

VEDANTA SOCIETY OF SOUTHERN CALIFORNIA v. CALIFORNIA QUARTET, LTD.

Does a Tie go to Appellee or Appellant under CEQA?

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Unlike baseball, appellate review under the California Environmental Quality Act ("CEQA") is not a game. However, similar to baseball, a question arises when the reviewing body reaches a tie vote, i.e. a split decision. Does a tie go to the appellee or the appellant? In *Vedanta Society of Southern California v. California Quartet, Ltd.* (2000) 84 Cal.App.4th 517 ("Vedanta Society"), the court drew an important distinction between appellate review under the common law that ends in a split decision, and CEQA administrative review that ends in a split decision. This distinction is the focus of this article.

Under the common law, when appellate judges split on whether to affirm or remand a lower court's decision, the lower court's decision is affirmed. This is commonly referred to as approval by acquiescence because the court of appeal acquiesces to the lower court's decision. However, in *Vedanta Society*, the court declared that approval by acquiescence does not apply to CEQA administrative review. Why does CEQA have a different review standard? The answer to this question is found in *Vedanta Society*, but first some helpful background information.

1. Common Law Rule: Tie Goes to the Appellee

Lon Fuller's article, *The Case of the Speluncean Explorers*, is one of the most famous, and colorful, examples of approval by acquiescence.¹ In the article, a handful of fictitious spelunkers are trapped in a cave in the fictitious land of Newgarth. Fearing death, the spelunkers resort to cannibalism. When the surviving spelunkers are subsequently rescued, they are sentenced to death for murder. The case goes to the Newgarth Supreme Court on appeal. After one justice recused himself, the remaining four Supreme Court justices reached a tie vote, 2-2. The Court explained, "The Supreme Court being evenly divided, the conviction and sentence of the Court of General Instances is affirmed."

The United States Supreme Court faced a similar situation in *Microsoft v. United States* (2000) 530 U.S. 1301 ("Microsoft"). In *Microsoft*, Chief Justice Rehnquist's son was a partner in the law firm that represented Microsoft. Chief Justice Rehnquist decided not to recuse himself in part because of the possibility of an affirmance through a tie vote. In a separate statement Chief

¹ Lon Fuller, *The Case of the Speluncean Explorers*, 62 Harv. L. Rev. 616 (1949).

Justice Rehnquist wrote, "Finally it is important to note the negative impact that the unnecessary disqualification of even one Justice may have upon the Court. . . . Not only is the Court deprived of the participation of one of its nine members, but the even number of those remaining creates a risk of affirmance of a lower court decision by an equally divided court."

But why do appellate courts approve by acquiescence? Under the common law when appellate courts review lower court decisions, appellate courts do not make factual findings, or rehear evidence. The appellate court's task is simply to review the lower court's decision for error. As a result, appellate courts give deference to trial court decisions since the trial court reviews the facts firsthand. However, following *Vedanta Society*, CEQA review is different. There is no approval by acquiescence.

2. **Vedanta Society of Southern California v. California Quartet, Ltd.**

(a) Overview.

In 1993, California Quartet purchased 222 acres of undeveloped land. Three years later, California Quartet requested a building permit for the construction of a mobilehome development. Before a permit could issue, Orange County required California Quartet to file an environmental impact report ("EIR") detailing the environmental effects of the project. California Quartet filed a draft EIR in June 1997, and in December 1997, the Orange County Planning Commission certified the final EIR. The Vedanta Society of Southern California timely appealed the certification to the Orange County Board of Supervisors. The Board of Supervisors reached a 2-2 tie on appeal. The fifth member, Supervisor Silva, recused himself. After some consternation, the vice chairperson of the Board declared that a tie vote affirmed the Orange County Planning Commission's prior decision to certify the EIR. Shortly thereafter, the Vedanta Society filed a lawsuit requesting a declaration that the Board of Supervisors' tie vote did not effectively ratify the Planning Commission's certification of the EIR. The Vedanta Society prevailed, and the case went to appeal.

The court of appeal held that California Administrative Code title 14 ("CEQA Guidelines"), section 15091, subdivision (a) required all reviewing bodies to explain all environmental findings. This requirement was counter to approval by acquiescence, and thus, a tie on appeal was not an adequate affirmative act of review by the Board of Supervisors.

(b) Background.

CEQA requires all state and local agencies to review accumulated data on proposed projects' environmental impacts before taking action.² Section 15050 of the CEQA Guidelines mandates that a decision-making body with the authority to approve or disapprove a project must consider all accumulated data before issuing a decision. Often the accumulated data is presented in the form of a draft EIR. Once a draft EIR is received, the agency, pursuant to the CEQA Guidelines, sections 15066 and 15085, must file a "Notice of Completion" to allow for public comment on the draft EIR. After evaluating public comment, the agency then certifies the final EIR. The general purpose of the CEQA Guidelines is to hold elected and appointed agency officials

² CEQA is codified in Public Resources Code section 21000 et. Seq.

accountable to the public. With that said, below are some of the cases that provided the groundwork for the Vedanta Society decision.

Kleist v. City of Glendale (1976) 56 Cal.App.3d 770 ("Kleist") was the first case to address CEQA's appellate procedure. In *Kleist*, Gregg Properties requested permission from the City of Glendale to rezone 63 acres from single family housing to planned development housing. Gregg Properties filed a draft EIR with the City of Glendale, the lead agency for CEQA purposes, and the city council, which was the decision-making body for purposes of rezoning. However, the city council delegated the project to the Glendale Environmental and Planning Board. After the planning board performed the environmental review, the city council approved the rezoning ordinance. *Kleist*, the plaintiff, claimed that the process was procedurally defective under CEQA.

Turning to the CEQA Guidelines, the court reasoned that the EIR requirement was designed to inform the decision makers, and consequently, the decision maker was required to review the EIR. If the city council were allowed to make a decision without ever reviewing an EIR, the whole purpose behind an EIR would be frustrated. The court held that neither CEQA nor the CEQA Guidelines permit the city council to delegate its review and consideration responsibility to another body. In other words, the reviewing body must actually review the EIR. It cannot delegate this duty to another body.

The court in *Greenebaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391 ("Greenebaum") refined the *Kleist* anti-delegation holding. The *Greenebaum* court held that the Los Angeles City Council could adopt the Environmental Planning Commission's environmental findings in the EIR. The court distinguished *Kleist* by pointing out that in *Greenebaum* the city council expressly certified that it had "reviewed and considered the information in the final EIR." In *Kleist*, the city council simply affirmed the prior EIR certification decision. It did not expressly or impliedly adopt the findings of the certifying body.

(c) The Vedanta Society Decision.

The specific situation in the Vedanta Society case involved the right to appeal a non-elected decision maker's EIR certification. CEQA section 21151, subdivision (c) states, "When an environmental impact report is certified by a local lead agency's decisionmaking body which is not elected, that certification may be appealed to the agency's elected decisionmaking body, if any."

The court first addressed who should perform the final environmental review of an EIR. Leaning heavily on the foundation poured by *Kleist* and *Greenebaum*, the Vedanta Society court stated that an agency responsible for the ultimate approval of a project could not delegate its authority to a non-elected commission to perform the requisite environmental review under CEQA. But, the court also pointed out that under *Greenebaum*, an elected body could explicitly adopt findings made by a non-elected body. However, even if non-elected commission findings can be adopted, the question still remains: Can the city council adopt the Planning Commission's findings through a tie vote?

The Vedanta Society court explained that a tie vote was not an affirmative act of review under CEQA. "The very fact that findings . . . must be made at all is incompatible with the nature of a tie vote." Fact-finding is by nature an affirmative act. The court said it best when it stated,

"Inherent in a consideration and finding requirement is that the body of elected decision makers must take unambiguous action, and unambiguous action means decision makers cannot be evenly divided against themselves." Elected officials "do not have the option of suffering them [EIR defects] silently."

The court held that a decision-making body could not approve an EIR by a tie vote because a tie vote is incompatible with the affirmative review process of CEQA.

3. **Practical Advice**

It is apparent from Vedanta Society that CEQA review requires an affirmative vote of approval. A tie does not go to the appellee. Since a tie vote does not affirm an agency's finding, consider the following:

(a) The Agency's Perspective.

The reviewing body must be aware that a tie vote does not affirm the previous agency decision. Additionally, reviewing members should think twice before recusing themselves from a decision. As Chief Justice Rehnquist noted, recusal presents the possibility of a tie vote, and in the CEQA context a tie vote on appeal overturns the earlier agency decision.

(b) The Project Applicant's Perspective.

Be aware of the law. It is important to know that a tie vote is not an affirmance for purposes of CEQA. Therefore, if an agency affirms a decision against your interests, it must be by a majority.

Be aware of the agency proceedings. If the reviewing agency rules on a project against the project applicant's interest, the project applicant must make a timely appeal. Therefore, the project applicant must stay abreast of all agency proceedings.

Know the reviewing agency. Generally reviewing bodies are composed of five members. It is helpful to know the political leanings and positions of these individuals because it gives a more accurate prediction of how the review is likely to come out. Additionally, by knowing beforehand if a member has an interest in the outcome, the project applicant can anticipate the likelihood of recusal.

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