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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CHARLES LEAVITT et al.,

Plaintiffs and Appellants,

v.

COUNTY OF MADERA,

Defendant and Respondent;

CASTLE & COOKE CALIFORNIA, INC., et al.,

Real Parties in Interest and Respondents.

F044068

(Super. Ct. No. CV18829)

ORDER MODIFYING OPINION AND DENYING REHEARING
[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on November 3, 2004, and partially published in the Official Reports (__ Cal.App.4th __ [20 Cal.Rptr.3d 578]) be modified in the following particulars:

Under part III, paragraphs A through C, with footnotes 26-32 (pp. 23-29), are deleted and the following paragraphs A and B, with footnotes 26-29, are inserted in their place, requiring the renumbering of all subsequent footnotes:

A. Legal Standard For Imposing a Terminating Sanction

In non-CEQA contexts, courts recognize that terminating sanctions are severe and are to be used sparingly—that is, only in situations where lesser

sanctions will not bring about compliance (see *R.S. Creative*, *Inc. v. Creative Cotton*, *Ltd.* (1999) 75 Cal.App.4th 486, 496) or the party has violated a court order (*ibid.*; *Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1247 [terminating sanction upheld after repeated violations of court orders]). This general rule arises because of the policy preference for resolving controversies on their merits. (See *Security Pacific Nat. Bank v. Bradley* (1992) 4 Cal.App.4th 89, 97-98.) This policy has added importance in CEQA cases because the dismissal of a CEQA petition "deprives not only the petitioners, but all citizens, of judicial resolution of the controversy concerning the project and its effects on those who live and work in the community." (*McCormick v. Board of Supervisors*, *supra*, 198 Cal.App.3d at p. 362.) Notwithstanding the public interest in seeing CEQA petitions resolved on their merits, we conclude that the foregoing general rule reflects an appropriate balance between the competing policy considerations that arise in the context of CEQA and, therefore, it is the correct legal standard for deciding if a terminating sanction is appropriate in a CEQA case where the petitioner has not timely prepared the ROP.

First, the Legislature has not provided explicitly for *any* sanctions against CEQA petitioners who fail to submit an ROP within the time frames established by statute, even though dismissal of CEQA petitions is mandatory in other situations. (E.g., § 21167.4, subd. (a).) The usual implication from such a statutory structure is that the Legislature only intended for dismissal to be a sanction in the circumstances expressly stated and no others. (See *Gikas v. Zolin* (1993) 6 Cal.4th 841, 852 [the expression of some things in a statute necessarily means the exclusion of things not expressed]; see also *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1230 [express statutory exemptions generally precluded implied exemptions]; Code Civ. Proc., § 1858 [judge may not imply what Legislature has omitted].)

Second, in over 10 years, the Legislature has not seen fit to expand the sanction provisions in section 21167.6, despite (1) commentators questioning whether the lack of such sanctions is consistent with legislative purpose[26] and (2) the enactment of other revisions to section 21167.6 in 2002. (See Stats. 2002, ch. 1121, § 4, No. 13 West's Cal. Legis. Service, pp. 5544-5546.) The logical implication from the text of CEQA and the Legislature's decision not to revise that text is that prompt resolution of CEQA proceedings is not the overriding statutory purpose when more basic purposes of CEQA are implicated. This case implicates statutory purposes related to the scope of the ROP, which include informing

[26] "In the authors' view, the Legislature's failure to provide [for sanctions against petitioners who do not expeditiously prepare a record] is anomalous in light of legislative policies favoring the prompt resolution of CEQA litigation." (Remy, Guide to CEQA, *supra*, at p. 618.)

decision makers and the public before decisions are made, and disclosing the reasons for the decisions after they are made. (See § 21061; Guidelines, § 15002, subd. (a)(1) & (a)(4).) Thus, exporting the statutory purpose of prompt resolution of CEQA litigation from CEQA to Code of Civil Procedure section 128, and claiming that purpose is sufficient grounds for a terminating sanction, is not a compelling argument. It erroneously elevates prompt resolution of CEQA litigation above other CEQA purposes and competing policy considerations.

Third, the Legislature has recognized that "determination of the completeness of the [ROP]" may constitute good cause for extending the date on which the CEQA petition is heard. (§ 21167.4, subd. (c).) This provision appears to anticipate that, in some cases, disputes concerning the scope of the ROP will arise and require resolution before the matter goes forward. As a result, this good cause provision is not consistent with imposing a terminating sanction *before* the resolution of the dispute between the parties over what documents should be included in a complete ROP.

Accordingly, we hold that a superior court has the discretion to impose a terminating sanction for failure to timely prepare the ROP where the petitioners violated a court order that defined the scope of the ROP or the court has no other means, such as the imposition of lesser sanctions, to bring about compliance with the obligation to prepare the ROP. (See *R.S. Creative*, *Inc. v. Creative Cotton*, *Ltd.*, *supra*, 75 Cal.App.4th at p. 496.)

B. Application of the Legal Standard to the Facts

Plaintiffs did not violate a court order that defined the scope of the ROP and the superior court did not explicitly address the alternate question whether other measures would bring about the filing of a complete ROP by plaintiffs. Accordingly, the appellate record does not contain an express finding of fact that there were no means for compelling plaintiffs to produce a complete ROP. Also, an implicit finding of such a fact cannot be inferred by us because the appellate record does not contain substantial evidence to support it. Indeed, the findings of fact needed to support a terminating sanction could not be made unless (1) the plaintiffs knew which documents were properly included in the ROP and (2) they had been given an opportunity to comply.[27]

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[27]We need not address whether termination would have been appropriate if specific rulings had defined the scope of the ROP and plaintiffs had failed to file a complete ROP even after the imposition of a lesser sanction. Nonetheless, framing that issue serves to illustrate that the terminating sanction was imposed too quickly in this case.

In this case, despite the general finding that the partial ROP filed was inadequate, the trial court did not make specific findings as to what documents should have been included in the ROP. Consequently, plaintiffs never knew what documents they were required to include in the ROP. Without a ruling defining the scope of the ROP, plaintiffs did not have a resolution of their bona fide challenges to (1) RPI's expansive view of the scope of the ROP, (2) the reasonableness of ESA's estimates that ROP preparation would cost $59,127.50,[28] and (3) County's demand for a deposit in the full amount of the estimated cost before it would begin to produce the ROP.[29] Thus, it does not appear that sanctions were needed to persuade plaintiffs to comply with their obligations regarding the ROP. Resolution of the issues regarding the scope of the ROP, rather than sanctions, would have been the more effective way to obtain either plaintiffs' compliance or a decision by plaintiffs to stop the litigation because of its high cost. Accordingly, a terminating sanction is not justified by the theory that compliance could not have been brought about by other means.

In summary, we conclude the superior court went beyond the scope of its discretion by imposing a terminating sanction of dismissal before the legitimate issues of fact and law raised by plaintiffs regarding the scope of the ROP had been decided and plaintiffs had an opportunity to prepare the ROP in accordance with that decision. In other words, the means existed for obtaining the compliance of plaintiffs with their obligation to prepare a complete ROP and a terminating sanction was not appropriate until those means had been tried and failed.

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[28]This estimate may no longer be accurate because (1) after the estimate was made (a) plaintiffs prepared part of the ROP and (b) a more detailed account of RPI's view of the scope of the ROP was prepared in connection with County's partial certification and (2) on remand the scope of the ROP may be determined to be narrower than assumed in the estimate.

[29]We do not address whether "any law or rule of court" (§ 21167.6, subd. (b)(1)) authorizes County to demand from plaintiffs a deposit of the estimated cost for producing the ROP except to note that the situation was unusual because plaintiffs' election to prepare the ROP was still in effect. Any questions regarding the applicability of the provisions in Code of Civil Procedure section 1094.5, subdivision (a) concerning costs and whether those provisions authorize a demand for a deposit, if raised by RPI on remand, must be decided in the first instance by the superior court. (Compare § 21168 [administrative mandamus used to challenge quasi-adjudicatory actions] with § 21168.5 [traditional mandamus used to challenge legislative or quasi-legislative action]; see Remy, Guide to CEQA, *supra*, at pp. 595-596 [distinguishing the relationship between § 21168.5 and Code Civ. Proc., § 1085 from the relationship between § 21168 and Code Civ. Proc., § 1094.5].)

The petition for rehearing filed by respondents is denied. This modification does not effect a change in the judgment.

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DAWSON, J.

WE CONCUR:

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DIBIASO, Acting P.J.

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BUCKLEY, J.