

LAW AND MOTION TENTATIVE RULINGS

DATE: July 30, 2020 TIME: 8:30 A.M.

TENTATIVE RULINGS ARE NOT POSTED IN UNLAWFUL DETAINER CASES

Case No.17CV02111

LINDOW v LINDOW

MOTION TO LIFT STAY AND DEMURRER TO COMPLAINT

First, as to the motion to lift the stay, in view of the Sixth District Court of Appeal's decision in case no. H045566 filed 3/4/20, the motion to lift the stay is granted. (see Defendant's Exhibits B, E, F,)

As to Defendant's demurrer, "A case becomes moot when a court ruling can have no practical effect or cannot provide the parties with effective relief." (*Californians for Alternatives to Toxics v. Department of Pesticide Regulation* (2006) 136 Cal.App.4th 1049, 1069)

The Sixth District Court of Appeal stated in its decision on the appeal of the Santa Clara County Lindow probate case (H045566), "Here the sale of the property is complete and title has already transferred from Carl to the new owner. Thus, the only relief appellant seeks, an adjudication that he owns the property, cannot be granted." (Defendant's RJN Ex. B p.7)

Therefore this case is moot and the demurrer to the complaint is sustained without leave to amend.

Defendant's Requests for Judicial Notice:

Exhibit A: Judge Burdick's December 20, 2017 Order imposing a stay in this case:
Granted.

Exhibit B: The decision of the Court of Appeal on Plaintiff's appeal of the Santa Clara Superior Court's orders: Granted.

Exhibit C: The deed to the Aptos property that is the subject of Plaintiff's action:
Granted.

Exhibit D: Plaintiff's Response to Yarbrough's Petition Dated September 24, 2019 and

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Counter Petition/Motion for Relief, filed in the Santa Clara Superior Court: Granted.

Exhibit E: In Case No. H045566, Court of Appeal, Sixth Appellate District: the June 17, 2020 Order of the California Supreme Court denying Robert Lindow's Petition for Review in his appeal from the orders of the Santa Clara County Superior Court: Granted.

Exhibit F: In Case No. H045566, Court of Appeal, Sixth Appellate District: the June 19, 2020 notice from the Court of Appeal that the remittitur has issued in Robert Lindow's appeal of the Santa Clara Superior Court's orders: Granted.

Exhibit G: In the writ proceeding in Case No. H045566: the May 13, 2019 letter from Court of Appeal, Sixth Appellate District, regarding briefing on Robert Lindow's Petition for Writ of Supersedeas seeking a stay of the Santa Clara Superior Court probate action under the automatic stay provisions of the Probate Code: Granted.

Exhibit H: In Case No. H045566: the July 18, 2019 Order from the Court of Appeal, Sixth Appellate District, denying Robert Lindow's Petition for Writ of Supersedeas regarding an automatic stay: Granted.

Case No. 19CV00673

**FOWLER PACKING COMPANY et al. v COUNTY OF SANTA CRUZ, CALIFORNIA
COASTAL COMMISSION**

PETITION FOR WRIT OF MANDATE

Tentative Decision

The petition is granted.

Petitioners are five property owners with a private driveway easement on Geoffrey Drive, Santa Cruz, located on a bluff above Twin Lakes State Beach. Petitioners challenge the Coastal Commission's jurisdiction to (1) reverse the County's exemption determination on their application for a Development Permit to install a gate and fence on their easement; (2) require Petitioners to either remove the gate and fence or apply for a Coastal Development Permit (CDP); and (3) impose civil penalties if Plaintiffs refuse to remove the gate and fence to allow public access to Twin Lakes State Beach. Petitioners seek a writ of mandate directing the County and the Coastal Commission to (1) withdraw demands for the retraction of their

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Development Permit; (2) withdraw demands for another CDP for the gate and improvements; and (3) withdraw a threat of civil administrative penalties under Pub. Resources Code §30821 in the event that Plaintiffs do not remove the gate and fence to allow public access to the beach.

The Commission asserts that Petitioners' requests for relief are not ripe for adjudication, because neither the County or the Commission has pursued any "formal" enforcement efforts; that Petitioners' failure to exhaust their administrative remedies by applying for a CDP bars their claim; and that the petition fails on the merits, because Petitioners did not apply for a Coastal Development Permit, they did not qualify for an exemption under the County's Local Coastal Plan (LCP), and there was no formal exemption determination or final agency action triggering the deadlines for Commission action. The Commission concedes that it does not have appellate jurisdiction, but asserts that it may exercise its independent enforcement powers over the subject gate and fence.

I. The regulatory scheme for exemption determinations under the LCP

The County has a certified Local Coastal Plan. Therefore, development review authority over any new development is "delegated to the local government that is implementing the local coastal program", and "shall not longer be exercised by the commission..". Public Resources Code §3066(d)

SCCC §3.20.080 provides the regulatory framework for the determination of exemptions from the requirement of a CDP, and the notice and hearing procedures thereafter. The exemption determination is to be made "by the local government at the time the application for development within the Coastal Zone is submitted or as soon thereafter as possible, and in all cases prior to the application being complete for processing"; and "may be made by any designated local government employee".

If the exemption determination is challenged by the applicant or an interested person, or if the County wishes to have a Commission determination as to the appropriate designation, the County is to notify the Commission by telephone and request the Executive Director's opinion. (§3.20.080 (B)) The Executive Director then has two working days to transmit his or her determination. (§3.20.080 (C)) If the Executive director's determination differs from the County's determination the Commission is to hold a hearing to determine the appropriate determination.(§3.20.080(D))

The information on development permits within the Coastal Zone which are exempt is to be maintained on the County's computer system. "Upon request a list of the exempt applications will be generated"; and "upon a request from the Coastal Commission Executive Director for any particular case" the County is to provide the same information that is required for permit exclusions, as set forth in subsection (F). (SCCC 3.20.080 (E))

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II. Petitioners' application for a Development Permit

On October 20, 2016 Petitioners submitted an application to the County for a Development Permit and Over-Height Fence Certification for the installation of a gate and fence across the easement. [AR15-18] The application identifies the project as being in the Coastal Zone [AR 15]. The application was “reviewed in light of 13.20.062” by County Planner Jerry Busch, the designated County employee authorized under the County’s Local Coastal Plan (LCP) to determine if the project was exempt from the requirement of a coastal development permit; and Mr. Busch determined that the project was exempt [AR 86]. On January 22, 2016 the County approved and issued the Development Permit. [AR 24]. In February 2016 Petitioners were issued a building permit [AR 31-33], and proceeded to install the fence and gate at a cost of \$175,000.

There were no challenges to the County’s exemption determination on Petitioners’ application, the County did not request an opinion from the Commission on the determination, and the Commission did not request a list of exempt applications or information on Petitioners’ application. A June 6, 2018 entry in the County’s computer system identifies Petitioner’s application as exempt.

III. The Commission’s actions

In November 2017, the Commission began to make inquiries of County staff as to whether Petitioners’ gate was permitted. [AR 87- 88]. In January 2018 the County advised the Commission that the gate and fence were permitted and had been deemed exempt from a CDP [AR 86]

In a letter dated April 11, 2018 an Enforcement Supervisor for the Commission “formally” brought the County’s attention to the Commission’s position that a CDP was required for the “unpermitted” gate . The letter advised that the gate requires a CDP and “needs to be removed, or if not removed authorized by a CDP” and that any CDP would require provisions for public access to Twin Lakes State Beach. The Commission offered to “coordinate with County regarding resolution of the violations”, and advised that if the County did not act to resolve the matter and restore public access, the Commission “may impose enforcement action”. [AR 36-37]

On May 4, 2018 the Commission sent a letter to Petitioners’ titled “Notice of Violation”, and references “the above referenced violation- file”. The letter states that the County requested the Commission to take the “enforcement lead”, and recites the basis for the Commission’s

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conclusion that a CDP was required; states that “In cases involving violations of the public access provisions of the Coastal Act, as appears to be the case here” civil penalties of up to \$11,250 per day may be imposed under §30821(h) if the property owner does not correct the violations within 30 days of receiving written notification from the Commission regarding the violation; and further states “please consider this letter to be ‘written notification’ for purposes of §30821(h).” The letter concludes by demanding that Petitioners submit “by June 8, 2018 a complete CDP application to authorize the subject gate and signs in a manner that respects historic public access and use or remove the gate and signs”. [AR 44-45]

On June 1 2018, in response to Petitioner’s offer to meet and confer, the Enforcement supervisor for the Commission sent a letter to Petitioners’ counsel asserting the Commission’s authority to challenge the County’s exemption determination, that a CDP was required which would be conditioned on public access, and demanding that that Petitioners submit a complete CDP application “by July 2, 2018 or remove the gate/fence” [AR 51-55].

On June 29, 2018 The Commission’s Enforcement Supervisor again wrote to Petitioners’ counsel, asking if Petitioners intended to apply for a CDP or if “we will need to address this matter through other means including formal enforcement action as detailed in our previous letters. “ [AR 66]

On August 2, 2018 Petitioners agreed to temporarily remove the gate, under protest, in order to avoid the threatened civil penalties. [AR 83]

IV. Petitioners’ claims are ripe for adjudication

The Commission contends that Petitioners’ claims are not ripe, because Commission merely expressed an opinion that a CDP was required for the gate, and it has never demanded that Petitioners apply for CDP, has not pursued an enforcement action, and has not demanded a retraction for Petitioners’ development permit. The letters from the Commission’s Enforcement Supervisor titled Notice of Violation, referencing a violation file, and demanding that Petitioners apply for a CDP or remove the gate by specific deadlines demonstrates that the Commission has initiated an enforcement action. Petitioners’ claims are ripe.

V. There are no administrative remedies available to Petitioners

The Commission essentially argues that Petitioners must accept the Commission’s authority to challenge the County’s exemption determination by submitting a new CDP application in order to exhaust their administrative remedies. However, Petitioners are without an available administrative remedy as to their present challenge to the Commission’s authority and jurisdiction.

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The Commission's reliance on *South Coast Regional Commission v. Gordon* (1977) 18 Cal. 3d 832, as authority for its argument that Petitioners are required "to raise their arguments to the Commission before seeking relief in the courts, even if they "did not apply for a permit because of the view that he was not required", is misplaced. In that case the court reasoned that the defendant was attempting "to raise by way of defense a matter which is initially committed to the Commission's determination, and which he has not presented to that agency". Here, however, Petitioners did apply to the County for a development permit under the County's certified LCP.

VI. The exemption determination was made in full compliance with the County's procedures under the LCP

The Commission argues that Petitioners never applied for a CDP, and that there was only an "informal" belief by a County employee that the project was exempt—not a formal exemption determination. As authorized under §3.20-.080 the County employee designated to make exemption determinations under the County's LCP reviewed Petitioners' development permit application, which indicated that the project was in the Coastal Zone, and determined that it was exempt from the CDP requirement.

VII. Commission does not have authority to challenge the County's 2016 exemption determination.

The Commission admits that it does not have appellate jurisdiction over the exemption determination, and asserts instead that it has broad independent enforcement authority as to the subject gate and fence. The Commission cites no authority for this position. Moreover, Petitioners properly applied for a development permit, and the gate and fence were permitted under the County's LCP authority. Therefore, there is no violation to enforce.

The time frames for the County's exemption determination ("as soon as possible" after the application is submitted and in all cases prior to the application being deemed complete), and for the Commission's transmittal of a contrary determination (two working days after a local government's request for review) suggest that the County's exemption determinations are to be considered final within a short time frame, and do not remain open to challenges by the Commission many years later. The County's certified LCP does not require notice to the Commission when exemption determinations are made, and instead puts the Commission on inquiry notice as to these determinations. Not having made any inquiry or utilized the available procedures under SCCC §3.20.080 to review the County's exemption determination for error, the

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Commission no longer has authority to challenge the County's exemption determination, which is now final.

VIII. The County has authority to perform the acts the petition seeks to compel

In light of the foregoing, the County's position that the writ is not properly directed at the County, because Commission retains authority to challenge the County's exemption determination and enforce compliance with State law, is incorrect.

Case No. 19CV03208

NASSERI v GRANITE CONSTRUCTION, INC. et al

DEMURRER TO COMPLAINT

The demurrer is sustained, with leave to amend.

Plaintiffs allege violations of the Securities Act of 1933 (§§11, 12(2)(a) and 15) in the stock-for-stock offering made by Granite in conjunction with Granite's merger with the Layne Christensen Company. Each of Plaintiffs' three causes of action are based on Defendants' alleged misrepresentations and failure to disclose material information with respect to four large joint venture projects. Plaintiffs allege that Defendants misrepresented that the "reasonably possible additional costs" of these projects were at most \$47 million for 2018; and that Defendants made additional misleading statements as to its "economic outlook in general", its "exceptional management of risks", and other expressions of corporate optimism. Plaintiffs further allege that Defendants failed to disclose that it had entered into the joint venture agreements on unfavorable terms; that the risks outweighed the potential profits; that attempts to accelerate the projects materially impaired the ability to compete for more profitable work; and that prior to the merger with Layne Christensen these projects had already experienced materially adverse developments, such as "project delays, cost overruns and tens of millions of dollars in revenue adjustments and other charges". Plaintiffs allege that "the full scope of these adverse developments and their impacts on Granite were not disclosed". Finally, Plaintiffs allege solicitation liability under §12 as to the individual Defendants based on allegations that they "signed the Registration Statement and participated in the solicitation and sale of Granite common stock in the Merger for their own benefit and the benefit of Granite"; and that they were "key members of the Merger working group" who "pitched Layne investors to exchange their shares".

Plaintiffs have failed to allege facts demonstrating that the alleged misrepresentation as to "reasonably possible additional costs" was a statement of an existing fact rather than a non-

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actionable forward looking statement, or an opinion. *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 183 (2015). Plaintiffs additional allegations of misleading statements constitute non-actionable “puffery”. *In re Cutera Sec. Litig.* (9th Cir. 2010) 610 F. 3d 1103. The alleged omissions are as to vague and broad subject matters; and the judicially noticeable documents (Granite’s filings with the SEC and publicly available transcripts of Granites Earnings Calls) demonstrate that Granite made “obvious” disclosures as to the purportedly omitted information, which defeats this claim. *Rubke v Capitol Bancorp Ltd.* (9th Cir. 2009) 551 F.3d 1156, 1163. Plaintiffs have further failed to allege statutory seller liability as to the individual Defendants. While they allege that these Defendants participated in the solicitation for their own benefit, they have failed to allege specific facts demonstrating that these Defendants had a “direct role” in the solicitation. *Welgus v TriNet Corp, Inc.* (N.D. Cal., Dec. 18, 2017- 2017 LEXIS 207777 at 92 [“Plaintiff must allege that the defendants did more than simply urge another to purchase a security; rather the plaintiff must show that defends solicited purchase of the securities for their own personal gain”; “mere participation in the solicitation or sale does not suffice”; and “the defendant must be alleged to have had some direct role in the a participation of the plaintiff”]

Plaintiffs’ Supplemental Authority (the Order re Motion to Dismiss and Requests for Judicial Notice in *The Police Retirement System of St Louis v Granite Construction, Inc.*, et al No: 3:19-cv-04744-WHA (N.D. Cal. May 20, 2020) indicates that a reasonable possibility exists that Plaintiffs can amend to state their causes of action. Plaintiffs are therefore granted leave to amend to allege facts demonstrating that circumstances known to Defendants at the time they made the representation of “reasonably possible additional costs” made this a misrepresentation of an of existing fact at the time it was made; to allege what specific material information, in addition to the information disclosed in the judicially noticeable documents, was omitted; and to allege statutory seller liability as to the individual Defendants.