Filed 10/3/18 Fudge v. Cal. Coastal Commission CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MARK FUDGE, Petitioner and Appellant, v. CALIFORNIA COASTAL COMMISSION et al., Defendants and Respondents; LAGUNA BEACH GOLD and BUNGALOW VILLAGE, LLC, Real Party in Interest.	B281700 (Los Angeles County Super. Ct. No. BS154300)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard L. Fruin, Jr., Judge. Affirmed.

Morrison & Foerster, Matthew L. Hofer and Peter Hsiao for Petitioner and Appellant.

Xavier Becerra, Attorney General, Daniel A. Olivas, Assistant Attorney General, and Andrew M. Vogel, Acting Supervising Attorney General, for Respondents California Coastal Commission and Charles Lester.

Nossaman, Steven H. Kaufmann and Jennifer L. Meeker for Real Party in Interest.

Petitioner and appellant Mark Fudge sued, among others, a neighboring landowner and developer Laguna Beach Golf and Bungalow Village, LLC, which sought to further develop and renovate an 84–acre parcel of coastal property located in a biologically diverse and environmentally sensitive area. On various substantive and procedural grounds, Fudge challenged the California Coastal Commission's decision to approve the developer's application for a coastal development permit under the California Coastal Act. The trial court rejected Fudge's claims and entered judgment against him. Finding no error, we affirm.

FACTUAL BACKGROUND

The Proposed Project

This is the second appeal in this action seeking administrative mandamus. Our factual recitation is drawn primarily from the nonpublished opinion in the first appeal, *Fudge v. California Coastal Commission* (Dec. 7, 2016) [nonpub. opn.] (*Fudge I*)). Real party in interest, Laguna Beach Golf and Bungalow Village, LLC (Developer), owns an 84–acre site commonly known as "the Ranch," and an adjacent parcel known as Scout Camp, in the Aliso Canyon area of the City of Laguna Beach. Aliso Canyon is a biologically diverse coastal area, surrounded by a nature preserve and environmentally sensitive habitat. (*Fudge I, supra*, B268824, at p. 2.) The Ranch has been developed with a hotel, restaurant, small golf course, and miscellaneous structures since at least the 1960s. (*Ibid.*)

In 2013, Developer began plans to renovate the Ranch in several phases (the project). Phase 2, at issue here, involved demolishing two structures and remodeling and expanding the hotel, dining, and golf facilities, including adding 33 hotel rooms, a spa, fitness center, accessory structures, and modification of assembly areas. (*Fudge I, supra*, B268824, at pp. 2–3.)

Approval of the Coastal Development Permit and Fudge's Appeal to the Coastal Commission

In March 2014, Developer applied to the planning commission of former defendant City of Laguna Beach (City) for a coastal development permit (CDP), conditional use permit (CUP) and design review permit for the proposed project.[1] Following a public hearing on May 14, 2014, all three permits were approved without conditions, and the planning commission found the project exempt from the California Environmental Quality Act, Public Resources Code section 21000, et seq. (CEQA), on the basis that it was within an existing developed area.

---

[1] A CDP is required in order for a property owner to build on property located within a coastal zone. (*Healing v. California Coastal Com.* (1994) 22 Cal.App.4th 1158, 1163; California Coastal Act, Public Resources Code section 30000 et seq. (Coastal Act), § 30600, subd. (a).) (Additional undesignated statutory references are to the Public Resources Code.)

The Coastal Act delegates authority to issue CDP's to a local (lead) agency–here, the City–with a certified Local Coastal Program (LCP), and the Coastal Commission exercising appellate jurisdiction. (§§ 30519, subd. (a), 30600.5, subds. (a), (d); *McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 272 (*McAllister*).)

(Cal. Code Regs., tit. 14, § 15303, subd. (c).[2]) A Notice of Exemption was recorded with the county on May 23, 2014.

In mid–June 2014, petitioner Mark Fudge appealed the City's approval of the CDP to respondent Coastal Commission. A subsequent report by the Coastal Commission staff noted that Fudge's appeal raised substantial issues regarding the project's consistency with the LCP and Coastal Act policies. That staff report also noted, however, that the Coastal Commission lacked jurisdiction to review the City's "CEQA determination for purposes of establishing whether or not [that] determination is consistent with CEQA." (*Fudge I, supra*, B268824, at p. 5.) At a public hearing on July 9, 2014, the Coastal Commission found that substantial issues raised by Fudge's appeal required that it conduct a de novo review regarding the project's compliance with the LCP. Consistent with its staff's recommendations, the Commission found "a lack of factual support" for the categorical CEQA exemption upon which the City had relied. Similarly consistent with staff recommendations, the Commission agreed that it lacked jurisdiction to review the City's CEQA determination. (*Fudge I, supra*, B268824, at p. 5.) The Commission set a hearing for January 8, 2015, to conduct its de novo review of the CDP application.

---

[2] Natural Resources Agency regulations, known as CEQA Guidelines, and adopted pursuant to its authority under CEQA, are codified at California Code of Regulations, title 14, sections 15000–15387. We will designate further references to these regulations as "Guidelines."

Over the course of the next several months, Coastal Commission staff analyzed material submitted by and requested of Fudge and the Developer, including engineering, biological, flood hazard, property appraisal, traffic and parking studies. Coastal Commission staff visited the property, and engaged in extensive communications with Fudge and his consultants, representatives for the Developer, and the City, and analyzed correspondence from members of the public.

The December 2014 Staff Report and January 2015 Addenda

Following its analysis and investigation, the Commission staff issued a report on December 23, 2014, recommending approval of the CDP, subject to 22 special conditions.

On January 6, 2015, two days before the de novo review, Commission staff received and posted a lengthy (over 500 pages) addendum report on the Commission's website which included: a December 31, 2014 letter from Developer requesting revisions to eight of the staff's 22 recommended conditions for approval, over 200 pages of materials submitted by Fudge on January 2, 2015, related to flood hazards, and 250 pages of public comments. On January 7, 2015, a second Commission staff report addendum (second addendum) was prepared in response to this material. The second addendum contained redlined changes to recommended findings and to six of the staff's recommended conditions based on additional comments that had been received from Fudge, the Developer and the public. Commission staff emailed a copy of the second addendum to the Developer's

representatives (but not to Fudge). The staff informed the Developer it would "attempt to hold off on posting/distributing [the second addendum] until [it heard] back as to whether [the Developer] would prefer to postpone" the de novo review hearing scheduled for the following day, in order to provide time for the Developer to review the addenda. The Developer elected to proceed as scheduled. On January 7, 2015, the second addendum was posted on the Commission's public website just after 8:00 p.m. Fudge learned about the posting of the second addendum at 4:30 a.m. on January 8, 2015. He saw the second addendum but did not review the entire document, nor did he print it out, before leaving for the afternoon hearing in Santa Monica.

January 8, 2015 Review Hearing

The public de novo hearing of Fudge's appeal of approval of the Developer's CDP began with a presentation of the staff's recommended findings and conditions. That presentation was followed by a 15 minute oral and visual presentation by the Developer. The Developer also presented the commissioners with written proposals (contained on yellow paper–the "yellow pages") requesting revisions to eight of the staff recommendations posted the previous evening, and the deletion of a ninth.[3]

---

[3] Fudge was unable to obtain a copy of the January 8 staff addendum from the Commission, and did not submit a written response in advance of the hearing. The Developer distributed copies of the "yellow pages" to the

Fudge was given 16 minutes to speak, and allocated portions of his time to an attorney, his biological resources consultant and his wife. Fudge's consultant made a PowerPoint presentation, and he and Fudge urged the Commission to deny the CDP in its entirety. The Commission received comments from at least 30 members of the public. The Developer was given four minutes for rebuttal before public comment was closed.

The Commissioners Vote to Approve the CDP with Conditions

After public comments were closed, the commissioners debated the proposed project, and posed questions to the Developer and Coastal Commission staff. Ultimately, the Coastal Commission approved the CDP, subject to specific conditions, by a 9–to–1 vote. As noted in detail below, commissioners disagreed with some of the staff's proposed revisions, as well as some of the Developer's proposed modifications.

The Commission's Revised Findings

On April 2 and 13, 2015, staff presented a report containing the Commission's proposed revised findings, and an addendum, respectively, for the commissioners' approval, and posted the documents

---

Commission, which denied requests by Fudge and others for copies, and did not make copies available until four days after the hearing.

on the Commission website.[4] On April 15, 2015, the Coastal Commission conducted a further hearing to consider, approve and issue its revised findings regarding its January 8, 2015 approval of the CDP. (*Fudge I, supra*, B268824, at pp. 5–6, fn. 5.) Those findings were unanimously adopted by a vote of eligible commissioners. On January 30, 2015, the Commission filed a written Notice of Decision with the office of the Secretary for Natural Resources.[5]

PROCEDURAL BACKGROUND

Fudge filed the instant petition for writ of mandate on March 5, 2015, against respondent Coastal Commission and its Executive Director, Charles Lester (collectively, Coastal Commission or the Commission), former respondent the City Council and Planning Commission for the City of Laguna Beach, and Anne Johnson, Chair of the Planning Commission (collectively, the City), and the Developer, Real Party in Interest. The petition asserted four causes of action: (1) violation of CEQA; (2) violation of the Coastal Act (alleged solely against the Coastal Commission); (3) violation of the City's Municipal

---

[4] Because the final decision differed from the staff's recommendation, the Commission was required to conduct a further hearing and consider and adopt revised findings in support of its decision. Only Commissioners on the prevailing side of the final decision may vote on the proposed revised findings. (§ 30315.1; Guidelines, § 13096, subds. (b), (c).)

[5] The court took judicial notice of the NOD filed on January 30, 2015.

Code and administrative regulations; and (4) declaratory and injunctive relief.

Each defendant demurred. The Commission and Developer demurred to the first, second and fourth causes of action. The City filed a demurrer as to all four causes of action.[6]

On November 16, 2015, after several hearings and rounds of supplemental briefing, the trial court sustained all demurrers without leave to amend. As pertinent here, the trial court found the first cause of action for violation of CEQA was time–barred, and the second cause of action for violation of the Coastal Act failed to state a viable claim.[7] Those claims were dismissed, leaving for trial only the third cause of action.

As relevant here, the third cause of action alleged that the Coastal Commission "failed to comply with its administrative regulations in considering and hearing" Fudge's appeal regarding the CDP. As a result of the Commission's alleged actions or its failure to act, Fudge

---

[6] The Commission also successfully moved to strike Fudge's prayer for a writ of traditional mandate under Code of Civil Procedure section 1085. That ruling is not challenged on appeal.

[7] The court found the third cause of action time-barred as to the City. After sustaining without leave to amend the City's demurrer to all claims, the court dismissed the action against that defendant. We affirmed that ruling and the dismissal as to the City. (*Fudge I, supra*, B268824, at pp. 8-16.)

The court also sustained without leave to amend all defendants' demurrers to the fourth cause of action for declaratory and injunctive relief. Fudge does not challenge that ruling on appeal.

alleged that he "and the public were prejudiced by the Coastal Commissions [*sic*] failures to follow its mandatory procedures, and such failures deprived [Fudge] of procedural and substantive due process for his appeal."

Pretrial Proceedings and Trial

On December 23, 2015, Commission staff certified the administrative record and provided copies to counsel. On March 30, 2016, Fudge sought to "amend or correct" the record in three ways. First, he sought to compel the Commission to augment the record with evidence of text messages that he claimed former Coastal Commissioner Mitchell sent or received during the January 2015 de novo hearing. Second, Fudge moved to augment the administrative record with written internal communications among members of the Commission staff before that hearing. Third, he moved to exclude from the administrative record documents relating to the Commission's April 15, 2015 adopted revised findings.

The Commission's opposition to Fudge's motion was supported by, among other things, Commissioner Mitchell's declaration stating that she had not sent or received text messages regarding the Developer's CDP application at, before, or after the January 2015 hearing. The Developer confirmed that no such text communications were exchanged. The court found no factual or legal support for Fudge's motion, which was denied.

The parties' merit briefs were filed between early May and July 2016. Together with his opening brief, Fudge submitted several declarations outlining alleged improprieties he claimed to have observed at the January 8, 2015 hearing. The court granted motions by the Commission and Developer to strike these extra–record declarations due to Fudge's failure either to seek leave to file them, or to explain why they should be admitted.

In mid–October 2016–about three months after the close of merits briefing–Fudge sought leave of court to introduce virtually the same extra–record declarations he had filed with his opening brief. Fudge also sought to compel Commissioner Mitchell to testify at trial regarding new allegations, and claimed the record supported his contention that she had engaged in improper, undisclosed ex parte communications with the Developer, and he should be permitted to conduct discovery to substantiate the allegations. Both the Commission and Developer opposed Fudge's motion on the grounds that it was procedurally defective, and legally and factually unsupported. The Commission submitted a declaration by Commissioner Mitchell stating she had not engaged in undisclosed ex parte communications of any sort with the Developer, before, at, or after the January 2015 hearing.[8]

---

[8] The court deferred ruling on Fudge's motion until trial, and ultimately did not require Commissioner Mitchell to testify. The court did admit excerpts from Fudge's declarations stating he lacked time to "print the [second staff] Addendum or review it completely before [he] had to leave" to attend the January 8, 2015 review hearing, and that he believed

Trial

Trial was conducted in mid–November 2016. At the outset, the parties were ordered to confine their inquiry to procedural issues. The court refused to hear argument challenging the Commission's substantive findings with respect to the CDP application, because the third cause of action was confined solely to alleged due process violations of the Coastal Commission's procedural regulations which purportedly occurred in connection with the de novo review hearing in January 2015.

Following trial, the court took the matter under submission. On February 23, 2017, the court issued its ruling denying relief on the third cause of action. The court found Fudge had waived his due process complaints by failing to raise them at the January 2015 de novo hearing. The court also found that the Commission substantially complied with governing regulations in conducting a de novo review of the CDP application and, in two limited instances where it failed to do so, Fudge had not demonstrated he suffered prejudice. The court refused to address Fudge's substantive challenges to the Commission's action under the Coastal Act, as those claims had been dismissed. On March 17, 2017, the court issued a statement of decision and entered

---

Commissioner Mitchell had used Developer's yellow pages in framing her motion.

judgment in favor of the Coastal Commission and Developer. This timely appeal followed.

DISCUSSION

I. *The First Cause of Action for Violation of CEQA is Time–Barred*

Fudge contends the trial court erred in sustaining demurrers to the first cause of action without leave to amend on the ground that his claim was time–barred. He insists the Coastal Commission's decision was not final until the April 15, 2015, hearing when the Commission adopted its revised findings.

The Coastal Commission is vested with jurisdiction over "appealable action[s] on a [CDP]." (§ 30625, subd. (a).) Unlike CUP's, CDP's are not merely local land–use matters; they embody state policy and are issued by local governments pursuant to authority delegated to them by the Coastal Commission under the Coastal Act. (*Charles A. Pratt Construction Co., Inc. v. California Coastal Com.* (2008) 162 Cal.App.4th 1068, 1075.) Section 30625 permits review only of the City's issuance of a CDP, a decision independent of the decision to issue a CUP. (See *Hines v. California Coastal Com.* (2010) 186 Cal.App.4th 830, 852 (*Hines*).)

After an agency (such as the Coastal Commission) with a certified regulatory program approves a project that is subject to CEQA, it must file a written Notice of Decision (NOD) with the office of the Secretary for Natural Resources (Secretary). (§ 21080.5, subd. (d)(2)(E);

Guidelines, §§ 13162, 15252, subd. (b).)[9] CEQA requires that a litigant suing to challenge an agency decision do so within 30 days of the *filing* of the NOD. (§§ 21167, subd. (c), 21080.5, subd. (g); Guidelines, § 15112, subd. (c)(3).) The filing of the NOD triggers the 30–day statute of limitation for "*any* challenge to that decision under CEQA . . . , regardless of the nature of the alleged violation." (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 48 (*Committee for Green Foothills*); *Strother v. California Coastal Com.* (2009) 173 Cal.App.4th 873, 880-881 (*Strother*) [30–day deadline applies to CEQA actions challenging Coastal Commission decision].) Under these authorities, Fudge's CEQA claim was time–barred long before the instant writ petition was filed on March 5, 2015.

Nevertheless, Fudge insists the trial court erred in sustaining the Coastal Commission's demurrer because (1) the court found the statute of limitations was triggered by the wrong act, (2) the Commission's decision was not final until it adopted its revised findings in April 2015, and (3) the Secretary did not properly post the Commission's NOD. Fudge is mistaken.

A. *The Trial Court Applied the Proper Limitations Period*

Fudge argues that CEQA's 30-day statute of limitations began to run not on the date the Coastal Commission filed the NOD, but rather,

---

[9] The court took judicial notice of the NOD filed by the Commission with the Secretary on January 30, 2015.

on the date the Secretary posted the NOD. Fudge's argument is based on two statutes of limitations and related case law, inapplicable here. Specifically, Fudge points to Guidelines section 15112, subdivision (c)(1), which governs actions challenging decisions by local agencies that lack certified regulatory programs, and Guidelines section 15112, subdivision (c)(2), which applies to actions challenging agency decisions finding projects exempt from CEQA. The 30–day limitations period of Guidelines section 15112, subdivision (c)(3), governs actions challenging decisions made by the Coastal Commission under its certified regulatory program, i.e., Fudge's claim. Case law on which Fudge relies is similarly inapplicable, either because it applies to Guidelines applicable to local agencies without certified regulatory programs (see *Latinos Unidos de Napa v. City of Napa* (2011) 196 Cal.App.4th 1154, 1161–1163; *Coalition for Clean Air v. City of Visalia* (2012) 209 Cal.App.4th 408, 421), or because the cases do not involve CEQA statutes of limitations (see *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 957–960 [analyzing effect of County's failure to provide proper notice of mitigated negative declaration]; *Fall River Wild Trout Foundation v. County of Shasta* (1999) 70 Cal.App.4th 482, 491–93 [same].)

B. *The Commission's Decision Was Final in January 2015*

Fudge also attempts to salvage the CEQA claim by arguing that the Commission's decision was not final until it adopted its revised findings in April 2015.

"'The exact date of approval of any project is a matter determined by each public agency according to its rules, regulations, and ordinances.'" (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 963; Guidelines, § 15352, subd. (a).) According to its Coastal Guidelines, the Coastal Commission's decision became final when the chair announced the tally of voting commissioners at the January 8, 2015 de novo review hearing. (Guidelines, § 13094, subd. (c); *Save Oxnard Shores v. California Coastal Com.* (1986) 179 Cal.App.3d 140, 149–150 (*Save Oxnard Shores*).) The regulations require that the Commission conduct an additional hearing to address and adopt revised findings, given that its final decision departed significantly from staff recommendations. (Guidelines, § 13096, subd. (b).) However, the hearing at which those revised findings were adopted did not reopen the earlier, final determination, or constitute a new decision. The April 2015 hearing "solely address[ed] whether the proposed revised findings reflect[ed] the [earlier] action of the [C]omission." (§ 30315.1; Guidelines, § 13096, subd. (c).) The revised findings simply reflect the written rationale for the final determination reached months earlier by the commissioners. (See *La Costa Beach Homeowners' Assn. v. California Coastal Com.* (2002) 101 Cal.App.4th 804, 819 ["revised findings [adopted June 13, 2000] did nothing more than reflect in writing the rationale that the Commissioners and staff articulated on the record at the April 12, 2000 public hearing"] (*La Costa*).)

Fudge also maintains that, pursuant to Code of Civil Procedure section 1094.6, the Commission's decision should not be deemed final until he received written notice of that decision. Code of Civil Procedure section 1094.6 which governs judicial review of local agency decisions does not apply here, because the Coastal Commission is a state–not local–agency. (§§ 30300, 30317.) Under the Coastal Act, judicial review of Coastal Commission decisions is authorized by Code of Civil Procedure section 1094.5. (§ 30801.)

C. *The Date on Which the NOD is Filed–Not the Posting Date–Triggers CEQA's 30-day Limitations Period*

Finally, Fudge argues that, even if final findings were adopted at the January 8, 2015 hearing, the record does not contain evidence that that the NOD was posted a full 30 days as required by law. We reject this assertion. Under the Guidelines, the date on which the NOD is filed with the Secretary triggers the statute of limitations. (Guidelines, § 15112, subd. (c)(3).) Subsequent dates on which the NOD is posted have no bearing on when the 30–day period has run. (*Ibid.*; *Committee for Green Foothills*, *supra,* 48 Cal.4th at p. 48.) The Commission satisfied its obligations by filing the NOD with the Secretary, which triggered the statute of limitations. The trial court did not err in finding the CEQA claim time–barred.

II. *Fudge Has No Viable Claim for Violation of the Coastal Act*

The second cause of action alleges that the Coastal Commission violated the Coastal Act by failing to review the City's notice of exemption under CEQA.[10] On appeal, Fudge argues this cause of action encompasses an additional claim that, having found that the City's approval of the CDP did not comply with CEQA, the Coastal Commission had–but failed to perform–a mandatory duty to conduct a de novo review and issue factual findings and legal conclusions to explain the violation, invalidate the CDP approval and remand the matter to the City for proceedings in compliance with the Coastal Act. Neither assertion has merit.

A. *The Commission Lacked Jurisdiction to Review the City's Compliance with CEQA*

In *Hines,* the court held that "[t]he Coastal Commission lacks jurisdiction to review a local government's compliance with CEQA." (*Hines, supra,* 186 Cal.App.4th at p. 852.) *Hines* explained that, in such circumstances, the Commission's role is "limited to reviewing the conformity of the local government's actions to the certified [LCP] or to the public access policies of the Coastal Act." (*Ibid*., citing § 30603,

---

[10] Fudge argues the court "erroneously found [he] had conceded that his 'writ action is based solely on the Coastal Commission's failure to review the City's Notice of Exemption under CEQA.'" He denies having made such a concession. Our reading of the allegations of the second cause of action is consistent with the trial court's understanding.

subd. (b)(1).) Accordingly, the Commission's demurrer was properly sustained with regard to the allegations that the Commission–which lacked jurisdiction to do so–failed to analyze whether the City's decision approving the CDP violated CEQA.

Fudge maintains that the issue is not whether the City complied with CEQA, but whether the City failed to comply with the LCP that incorporates CEQA. He insists *Hines* does not apply because the case "did not involve the violation of an LCP provision that expressly incorporated CEQA compliance." He points to provisions of the Land Use Element of the City's General Plan and its municipal code, which he claims expressly incorporate CEQA compliance into the LCP. But the LCP provisions on which Fudge relies merely establish "goals" for the City to prepare CEQA initial studies for proposed projects, and the municipal code section provides only that the City's approval of Coastal development projects is contingent on its first making CEQA findings. None of these provisions expressly incorporates CEQA into the LCP. Indeed, the theory Fudge advances is contrary to California law. A statute incorporates another statute only if the latter is "'adopt[ed] by specific reference.'" (*Coastside Fishing Club v. California Fish & Game Com.* (2013) 215 Cal.App.4th 397, 420.)

We also find Fudge's attempt to distinguish *Hines* unavailing. Any public agency that exercises discretionary authority over project approvals is subject to CEQA. (See § 21080, subd. (a); Guidelines, §§ 15020, 15021, subd. (a); see also *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 112.) As a public agency exercising

discretionary authority over project approvals in the Coastal Zone, the City must comply with CEQA's substantive mandates, without regard to whether its LCP "incorporates" CEQA. (See §§ 21003, subd. (a), 21080, subd. (a); Guidelines, §§ 15000, 15020, 15021, subd. (a), 15040, subds. (a), (b).)

As the Coastal Commission staff correctly noted in its initial report, the Commission lacked authority to review the City's permit decision. Once the Commission determined Fudge's appeal raised a "substantial issue" and took jurisdiction over his appeal, the City's decision became a nullity, i.e., there was no permit decision to review. (See *McAllister, supra,* 147 Cal.App.4th at p. 294 ["'Once the Commission conducted its de novo examination, there was no longer a decision by the [County] to review.' . . . [¶] The County's CEQA decisions [were] superseded by the Coastal Commission's environmental review"].) Under the Coastal Act, the Commission does not review the hearing previously held. Rather, it conducts an entirely new hearing to evaluate the Developer's "permit application *as if no decision had been previously rendered*." (*Coronado Yacht Club v. California Coastal Com.* (1993) 13 Cal.App.4th 860, 871-872, italics added; accord, *Kaczorowski v. Mendocino County Bd. of Supervisors* (2001) 88 Cal.App.4th 564, 569 [If Coastal Commission determines that appeal presents a "substantial issue," application is reviewed de novo; i.e., Commission hears application as if no local government agency was ever involved] (*Kaczorowski*); *McAllister, supra*, 147 Cal.App.4th at p. 294.) Because the Commission's de novo review superseded the City's permit decision,

the Coastal Act neither empowered nor required the Commission to review the City's decision for correctness.

B. *The Commission Conducted the Requisite De Novo Review*

Fudge argues that he pled a viable Coastal Act violation by alleging that the Commission failed to review the project under CEQA's procedural requirements and make CEQA findings. His argument fails.

The Commission's review process is exempt from CEQA's procedural requirements. (§ 21080.5, subd. (c); Guidelines, § 15250.) The Commission's review of a permit application, in compliance with its own certified regulatory requirements, constitutes compliance with CEQA. (*Ross v. California Coastal Com*. (2011) 199 Cal.App.4th 900, 935–937 (*Ross*).)

Here, the Commission conducted a de novo analysis of the Developer's permit application under its certified program and, as Fudge's writ petition concedes, made findings regarding the project's consistency with CEQA. The Commission found "there were no other feasible alternatives or mitigation measures available which would substantially lessen any significant adverse impact which the activity may have on the environment." (*Ross, supra*, 199 Cal.App.4th at p. 937.) The Commission was not required to draft, circulate or certify a

separate EIR; its findings satisfied its obligations under CEQA.[11] (*Ibid.*; § 21080.5, subd. (a).) The demurrer was properly sustained as to the second cause of action.

III. *Trial on the Third Cause of Action Claim for Procedural Due Process Violations*

A. *The Standard of Review*

Typically, a trial court's review of a Coastal Commission decision is confined to the administrative record. (*Sierra Club v. California Coastal Com*. (2005) 35 Cal.4th 839, 863; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 81 [evidence before the agency at the time of its final decision constitutes the administrative record] (*No Oil*).) The court has "'broad discretion in ruling on the admissibility of evidence.' [Citation.]" (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431 (*Tudor Ranches*).) This Court will reverse only upon a clear showing by appellant that the trial court abused its discretion (*ibid.*), and that absent the error, appellant would have achieved a more favorable result. (See *Cassim v. Allstate Ins. Co* (2004) 33 Cal.4th 780, 800–801.) The same standard governs evidentiary rulings on efforts to augment an administrative record. (*Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1144.) In "rare instances," the

---

[11] The Commission's certified regulatory program required that its review include written findings addressing the project's consistency with CEQA. (Guidelines, §§ 13057, subds. (a), (c), 13096, subd. (a).)

trial court may deviate from this rule to consider extra–record evidence if it finds there is "relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the [administrative] hearing." (Code Civ. Proc., § 1094.5, subd. (e); *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 578.)

Fudge contends that the trial court erred in (1) permitting the introduction of evidence of the April 15, 2015 revised findings, adopted after the Coastal Commission issued what, in this argument, now asserts was its final decision on January 8, 2015, and (2) excluding certain extra–record evidence he sought to introduce at trial. Neither contention succeeds.

B. *The Trial Court Did Not Err in Finding that the Commission's Revised Findings are Part of the Administrative Record*

Fudge contends that the trial court erred when it refused to excise the Commission's April 15, 2015 revised findings from the administrative record, because those revisions were adopted after its final decision was rendered on January 8, 2015.

Fudge is correct that the Commission's decision was final following its de novo review hearing on January 8, 2015. (Guidelines, § 13094, subd. (c); *Save Oxnard Shores, supra*, 179 Cal.App.3d at pp. 149-150.) However, because that decision departed from staff recommendations, the Commission was required to further consider, approve and issue revised written findings reflecting the reasoning and

bases for that final January 2015 decision. (Guidelines, § 13096, subds. (b), (c).) Evidence of the Commission's revised findings was a necessary part of the administrative record, and is the sort of evidence routinely reviewed by courts adjudicating challenges to Coastal Commission findings. (See *La Costa, supra*, 101 Cal.App.4th at pp. 813, 819.)[12] Had the revised findings not been included in the record and available for the trial court's review, a petitioner could accuse the Commission of reaching a final decision without supporting findings, while excising from the record the very evidence of the factual findings the Commission relied on in adopting and to support its decision. Such a practice would interfere both with judicial ability to review a Commission decision (*La Costa, supra*, at p. 814), and the Commission's ability to defend it.

C. *The Court Appropriately Excluded Extra–Record Evidence*

Fudge argues the trial court erred in refusing to augment the record to include internal staff communications which "were not

---

[12] Case law on which Fudge relies is inapposite. Both *No Oil, supra*, 13 Cal.3d 68, and *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, addressed decisions by agencies other than the Coastal Commission, as well as the absence of factual findings on the issue before the agency. (*No Oil*, *supra*, 13 Cal.3d at p. 81; *Topanga Assn., supra*, 11 Cal.3d at pp. 520–521.) And the California Supreme Court has held that *Citizens to Preserve Overton Park v. Volpe* (1971) 401 U.S. 402, "does not apply to . . . actions for review of quasi–judicial proceedings." (*City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 778.)

submitted to the voting members of the Commission," erred in allowing the Commission to withhold notes purportedly written by Commissioner Mitchell in a notebook during the January 8, 2015 hearing, and erred in excluding her alleged ex parte communications with the Developer's representative during that hearing. These contentions fail.

First, section 21167.6, subdivision (e)(10), upon which Fudge relies as authority that the certified record should have been be augmented to include internal Commission staff communications, is a CEQA statute. That statute requires that, in actions arising under section 21167 of CEQA, the administrative record must include "internal agency communications" of an agency that approves a project. But Fudge ignores the fact that this was no longer a CEQA case by the time of trial on the petition, as that claim against the Commission was dismissed.[13]

Second, as for the claim that the record should have been augmented to include notes allegedly contained in Commissioner Mitchell's notebook, Fudge did not request to augment the record on this basis. Having failed to do so before the trial court, he may not raise the issue on appeal. (*Tudor Ranches, supra,* 65 Cal.App.4th at p. 1433.)

---

[13] Even if a CEQA claim did survive, the Coastal Commission's certified CDP program is exempt from section 21167. (See § 21080.5, subds. (c) ["regulatory program certified pursuant to this section is exempt from . . . Section 21167"]; (d)(2), (3); Guidelines, § 15252, subd. (a); *Strother, supra*, 173 Cal.App.4th at p. 877; *Californians for Alternatives to Toxics v. California Department of Pesticide Regulatio*n (2006) 136 Cal.App.4th 1049, 1068 [agency's "compliance with [its] applicable statutes and regulations constitutes CEQA compliance"].)

Third, the record does not support Fudge's assertion that the court excluded evidence of Commissioner Mitchell's ex parte communications with the Developer's representative. Although the court had discretion to disregard completely Fudge's unilaterally–filed extra–record declarations, it did not do so. Instead, the court received in evidence and considered portions of Fudge's declaration, to which it referred in its ruling. Further, even if a court excludes evidence, no abuse of discretion occurs unless it is shown that the court's ruling "foreclosed [an] essential theory of liability." (*Tudor Ranches, supra*, 65 Cal.App.4th at p. 1432.) That did not occur here. Fudge was given the opportunity to present his theory that he was denied due process because of allegedly improper proceedings due, in part, to Commissioner Mitchell's alleged ex parte communications with the Developer's lobbyist. After considering relevant portions of Fudge's declarations, the court rejected this theory. No abuse of discretion occurred.[14]

Fudge mistakenly asserts that he was entitled to cross-examine Commissioner Mitchell as to her declarations that she had no undisclosed ex parte communications. First, the court found no

---

[14] Moreover, Fudge failed to demonstrate that evidence about which he and another declarant (Elia) testified could not have been produced at or was improperly excluded from the January 2015 hearing. Both he and that witness attended that hearing, but neither complained of any suspected improper ex parte communications between Commissioner Mitchell and the Developer. Those complaints are forfeited. (*Markley v. City Council* (1982) 131 Cal.App.3d 656, 661-664.)

evidence that the commissioner "had ex parte communications with the Developer's lobbyist during the hearing on her smartphone." Nor, as set forth in detail in section III.D.4(b), below, does the record support Fudge's claim that Commissioner Mitchell surely had some form of ex parte communication with the Developer, because she "read the [Developer's] yellow pages script . . . as her own motion." Commissioner Mitchell testified that no such ex parte communications took place, and nothing in the record reflects otherwise.

D. *Fudge's Third Cause of Action for Procedural Violations by the Coastal Commission for Failure to Comply With Controlling Administrative Guidelines Fails*

Fudge contends the Coastal Commission hearing violated its own rules and resulted in due process violations in that: (1) the Developer failed to post required notice of the January 2015 appeal; (2) the Commission failed to provide reasonable notice of the second addendum; (3) the Commission's staff provided an advance copy of the second addendum only to the Developer; (4) Commissioner Mitchell had prohibited, undisclosed ex parte communications with and about the Developer; (5) the Commission prevented Fudge and the public from addressing Developer's script; (6) the Commission failed to issue a Notice of Final Action; and (7) the Commission failed to register disclosure of the Developer's representative.

1. *The Commission Was Not Required to Post Notice of the Appeal*

Fudge maintains that a due process violation occurred when the Developer failed to post and provide proper notice of the January 8, 2015 hearing at or near the site of the project.

Section 13054 of the Guidelines, requires posting of notice of direct permit applications to the Commission, but says nothing regarding de novo appeal hearings regarding such applications where the grant of a permit is being appealed. (See Guidelines, § 13054, subd. (d).) (Guidelines, § 13115, subds. (a), (b).) Different regulations govern the notice requirements for and conduct of the Commission's de novo review of such appeals.[15] (Guidelines, §§ 13057, 13063, subds. (a)-(c), 13096.)

2. *No Due Process Violation Occurred as a Result of the Timing of the Commission's Staff's Transmittal of the Second Addendum*

Fudge contends he was denied due process because he was not given reasonable notice of the substantial changes contained in the second addendum on which the Coastal Commission planned to vote on January 8, 2015.

---

[15] Fudge's claim that the January 2015 hearing was not an "appeal," because the Commission's agenda referred to the matter as an "Application" is specious. The scheduled hearing was Fudge's own appeal to the Commission of the City's decision to grant the Developer's CDP. (See *Kaczorowski, supra*, 88 Cal.App.4th at p. 569; §§ 30621, subd. (a), 30625, subd. (b)(1); Guidelines, § 13115, subds. (a), (b).)

First, the trial court made a factual finding (based on Fudge's testimony), that Fudge became aware of the existence of the second addendum at "4:30 a.m. on the morning of the hearing." Fudge partially reviewed the addendum, but lacked sufficient "time to print . . . or review [the document] completely before [he] had to leave" for the afternoon hearing in Santa Monica.

The trial court rejected Fudge's claim that he had no chance to obtain the addendum before the hearing. The court observed that Fudge was aware of the existence of the addendum, but "decided not to take 10 minutes to download the document before leaving home so that he would have a copy for the hearing." To the extent there was a belated posting, Fudge was not prejudiced because he knew about and saw the document, which was available to him. Moreover, Fudge waived any claim of error by failing to object at the January 2015 hearing that he was disadvantaged in any respect by having been denied an opportunity to review the addendum (which was addressed at the hearing by several speakers, including one to whom Fudge ceded some of his allotted time).

In any event, the staff's posting of the second addendum the evening before the hearing cannot, under the circumstances, be considered untimely. Fudge relies on section 13015 of the Guidelines, which requires 10–days' mail notice of a Coastal Commission meeting. But there is no dispute that notice of the hearing itself was proper. Further, the regulation on which Fudge relies makes no mention of the timing for mailing of notice of addenda to staff reports, nor may such a

requirement be read into the regulation. (*Pacific Gas & Electric Co. v. Superior Court* (2017) 10 Cal.App.5th 563, 571; see *Ross, supra*, 199 Cal.App.4th at p. 939 [addenda are not subject to the same timing requirements as staff reports]; see Guidelines, § 13059 [Commission staff may distribute a report at the same time notice of a hearing is issued, or separately].) In this instance, Commission staff could not have distributed the second addendum 10 days in advance of the January 8, 2015 hearing (on December 29, 2014), a date several days before the staff received the voluminous materials from Fudge, the Developer and the public that were analyzed and addressed in the January 2015 addenda.

Finally, even if the Guidelines required that addenda be treated as staff reports and Fudge requested a copy of the second addendum, the only requirement would be that staff mail him a copy of the addendum. Given that the de novo hearing was set to convene the following morning, such an act (according to Fudge's own theory) would have been useless. Instead, staff acted as expeditiously as possible and made the addendum readily available to Fudge and others by posting it on the Commission website.

3. *Fudge Has Not Shown he Suffered Prejudice Because the Developer Received an Advance Copy of the Second Addendum*

Fudge argues the court should have "presumed" that he was prejudiced because the Commission staff first transmitted the second addendum to the Developer, which received an unfair advantage by the

staff's offer to "withhold" the document until the Developer decided whether to proceed with the next day's planned hearing. (See §§ 30621, subd. (a); 30322, subd. (a).) He maintains the Developer took advantage of this advance notice "to create a script of motions for Commissioner Mitchell to weaken the permit conditions," which "deprived [him] of a fair opportunity to respond." The trial court found that advance transmission of the addendum to the Developer was not an effort to favor the Developer. Rather, the staff merely engaged in a customary and permissible communication with a permit applicant (an "interested party") about a scheduling issue, and advised the Developer it could postpone the hearing if it chose, in light of eleventh hour recommendations which, if adopted, would subject the project to imposition of additional and more burdensome conditions. (§ 30322, subd. (b).)

Prejudice is not presumed. Under the Coastal Act, Fudge must affirmatively demonstrate prejudice by virtue of the Commission's (alleged) failure to comply with governing regulations. (*Benson v. California Coastal Com*. (2006) 139 Cal.App.4th 348, 355–356 (*Benson*); *North Pacifica LLC v. California Coastal Com*. (2008) 166 Cal.App.4th 1416, 1435 (*North Pacifica*).) Fudge has not shown how he was prejudiced by the Commission's earlier provision of the second addendum to the Developer. Fudge knew about but did not take issue with that addendum at the January 8 hearing. Even now, he does not assert he would have taken different action had he and the Developer

been given simultaneous access to the document. We find no due process violation.

4. *Fudge Has Not Shown that Commissioner Mitchell Engaged in Undisclosed Ex Parte Communications*

(a) *Commissioner Mitchell's Email Communication to the Developer*

The Coastal Act requires commissioners to fully disclose ex parte communications. Subject to timing, such disclosures must either be in writing or on the record at a public hearing, and must include, among other things, a "comprehensive description of the content of the ex parte communication." (§ 30324, subd. (b)(1)(C).) A commissioner who knowingly fails to comply with this reporting requirement is precluded from voting on or influencing a commission decision. (§ 30327, subd. (a).)

Fudge correctly notes that the trial court mistakenly found that an email sent by the Developer *to* Commissioner Mitchell on September 17, 2014 was not an undisclosed ex parte communication. However, that email was not at issue. What was at issue, according to Fudge, was the nondisclosure of a communication *from* Commissioner Mitchell four months earlier to the Developer.

However, Fudge concedes that, at the January 8 de novo hearing, Commissioner Mitchell acknowledged having initiated that contact with the Developer (Mr. Christy), and disclosed the substance of that communication. Once that occurred, Commissioner Mitchell's

communication was no longer considered ex parte. "Communications . . . cease to be ex parte . . . when fully disclosed and placed in the commission's official record." (§ 30324, subd. (c).) Fudge argues this is factually incorrect, because the record lacks a "comprehensive disclosure." But he provides no evidentiary support for this claim, merely speculation. Absent evidence to the contrary, we presume that Commissioner Mitchell complied with her disclosure obligations. (Evid. Code, § 664; *Mednik v. State Dept. of Health Care Service*s (2009) 175 Cal.App.4th 631, 647 [in the absence of "evidence to contradict [section 664] presumption," court "presume[s] this duty [was] performed"].)

(b) *Commissioner Mitchell's Alleged Communications With Developer's Representative During the De Novo Hearing*

Fudge also contends that the Developer's distribution at the January 8 hearing of the "yellow pages" containing its proposed amendments to the staff recommendations in the second addendum constituted an improper ex parte communication with Commissioner Mitchell about those proposed amendments. Not so.

First, the Developer's proposed amendments were disseminated at the hearing and placed in the record. (§ 30325 ["Nothing . . . prohibits . . . any interested person from . . . submitting written comments for the record on a matter before the commission. Written comments . . . may be delivered to the commission at the . . . scheduled hearing."].) The Developer's submissions were, by definition, not ex parte communications. (See § 30322, subd. (a) ["an 'ex parte communication'

is any . . . communication between a member of the commission and an interested person . . . ,which does *not* occur in a public hearing." (italics added)].) Even if the yellow pages might have been considered an ex parte communication, they lost that character under the Coastal Act once "fully disclosed and placed in the commission's official record." (§ 30324, subd. (c).)

Fudge proffered no evidence at trial to contradict this record. Rather, he claimed only that Commissioner Mitchell must have engaged in improper ex parte communications with a representative of the Developer, because she adopted as her own its proposed amendments. Again, he is mistaken. Three amending motions were made at the hearing.[16] As for the motion made by Commissioner Mitchell (and fully

---

[16] The first amending motion was made by Commissioner Mitchell and seconded by Commissioner McClure. The first amending motion modified a staff recommendation by removing a shuttle through the golf course, but retaining a requirement that the Developer record and offer to dedicate an easement for a public trail. The motion also addressed staff recommendations regarding restrictions on the Developer's use of lighting and sound amplification at events, and its obligations with regard to the provision of, and limitations on the number of attendees at, overnight camping and public events, in order to balance the effects of such events on biological resources. The motion proposed to eliminate the Developer's duty to indemnify the Commission for legal fees in the event of a challenge to its permit decision. The latter portion of this motion was later superseded by a third amending motion which was adopted, reinstating the indemnification provision.

The second amending motion was offered by Commissioner Turnball-Sanders who was largely "inclined to agree generally with the motion put forth by Commissioner Mitchell," but had concerns about elimination of the duty of indemnification in exchange for an in-lieu fee. Commissioner

seconded by Commissioner McClure), she explicitly stated that she was adhering not to "the recommended motions that [the Developer] suggested but [following her] own original thought." Fudge argues otherwise, but he has presented no evidence, nor anything beyond conjecture to support his claim that undisclosed ex parte communications took place.

Finally, as the court observed, Fudge was well aware that the Developer submitted and discussed its proposed changes to the addendum during the January 8, 2015 hearing. Fudge did not object to the submission of, nor did he take issue with, those proposals. Accordingly, assuming Fudge's arguments were grounded in law, his objections were forfeited by his failure to object at the hearing. (*Markley v. City Council, supra,* 131 Cal.App.3d at pp. 661–664.)

5. *Fudge Has Not Shown He Suffered Prejudice Because He Was Denied an Opportunity to Address the Developer's Proposals Following the Close of Public Comments*

Fudge contends the Commission's decision should be nullified because he and members of the public were not permitted to address the Coastal Commission after the commissioners moved to amend

---

Turnball-Sanders moved to adopt the Developer's proposal to reduce a $1.1 million in lieu fee staff had recommended to $163,252. However, this motion was withdrawn in favor of a proposal (by Commissioner Cox) to accept and apply a $250,000 fee toward planning and construction of a public trail, which the Commissioners ultimately approved.

certain staff recommended conditions. He points to an administrative regulation which provides that, "[w]here the commission moves to vote on an application with . . . conditions different than those proposed . . . in the staff recommendation, the applicant, appellant, and the executive director shall have an opportunity to state briefly and specifically their views on the conditions." (Guidelines, §§ 13090, subd. (d), 13066, subd. (b)(4).) First, we note that only Fudge has standing to raise this issue; the regulation does not provide for an additional opportunity to speak to members of the public.

Second, the fact that the Commission failed to afford him an opportunity (which he did not request) to respond to the proposed amendments to staff recommendations does not constitute grounds to nullify the Commission's decision. Nullification is not required based on the Commission's noncompliance with a regulation unless the regulation with which the Commission failed to comply expressly so provides. (See *North Pacifica, supra,* 166 Cal.App.4th at pp. 1435–1436.) Guidelines section 13090 contains no provision for nullification. Further, as discussed above, prejudice is not presumed based on the violation of a procedural Coastal Act regulation. Fudge must affirmatively demonstrate that the Commission's failure to allocate him additional time caused him prejudice. (*Ibid.*; *Benson, supra,* 139 Cal.App.4th at p. 355.) He failed to demonstrate prejudice at trial, and his only attempt to do so on appeal is an assertion first made in his Reply brief that "Commissioner Mitchell's amending motions modified the [CDP] in ways that violate the LCP." An argument raised in the

reply brief for the first time will not be considered, unless good reason is shown for failure to present it before. (*Scott v. CIBA Vision Corp*. (1995) 38 Cal.App.4th 307, 322.) Fudge makes no effort to explain why this point was not raised earlier. In any event, by the time Commissioners moved to modify the staff recommendations, Fudge had been given an opportunity to speak and respond to the Developer's arguments. He argued only that the project should be denied in its entirety.

6. *Nullification of the Commission's Final Decision Is Not Required Because Fudge Was Not Notified of that Decision*

The Coastal Commission was required, but failed, to provide Notice of its Final Action within 10 days of the de novo hearing. (Guidelines, § 13120.) Fudge argues that the de novo appeal proceeding and Commission decision are nullified because the Commission failed to provide this notice. He is mistaken.

First, nothing in the applicable regulation expressly requires nullification of a final decision based on failure to provide notice of a final Coastal Commission decision. (*North Pacifica, supra,* 166 Cal.App.4th at p. 1435.) Nor, more importantly, has Fudge shown he suffered prejudice as a result of this administrative oversight. (*Id*. at pp. 1433-1434; *Benson, supra*, 139 Cal.App.4th at pp. 355-356.) Fudge attended and participated in discussion of pertinent disputed issues at the de novo review hearing, at which he received actual notice of the Commission's final decision. "Actual notice satisfies due process."

(*Benson, supra*, at p. 353.) Fudge suffered no prejudice as a result of the fact that he was not provided subsequent written notice of that decision.

7. *Developer Did Not Fail to Identify its Attorney to the Commission*

The Coastal Act requires that an applicant identify for the Commission "all persons who, for compensation, will be communicating with the commission or commission staff on the applicant's behalf" before such communication occurs. (§ 30319.) Failure to comply with this requirement is a misdemeanor and, upon conviction, will result in denial of a permit application and other penalties. (*Ibid.*)

At trial, Fudge argued that Steven Kaufmann, the Developer's attorney and representative at the de novo hearing on January 8, 2015, had been an employee of the Coastal Commission because Kaufmann had worked for the Attorney General's office, which serves as the Coastal Commission's outside counsel, from 1977 to 1991. Although the Developer made the section 30319 disclosure for another of its consultants in advance of the January 8 hearing, it did not do so for Kaufmann. Fudge claims he was presumptively prejudiced by this nondisclosure. The trial court rejected Fudge's assertions, as do we.

First, the court correctly found no violation of section 30319. The court observed that the statute "does not specify when a party must reveal the name of a person who for compensation communicates with the Commission." Kaufmann identified himself as the Developer's representative when he spoke at the January 8 hearing. The court

observed that the commissioners knew Kaufmann represented the Developer because he had sent correspondence to the Commission in which he had "undoubtedly identified himself and his law firm as representing the [Developer] applicant." The court found no evidentiary support for Fudge's assertion either that "Kaufmann [was] a former staff member of the California Coastal Commission," a claim denied by Kaufmann's law partner (who also represented the Developer) and the Commission's counsel, or that Fudge was somehow prejudiced by the Developer's failure formally to disclose Kaufmann's representation before the hearing. The fact that Kaufmann had been employed by the Attorney General's office more than 25 years earlier did not mean he was employed by the Coastal Commission. Nor does the fact of Kaufman's work as a deputy attorney general, without more, demonstrate the conflict of interest Fudge invites us to infer. The trial court was correct to reject Fudge's due process argument on this ground.

IV. *The Court Did Not Err in Refusing to Consider Fudge's Unpled Allegations for Substantive Violations of the Coastal Act*

Fudge insists the trial court erred in denying him an opportunity to amend the petition at trial to clarify that the third cause of action for violation of administrative regulations in connection with his appeal to the Coastal Commission was not limited to due process issues, but also incorporated allegations of substantive legal violations by the Commission. Specifically, he asserts that this action includes

allegations that the Commission exceeded its jurisdiction by: (1) approving development of the Scout Camp; (2) violating the minimum parking provisions of the LCP; (3) failing to obtain a trail dedication prior to issuance of a certificate of occupancy; and (4) failing to comply with floodplain building requirements.

The trial court rejected Fudge's argument that he should be permitted to raise these substantive arguments because the first paragraph of the third cause of action (¶71) "incorporates by . . . reference each and every allegation contained in" the preceding 70 paragraphs. The court correctly found that, because all of Fudge's other claims had been dismissed (a decision we affirmed on appeal), "[n]othing survives from the remainder of the petition that may be incorporated into the third cause of action." A "party cannot recover on a cause of action not in the complaint." (*Griffin Dewatering Corp. v. N. Ins. Co. of New York* (2009) 176 Cal.App.4th 172, 179.) The court had jurisdiction to try the third and only operative claim in the petition at the time of trial. (*Davis v. Farmers Ins. Exchange* (2016) 245 Cal.App.4th 1302, 1326.) That claim challenged the Commission's compliance with its de novo hearing procedures, not the evidentiary bases for its decision, and the court properly declined to address arguments challenging the substance of that decision.

Fudge's reliance on *Kajima Engineering and Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921 (*Kajima*) to support his claim that the third cause of action incorporates the allegations of previously dismissed claims is misplaced. First, unlike the instant

action, *Kajima* involved a special motion to strike (Code Civ. Proc., § 425.16), which applies specifically to SLAPP lawsuits. *Kajima* involved the converse situation from the one presented here, viz., an argument that the court had to strike a remaining cause of action which incorporated a previously dismissed claim that had been dismissed. (*Id.* at pp. 931–932.) *Kajima's* holding that a claim previously stricken from a cross–complaint "was similarly eliminated from the causes of action into which it had been incorporated," defeats Fudge's attempt to revive dismissed claims in a remaining cause of action. (*Id.* at p. 931.) The trial court correctly concluded that the cause of action alleging due process violations by the Coastal Commission was the only operative claim. (See *Davis v. Farmers Ins. Exchange, supra,* 245 Cal.App.4th at p. 1326.)

We also reject Fudge's argument that the court should have granted leave to amend to raise new substantive attacks on the Commission's determination. The third cause of action contains a single reference to only one of four substantive arguments Fudge raised at trial. There, Fudge alleged that in determining the appeal of the CDP for the project, the "Commission failed to comply with its administrative regulations" by "the illegal development and use of a new project at the Girl Scout camp." The claim does not refer to any violations of minimum parking provisions, failure to obtain a trail dedication prior to issuance of a certificate of occupancy, or failure to satisfy floodplain building requirements in regard to the Commission's failure to comply with governing law.

In his reply brief for trial, Fudge acknowledged the Developer's assertion that the petition's allegations were insufficiently specific as to all the violations Fudge claimed had been committed. Fudge chose not to file a noticed motion seeking leave to amend, with supporting documentation. (See Cal. Rules of Court, rule 3.1324.) He insists no formal motion was necessary because the parties addressed these substantive matters in pretrial proceedings, and the court never "indicate[d] it thought the issues were not adequately pleaded until trial was underway," at which point he "renewed his request for leave to amend the Petition."[17] Fudge also seeks to shift responsibility to the trial court, arguing that, to the extent the court found the allegations insufficient before trial, it could simply have "conform[ed] the pleading to the proof."

A judge may allow the amendment of any pleading at any time before or during trial. (Code Civ. Proc., § 473, subd. (a)(1); *Guan v. Hu* (2018) 19 Cal.App.5th 495, 511.) The appropriate exercise of this discretion requires the judge to consider a number of factors, including the movant's conduct, the timeliness of the amendment and prejudice to the opposing party. (*Duchrow v. Forrest* (2013) 215 Cal.App.4th 1359, 1377.) Courts generally adhere to a policy of liberality in permitting amendments to pleadings, even during trial, so long as no prejudice to

---

[17] Despite this claim, and a similar assertion made by Fudge's counsel during oral argument, our review of the record did not reveal that Fudge filed a motion to amend the writ petition before trial.

the opposing party is shown. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 240.) However, an unwarranted delay in presenting the amendment may, itself, be a valid reason for denial. (*Ibid.*)

Under the circumstances here, the court acted within its discretion to deny Fudge's oral request to amend at the close of trial. The "'courts are much more critical of proposed amendments . . . when offered after long unexplained delay . . . , or where there is a lack of diligence.'" (*Hulsey v. Koehler* (1990) 218 Cal.App.3d 1150, 1159; see also *McClain v. Rush* (1989) 216 Cal.App.3d 18, 30.) The law favors permitting amendments to correct technical pleading defects. But that policy does not encompass Fudge's argument that the court should have granted leave to amend after his unexplained delay, particularly where he had long been aware of respondents' contention that the third cause of action was both solely procedural, and insufficiently specific. (See *Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 486-487.) Further, the record supports the court's conclusion that the nature of the amendment Fudge sought was not merely to clarify his sole remaining procedural claim, but to raise significant substantive issues as to the Commission's findings regarding the scout camp, trail dedication, parking limitations and floodplain requirements. Finally, the rule discouraging belated amendments is particularly apt where, as here, such an amendment would be futile to the extent Fudge sought to revive dismissed allegations. (*Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 176-177; *Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 685.) The court properly

declined to consider Fudge's nonprocedural challenges to the grant of the CDP.[18]

---

[18] As to the parties' pending motions: on January 11, 2018, the Developer filed a motion requesting that this Court take judicial notice of public record documents related to the Coastal Commission's authority to approve and October 4, 2016 approval of use of the Scout Camp area, and the Developer's Irrevocable Offer to Dedicate a Public Pedestrian and Cycling Trail Easement and Declaration of Restriction, recorded on November 8, 2017. These documents are not relevant to our disposition. The Developer's January 11, 2018, Request for Judicial Notice is denied.

On March 2, 2018, Fudge requested that this Court take judicial notice of certain public records, specifically, excerpts of: (1) "Section 7 of the Land Use Element of the City of Laguna Beach's General Plan," and B public record documents related to the Coastal Commission's authority; (2) a July 28, 2017, California Coastal Commission "Staff Report"; and (3) the Coastal Commission's agenda for an August 9, 2017 meeting. These documents are not relevant to our disposition. Fudge's March 2, 2018, Request for Judicial Notice is denied.

On March 21, 2018, Fudge filed a motion requesting this Court to take judicial notice of the allegations of a complaint in a pending action in San Diego Superior Court, *Spotlight on Coastal Corruption v. Steve Kinsey, et al.* (case No. 37-2016-00028494-CU-MC-CTL). On March 28, 2018, the Coastal Commission filed a Request to Strike Fudge's March 21, 2018 Motion for Judicial Notice, on the grounds that it is procedurally improper and requests judicial notice of matters not relevant here. We agree. The Commission's Motion to Strike is granted.

DISPOSITION

The judgment is affirmed. Each party shall bear his or its own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.