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Petitioner's Failure to Comply With Discovery Regarding its Standing to Sue Results in Dismissal of CEQA Case

A CEQA case challenging the City of Wildomar's approval of a Wal-Mart retail complex has been dismissed because the petitioner refused to comply with discovery requests regarding its standing to sue. [Creed-21 v. City of Wildomar](#), 4th Dist. Court of Appeal Case No.E066367 (pub. order 12/19/2017). CEQA cases generally are decided on the administrative record before the public agency when it approved a project. Therefore, civil discovery such as depositions, interrogatories and document production requests normally is not a feature of CEQA litigation. Discovery can, however, be allowed regarding threshold questions that are not addressed in the agency's record, such as the petitioner's standing to sue. In *Creed-21*, the petitioner alleged that it had standing to sue because it was a non-profit, social-advocacy organization, and that at least one of its members resided in or near Wildomar. Wal-Mart contended, however, that Creed-21 existed only as a vehicle for collection of attorneys' fees and lacked standing to bring a CEQA suit. It sought a deposition and documents in order to support its theory that Creed-21 was a shell corporation that consisted of only two members, neither of whom lived in Wildomar. Over the next six months, Creed-21 responded by:

- objecting to the discovery requests on the ground that its membership was irrelevant;
- requiring the respondents to obtain an order from the superior court for the deposition and documents;
- unsuccessfully seeking relief from the superior court to reverse that order;
- unsuccessfully seeking relief from the court of appeal on the grounds that discovery was not allowed in CEQA cases and would violate the privacy rights of its members; and then
- failing to comply with the court order, citing family emergency.

During this time, the briefing on the merits of the CEQA claims proceeded. Creed-21's opening brief attached a declaration from a witness who stated that she was a member of Creed-21 and that she and other members lived and worked in Wildomar. The respondents' opposition brief, filed without benefit of the court-ordered discovery, argued that Creed-21 had two members, who did not include the declarant; noted that her declaration did not indicate when she had joined Creed-21; and further noted that Creed-21's president had testified in another case that Creed-21 had only two members. The trial court granted Wal-Mart's motion for an "issue sanction" due to Creed-21's failure to comply with the court's discovery order. The issue sanction precluded Creed-21 from establishing its standing to sue, and thus had the effect of terminating the litigation. The court of appeal held that the trial court's imposition of the terminating sanction was not arbitrary or capricious. In *Creed-21*, the courts addressed an abuse of the CEQA process that also happened to constitute an abuse of the discovery process. As is typical in such cases, however, the remedy for abuse does not make the project proponent whole. Wal-Mart obtained dismissal of the case and an award of \$3,000 in discovery sanctions -- not enough to compensate an applicant for the attorneys' fees it incurred, much less delay to its project from more than two years of litigation.

Authors