over the Estrella River riverbed (the "public trust easement" cause of action). NCW did not request a hearing within 90 days of filing its petition. (§ 21167.4 [action alleging non-compliance with CEQA subject to dismissal if no hearing requested within 90 days of filing], "the 90-day rule".)

Viborg's Attacks on the Pleadings

Viborg filed a motion to strike and a demurrer on the grounds that the four CEQA and local EQA causes of action were barred by the 90-day rule (§ 21167.4), and that the zoning law and SMARA causes of action were vague and uncertain. Viborg did not challenge the public trust easement cause of action.

NCW missed the deadline for opposition. NCW requested a continuance of the hearing, which the trial court granted. NCW did not file an opposition, but filed an amended petition one day before the hearing.

The second petition³ omitted the CEQA causes of action, but sought to set aside the CUP based on violation of local EQA. NCW added a cause of action to set aside the CUP based on deprivation of due process. It added a four causes of action for declaratory relief. These did not directly seek to set aside the CUP, but alleged that the County engaged in an unspecified "pattern, practice and custom" and that an "actual, present controversy" existed with respect to the interpretation of local EQA, consistency with the general plan, compliance with SMARA, and "the legality of [County's] practices." NCW alleged no facts to support these new causes of action for declaratory relief. The second petition maintained the original zoning law cause of action, the

³ For clarity, we refer to the "First Amended Verified Petition . . ." as the second petition.

SMARA cause of action (with some improvement) and the previously unchallenged public trust easement cause of action. Only the latter two survived Viborg's subsequent challenge.

Viborg filed a motion to strike and a demurrer to the second petition on the grounds that (1) the local EQA cause of action was barred by the 90-day rule (§ 21167.4); (2) the new due process cause of action was barred by the applicable statute of limitations (Gov. Code, § 65009, subd. (c)(1)(E) [action challenging decision to approve a CUP must be filed and served 90 days from issuance of the CUP]); (3) the zoning law cause of action remained vague and uncertain; and (4) the four new declaratory relief causes of action and the public trust easement cause of action failed to state a valid claim for relief because mandamus is the sole mechanism to set aside approval of a CUP and, to the extent the petition sought declaratory relief concerning a "pattern, custom and practice," they were devoid of facts identifying the pattern, custom and practice or demonstrating the existence of an actual controversy. Viborg did not challenge the improved SMARA cause of action. NCW opposed the demurrer.

The court sustained the demurrer (1) without leave to amend as to the cause of action for violation of local EQA based on the 90-day rule (§ 21167.4); (2) with 30 days leave to amend as to the vague cause of action for zoning law violations; (3) without leave to amend as to the new cause of action based on deprivation of due process, finding it was barred by the statute of limitations (Gov. Code, § 65009)); and (4) with 30 days leave to amend the four new causes of action for declaratory relief to allege a judicable controversy concerning a pattern, custom and practice. The court overruled the demurrer as to the remaining cause of action for declaratory relief concerning the alleged public trust easement, which it found was not a direct attack on the CUP and sufficiently alleged an actual controversy concerning the scope and extent of a public easement.

NCW filed a request for reconsideration, which the court denied. NCW did not amend its petition within 30 days. About 60 days after the court's order on the demurrer and motion to strike, NCW filed an amended petition.

The third petition⁴ retained the cause of action for violation of local EQA, for which no leave to amend had been granted. It retained, without amendment, the vague cause of action for violation of zoning laws and the four factually devoid new causes of action for declaratory relief. It added a new introductory paragraph number 12 which stated that the alleged violations are common and repeated in other application procedures. The petition maintained the properly pled causes of action for violation of SMARA and declaratory relief based on public trust easement.

Viborg filed a demurrer to the third petition. NCW missed the deadline for opposition. (Code Civ. Proc., § 1005, subd. (b).) NCW filed an opposition three days before the hearing, after Viborg had filed a "reply in support of unopposed demurrer" and after the court had prepared its tentative decision.

The trial court sustained the demurrer without leave to amend, leaving only the SMARA and public trust easement causes of action for trial. Viborg answered the petition and the court set the matter for hearing.

Sanctions

NCW missed a court ordered deadline for filing its trial brief. Viborg moved for terminating and monetary sanctions "against Petitioners," for failure to comply with court orders and local rules resulting in undue delay. (Super. Ct. San Luis Obispo Local Rules, rule 9.03(b); Code Civ. Proc., § 575.2, subd. (a).)

The trial court denied Viborg's request for terminating sanctions, but awarded \$3,750 in sanctions against NCW's counsel, Michael R. Jencks, \$3,000 of which was to be paid to Viborg and \$750 of which was to be paid to the court. The court later clarified: "I was careful to specify that the sanctions were payable by Petitioners' counsel. This reflects my determination that the sanctionable conduct was based upon counsel's failure to comply with legal rulings and statutory requirements on multiple occasions

⁴ For clarity, we refer to the "Second Amended Verified Petition . . . " as the third petition.

leading up to and including the violation of the scheduling order. I never made a finding that Petitioners themselves were responsible for the conduct."

Three days after the court imposed sanctions, and three days before trial, NCW filed a statement of disqualification pursuant to Code of Civil Procedure, section 170.1. A Santa Barbara Superior Court judge heard and denied the challenge. The judge observed that NCW's counsel had delivered documents to its chambers that had not been filed and were not accompanied by proof of service, and that, "time and time again petitioners have failed to honor the most basic rules that govern litigation."

Trial

The court conducted trial on the remaining two causes of action. At the hearing, NCW's counsel read for two hours from a document with which Viborg had never been served.⁵ He provided, for the first time, some citations to the administrative record in support of NCW's SMARA claim. He offered no evidentiary support for the public trust easement cause of action.

In a written decision, the court denied the petition based on NCW's failure to file any points and authorities in support of its petition and its failure to support its claims with evidence.

DISCUSSION

The Order Sustaining the Demurrer to the First, Second, Third, Fourth, Sixth and Eighth Causes of Action of the Third Petition

NCW contends that the court abused its discretion when it sustained, without leave to amend, six causes of action of its third petition. We disagree.

We examine the petition de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) We assume the truth of all facts properly pleaded, but we do not assume the truth of conclusions and contentions. (*Evans v. City of Berkley*

⁵ We granted Viborg's motion to strike from NCW's appendix a document entitled "Petitioner's Trial Brief" that was never filed in the trial court or served on Viborg. We denied Viborg's request for sanctions.

(2006) 38 Cal.4th 1, 5.) We review a trial court's decision not to grant leave to amend for abuse of discretion. (*Gutkin v. University of Southern California* (2002) 101 Cal.App.4th 967, 975.) We examine underlying issues of law de novo. (*Credit Managers Assn. of California v. Countrywide Home Loans, Inc.* (2006) 144 Cal.App.4th 590, 593.)

The first cause of action to set aside the CUP based on violation of local EQA was precluded as a matter of law because NCW did not request a hearing within 90 days of filing the petition. Section 21167.4, subdivision (a) provides, "In any action or proceeding alleging noncompliance with this division [CEQA], the petitioner shall request a hearing within 90 days from the date of filing the petition or shall be subject to dismissal" Dismissal is mandatory. (*San Franciscans for Reasonable Growth v. City and County of San Francisco* (1987) 189 Cal.App.3d 498, 504.) We reject NCW's contention that section 21167.4 does not apply to local EQA claims. The "division" referenced in section 21167.4, includes the requirement that local entities adopt guidelines for the purpose of implementing CEQA. (§ 21082; Cal.Code Regs., tit. 14, § 15022, subd. (a).) Local EQA guidelines are the tools a county uses to comply with CEQA, and must not be used to circumvent the 90 day rule. The gravamen of NCW's local EQA cause of action remained violation of CEQA, even after it was re-styled as a violation of local EQA. Accordingly, the first cause of action was barred by the 90-day rule.

The second, fourth, sixth and eighth causes of action for declaratory relief concerning a "pattern, custom and practice" did not state facts sufficient to constitute valid claims for relief (Code Civ. Proc. § 430.10, subd. (e)), and NCW did not demonstrate that the defects could be cured by amendment. A challenge to a specific agency decision, such as approval of a CUP or issuance of negative declaration, must be made through administrative mandamus. (Code Civ. Proc., § 1094.5; *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 574-575.) Here, NCW could not challenge the decision by mandamus based on CEQA because it had not complied with the 90 day rule, and its effort to do so based on deprivation of due process was

barred by the statute of limitations. (Gov. Code, § 65009, subd. (c)(1)(E); *Royalty Carpet Mills, Inc. v. City of Irvine* (2005) 125 Cal.App.4th 1110, 1123.)

NCW tried to circumvent these barriers by pleading causes of action for declaratory relief regarding a "pattern, custom, or practice" instead of challenging the specific agency decision. (*Californians for Native Salmon etc. Assn. v. Department of Forestry* (1990) 221 Cal.App.3d 1419, 1429 [declaratory relief proper where an actual, present controversy was alleged regarding the California Department of Forestry's pattern and practice of issuing responses after approving timber harvest plans and failing to consider cumulative impacts of timber harvest plans, as opposed to a specific decision on a particular harvest plan].) But NCW did not allege the existence of any actual, present controversy concerning a particular pattern or practice. Instead, it broadly alleged that the County engaged in a "pattern, custom and practice" and that "an actual, present controversy" existed as to whether local EQA guidelines "are mandatory or only directory," "what constitutes General Plan consistency and compliance with SMARA and whether such compliance is merely directive or mandatory," and "regarding the legality of [the County's] practices." (Code Civ. Proc., § 1060; *Rimington v. General Accident Group of Ins. Cos.* (1962) 205 Cal.App.2d 394, 397.) The trial court gave NCW an opportunity to amend within 30 days, but NCW did not, thereby admitting that it had stated its claims as strongly as it could. (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1091.)⁶

Thirty days after the deadline to amend, NCW filed a petition with no change at all to these four causes of action for declaratory relief. A new introductory paragraph 12 contended that "the violations of law which are alleged herein . . . render[ed] the specific decision and approval of the conditional use permit . . . defective . . . [and] are common and repeated in other sand, gravel and aggregate

⁶ Dismissal of these causes of action would also have been appropriate because NCW did not amend within the time allowed after the court sustained the second demurrer with leave to amend the causes of action for declaratory relief. (Code Civ. Proc., § 581, subd. (f)(2).)

extraction applications and proceedings . . . , but offered no facts to put the court or Viborg on notice regarding the particular conduct that it claimed constituted an unlawful pattern or practice or the nature of the actual, present controversy. NCW did not timely oppose the demurrer to the third petition and its late-filed opposition did not demonstrate that it could allege any facts to cure the defect. The trial court acted within its discretion when it sustained the demurrer to the second, fourth, sixth and eighth causes of action without leave to amend.

The third cause of action to set aside the CUP based on an unspecified violation of zoning laws was vague and uncertain because it did not identify any act or omission by the County that was inconsistent with the referenced zoning laws. In its second and third petitions, NCW vaguely alleged that Viborg's project conflicted with the County's general plan, the clean air plan, SMARA, and land use ordinances, but it did not identify the alleged conflicts. NCW did not cure the defect after an opportunity to do so. The court did not abuse its discretion when it denied further leave to amend.

*The Decision After Trial on the SMARA and
Public Trust Easement Causes of Action*

NCW contends that the court should not have entered judgment against it on its remaining causes of action, that it did so as an unwarranted sanction for failure to file a trial brief, and that the Board did not comply with SMARA and did not provide for public trust assets as required by law. We reject NCW's contentions because it did not meet its burden of supporting its claims in the trial court.

The County's decision comes before the court with a presumption of regularly performed official duty. (Evid. Code, § 664, *Feist v. Rowe* (1970) 3 Cal.App.3d 404, 422.) The presumption was not rebutted, because appellant disregarded the trial court's order requiring it to file an opening brief and did not otherwise meet its burden to

set forth "a fair and adequate statement of the evidence" in support of its claim. (*Markley v. City Council* (1982) 131 Cal.App.3d 656, 673.)⁷

The Order Imposing Sanctions Against Michael R. Jencks

A trial court may impose monetary sanctions where a party fails to comply with court orders and local court rules resulting in undue delay. (Code Civ. Proc., § 575.2, subd. (a); Super. Ct. San Luis Obispo County, Local Rules, rule 9.03.) The record supports the trial court's findings that NCW failed to comply with court orders and local rules resulting in undue delay when it, "fail[ed] to timely file oppositions to Viborg's demurrers to the First and Second Amended Petitions (which repeated previously stricken claims)," when it "delayed the resolution of the case by failing to timely pay for the Administrative Record," and when it "fail[ed] to file its Opening Brief or timely advise the Court and parties of claimed deficiencies in the Administrative Record." Substantial evidence also supports the courts finding that Viborg incurred \$3,000 in unnecessary legal fees as a result, and that NCW's conduct was attributable to its counsel, Michael R. Jencks. We have observed a similar failure to comply with the rules of procedure in this court.

Nonetheless, due process requires adequate notice and opportunity to be heard on a motion for sanctions. (*O'Brien v. Cseh* (1983) 148 Cal.App.3d 957, 961-962.) If sanctions are sought against an attorney personally, the notice must so specify so that the attorney is "put on notice of the need to prove his or her own blamelessness in the complained of actions." (*Corralajo v. Quiroga* (1984) 152 Cal.App.3d 871, 874.) Here, the notice of motion for sanctions identified only "Petitioners" as the party against whom sanctions were sought. Indeed, Viborg argued that terminating sanctions were

⁷ On appeal, NCW also failed to meet its burden to designate the administrative record so that we might review and determine whether the County's decision was supported by substantial evidence. (*MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 217-218; Cal. Rules of Court, rules 8.121(b)(2) & 8.123(b).) Five days before this case was set for oral argument, NCW moved to cure its default by designating the administrative record. We granted its motion and continued oral argument to accommodate the late designation.

appropriate because NCW's conduct was not attributable to its counsel. The sanctions order against Michael R. Jencks personally does not comport with due process and must be reversed.

DISPOSITION

The order imposing sanctions against Michael Jenks is reversed. In all other respects the judgment is affirmed. Each party shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

COFFEE, J.*

We concur:

YEGAN, Acting P.J.

PERREN, J.

* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Martin J. Tangeman, Judge
Superior Court County of San Luis Obispo

Michael R. Jencks, and Michael P. Slater, for Plaintiffs and Appellants.

No appearance for Defendants and Respondents

Paul Viborg, in pro. per.; Lombardo & Gilles, Anthony L. Lombardo, Jason S. Retterer; and Anthony Lombardo & Associates, Anthony Lombardo, for Real Parties in Interest and Respondents.

Michael R. Jencks, in pro. per., for Michael R. Jencks, Objector and Appellant