

No 'Common Interest' Privilege in CEQA Cases: Communications Between Developer and Agency Lawyers Belong in the Administrative Record

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If a developer and the local government want to strategize about how to make a CEQA document defensible, pick up the phone or schedule a meeting to talk about it. In *Citizens for Ceres v. Superior Court*, the Court of Appeal made it clear that you cannot send memos and drafts through counsel to establish an attorney-client privilege and keep such materials out of the administrative record when litigation is filed. Knowledgeable CEQA practitioners have always been careful about sending emails and other written work product to a public agency. *Citizens for Ceres* confirms such caution is warranted.

The petitioners in *Citizens for Ceres* challenged the environmental review for a Wal-Mart shopping center in the City of Ceres. The administrative record prepared by the City did not include a single communication between the City and the developer, which struck Petitioners as odd. When challenged on that point, the City responded that it knew the project would be controversial and that the potential for litigation was significant. Consequently, all communications between the City and the developer were managed through counsel so that they would be privileged. That privilege was initially claimed for more than 3,300 documents.

The City and developer argued that privilege was appropriate because they shared a “common interest” in preparing a legally defensible CEQA document. Prior case law (*California Oak Foundation v. County of Tehama*) arguably provided support for that argument. This Court soundly rejected it, however, ruling that the interests of the City and developer are “fundamentally divergent” prior to project approval. The court reasoned that the developer’s interest is to seek approval on the most favorable, least burdensome terms possible, while the City’s interest is to objectively analyze a project’s environmental impacts, require feasible mitigation and even consider rejection of a project, all without bias. Thus, the *Citizens for Ceres* case held that there can be no “common interest” between a developer and the City prior to approval of a project. Once a project is approved, then the City and the developer have a common interest in defending the CEQA document and communications between counsel may at that point become privileged.

Active land use/CEQA practitioners might question the court’s rationale. First, it does not recognize the fact that CEQA allows the applicant to prepare the EIR, obviously reflecting some commonality of interest and goal. Likewise, “Indemnity Agreements” are commonly entered as part of the application process, thereby requiring the applicant/developer to hold the public agency harmless and to fund and run any future legal defense. Certainly, that applicant/developer has a keen interest in the legal compliance of the CEQA document. Second, it does not reflect reality – stories abound of developers pushing for more-involved and legally compliant CEQA documentation than that required by the public agency because of the developer’s greater fear of legal challenge. Third, practically speaking, political bodies are more likely to approve or deny projects for reasons

other than its environmental profile or compliance document. The real threat to preserving the approval is always legal challenge. To hold that a common interest exists only after a lawsuit is filed but not before, when in reality such lawsuits are often won or lost depending on the administrative-level legal work, is to turn a blind eye to the realities of land use challenges and to create disadvantages to those who defend project approvals.

Citizens for Ceres illustrates that coordination between a developer and lead agency must be handled carefully. Communication in particular needs to be handled strategically. Please feel free to contact any member of the Land Use, Entitlements and CEQA Professionals group with questions about CEQA compliance for your current or future projects.

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Practice Areas

Real Estate, Energy, Land Use & Environmental