

Land Use and California Environmental Quality Act Update

July 2004

Defend the Bay v. City of Irvine

(June 29, 2004) 04 C.D.O.S. 5877

Introduction

The decision of the Fourth Appellate District in this case reflects a common sense approach to implementing CEQA and its requirements. In upholding an EIR prepared by the City of Irvine for development of the Northern Sphere project on a 7,743-acre site located northeast of the former Marine Corps Air Station at El Toro, the California Court of Appeal agreed with the trial court and rejected all of Petitioner's claims that the EIR was inadequate and should be set aside. Petitioner *Defend the Bay* raised a number of issues under the following three primary grounds.

A. Jobs/Housing Imbalance

Defend the Bay argued that there was insufficient evidence to support the EIR's conclusion that the jobs to housing imbalance (17,667 jobs and 12,350 housing units; a 1.44 ratio) created by the project, while substantial, would not result in a significant adverse impact on housing or employment growth. The EIR concluded that the jobs to housing ratio for the project would lower the overall jobs to housing ratio in the City (3.29 ratio in 2000), and that project housing would add affordable housing in a "jobs rich" area. The EIR also concluded that while the cumulative housing impact with the project

ABOUT THIS UPDATE

This client alert summarizes two recent cases considering a local agency's compliance with the California Environmental Quality Act ("CEQA") in connection with an EIR prepared for a development project. In both cases, the Fourth District Court of Appeal upheld the adequacy of the EIR.

would be substantial, it too would not be adverse for the same reasons the project housing impact would not be, and because the housing shortfall could be met by more plentiful housing in surrounding communities. Petitioner contended that the jobs/housing imbalance created a housing shortage and was inconsistent with the City's General Plan, and that these constituted significant environmental impacts. These arguments were viewed by the court as merely differing assessments of the impact of the jobs/housing ratio, with Petitioner striking a "different balance with the City," which did not equate to a lack of support in the record for the City's conclusion of no significant impact. *Defend the Bay's* final arguments on the treatment of the jobs/housing ratio, that the alternatives analyzed in the EIR and the City's adopted Statement of Overriding Considerations were legally insufficient because they failed to consider the housing imbalance, were recognized by the court as

the City's conclusion that with the project, the jobs/housing ratio would be improved overall with the project and the court properly deferred to the City's policy decision.

B. Agricultural Resources

The EIR concluded that the conversion of 3,100 acres of prime farmland was a significant unavoidable environmental impact, as no feasible on-site or off-site mitigation was possible. On-site agricultural use was determined not to be economically viable over the long term and reducing the development site would impede the City's General Plan goals and objectives for housing and improving the jobs/housing imbalance. The court rejected Petitioner's claim that economic viability is an impermissible reason under CEQA for finding mitigation infeasible. Off-site mitigation was deemed infeasible because no other comparable land was planned for agricultural use under the City's General Plan. The court determined that Petitioner's argument that non-agricultural lands could be converted to agricultural use by the City was merely a policy disagreement.

Defend the Bay argued that the proposed General Plan amendment which sought to amend an objective dealing with agriculture was inadequately analyzed in the EIR. The amendment essentially proposed a change in policy from "preserve and protect agriculture" within designated

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agricultural areas to "encourage the maintenance of agriculture" in certain areas pending future development or where no development would be available. The EIR discussed the change in various places, including under the Land Use and Planning Section of the EIR and in response to comments. Petitioner objected on the grounds that the discussion of this major policy shift should have been included in the Agricultural Resources Section of the EIR and the significance of the policy shift inherent in the General Plan amendment was only first addressed in a response to a comment on the draft EIR, after the public comment period had closed, thereby depriving the public the opportunity to comment. The court emphasized the importance of what is discussed in the EIR, not where it is discussed, stating that Petitioner's "wrong place" argument was "trivial in this context." The court applied the recirculation test under Public Resources Code § 21092.1 and the decision in *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112 in determining that the response to comment did not raise "significant new information" requiring recirculation of the EIR.

C. Biological Resources

Petitioner's last claim of alleged inadequacy was that the EIR improperly deferred mitigation for impacts to biological resources and, therefore, the record did not support the conclusion that there would be no significant impact on biological resources. An adopted Natural Community Conservation Plan and Habitat Conservation Plan (NCCP/HCP) applicable to the site provided that where species that are "conditionally covered" under the NCCP/HCP will be affected by a project, the U.S. Fish & Wildlife Service (FWS) and the California Department of Fish & Game (CDFG) must be consulted and a specific mitigation plan developed. The EIR concluded that the Least Bell's Vireo (an endangered bird species conditionally covered under the NCCP/HCP) habitat would be impacted by the project, and proposed mitigation in the alternative depending on the ultimate conservation value classification of the habitat, a determination to be made in the future by the FWS and CDFG. The EIR indicated that then available data suggested it would be classified in a lower value category. The mitigation required the owner, prior to the tentative map, to consult with and obtain permits from the FWS and CDFG, conduct surveys during the breeding season, obtain a determination of the long-term value of the habitat, and coordinate avoidance measures with the FWS and CDFG in ways to incorporate seven enumerated items. The court rejected the argument that failure to first obtain the habitat's conservation value was an improper deferral of mitigation. Relying primarily on *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, the court found that there was no improper deferral of mitigation because the EIR was prepared at the early stage of the planning process (General Plan amendment and zone change), and the City committed to mitigation for which there was criteria specifically identified.

For the Foothill Mariposa Lily (conditionally covered under the NCCP/HCP; two colonies of 28 plants would be affected by the project), the EIR discussed the required mitigation under the NCCP/HCP which included design modifications to reduce impacts, evaluation of mitigation techniques, monitoring and management, coordination with the FWS and CDFG, and approval from the FWS. Again, the court determined that while no actual mitigation plan was set out in the EIR and the mitigation was deferred, such deferral was not improper. The City was required

to mitigate impacts pursuant to the NCCP/HCP and the EIR committed the City to do so. The EIR also identified what is to be required in the mitigation plan.

With respect to the Western Spadefoot Toad (a "sensitive" species), the EIR reported that the toad had not been found in the project area. Since there was suitable habitat for this species, the EIR called for surveys to be conducted in potential breeding pools prior to issuance of grading permits and if toads are found, then the FWS and CDFG must be consulted, and a mitigation plan prepared which must include construction of breeding pools on nearby protected lands. In response to Petitioner's claim that there was no timetable for the surveys and no avoidance of impacts where feasible, the Court determined that the City's commitment to mitigation and to a plan to build breeding pools was sufficient and there was a timetable—prior to issuance of grading permits.

Maintain Our Desert Environment v. Town of Apple Valley

(July 7, 2004) 04 C.D.O.S. 6060

Introduction

In 2002, the Town of Apple Valley approved a project allowing the construction of a 1.2 million square foot distribution center with related outbuildings on a 300 acre site. The City Council certified an EIR for the project, adopted findings, and adopted a statement of overriding considerations for seven significant unavoidable environmental impacts. Neither the EIR nor the various public notices issued in connection with the EIR and the public hearings on the project revealed that Wal-Mart would be the project's end user. Maintain Our Desert Environment ("MODE") filed this action challenging the Town's certification of the EIR. The Attorney General filed an Amicus Curiae on behalf of MODE. Following the trial court's denial of the writ, MODE filed this appeal. This case raises procedural issues concerning a petitioner's obligations under CEQA to exhaust administrative remedies and substantive issues regarding the adequacy of the EIR, including whether the project description must identify the end user.

A. Exhaustion of Administrative Remedies

1. *Does an association formed after project approval have standing to seek a writ?*

Even though MODE was formed after the project was approved, several of its members participated in the public hearings on the project and objected to the project. CEQA provides that an organization formed after the approval of a project may maintain an action against a public agency for noncompliance with CEQA if a member of the organization objected to the project during the public review and hearing process. (Pub. Res. Code § 21177.) Thus, the court concluded the plaintiff had met its exhaustion duty as specifically authorized under CEQA.

2. *On what grounds may MODE challenge the EIR?*

CEQA challenges are limited to those grounds raised by any party during the administrative process. (Pub. Res. Code § 21177(a).) MODE argued that this case falls within an exception to this general rule, because the Town failed to provide adequate notice under CEQA. (Pub. Res. Code § 21177(e).) MODE claimed

that the Town's notices were deficient because, among other reasons, it failed to identify Wal-Mart as the end user.

CEQA calls for the notice to include a "brief description of the proposed project and its location." (Pub. Res. Code § 21092(b)(1).) The court interpreted this language to mean "the project description contained in the public notice need not be as extensive as the description in the EIR itself, but need only be a brief, compact summary without elaboration or detail." Given the purpose of this notice to alert the public that it may review and comment on the project's environmental impacts, the notice was not required to identify the project's end user. Consequently, MODE could not be excused from exhausting its administrative remedies and must limit its appeal to those issues properly raised in public comments.

Comments that satisfy the exhaustion requirement must do more than generally object to a project. An issue is adequately raised if it fairly apprises the lead agency of facts or conclusions that can be responded to in the context of the agency's compliance with CEQA. The court determined that MODE was barred from pursuing a number of issues included in its writ petition, because these issues were not raised at the administrative level. The issues the court determined were properly raised are discussed below.

B. Adequacy of the EIR's Technical Sections

1. Was the traffic analysis adequate?

MODE argued that the EIR's traffic analysis was inadequate in several ways. The court rejected all of MODE's arguments and found the traffic analysis complied with CEQA. First, the court upheld the EIR's reliance on trip generation rates based on a traffic study prepared for a similar facility rather than on Institute of Transportation Engineers figures. Second, the court found that the EIR adequately considered the project's total daily truck trips, because the total could be deduced from the information in the EIR and was included in the appendix. Third, although the project would cause the level of service to deteriorate at several intersections, the standard of significance would not be exceeded at these intersections. Thus, the EIR correctly determined that the reduction in the level of service did not amount to a significant impact. Fourth, a mitigation measure requiring the Town to monitor an intersection for signal warrants was sufficient, because it could be reasonably concluded that the Town will install the signals when the warrants are met. Finally, the EIR was adequate even though it did not require defined mitigation for a potential future road project. Given the uncertainty about the road project and its design, it was not practical to determine the precise mitigation at the time of project approval.

2. Was the land use analysis adequate?

The court found the EIR's consideration of land use impacts adequate. The EIR contained a list of the Town's land use policies and goals, analyzed the project's effect on these policies and goals, and required mitigation measures for the significant effects. The EIR recognized that the project would have an unavoidable significant cumulative land use impact. The Town properly adopted a statement of overriding considerations documenting the project benefits (i.e., catalyst to planned development, provisions of jobs, wage benefits, and jobs/housing ratio improvement) that outweighed the unavoidable impact.

3. Was the noise analysis adequate?

The court found the EIR contained adequate information to

justify a finding that no mitigation was reasonable or feasible to control certain roadway noise impacts to several homes. The Town properly concluded that the project's benefits outweighed this unavoidable impact.

4. Was the mitigation for the Mojave ground squirrel adequate?

The court found the EIR provided adequate mitigation for the Mojave ground squirrel by requiring compliance with the California Department of Fish and Game guidelines and permit process.

5. Was the air quality analysis adequate?

The court dismissed MODE's complaints that the air quality analysis relied on trip generation numbers that did not match the numbers used in the traffic analysis. Although acknowledging some discrepancies in the numbers, the court concluded these discrepancies were not great and could not support a finding that the Town acted unreasonably in relying on the information. The court also determined the EIR's analysis of NOx emissions was adequate in that it examined whether project emissions would exceed the threshold of significance and discussed the potential local and cumulative impacts. The Town properly recognized the project's unavoidable significant air quality impacts and adopted a statement of overriding considerations.

C. Adequacy of the Project Description

After recognizing the importance of an accurate project description to the sufficiency of an EIR, the court rejected the notion that the identity of the end user is a required element of an accurate project description. Projects are often developed without any knowledge of the end user. Requiring this information would be impractical and would result in an interpretation without support in CEQA or the CEQA Guidelines. The court emphasized that CEQA is concerned with environmental consequences. Disclosure of the end user identity depends on the ability to "demonstrate that the identity implicates potential physical environmental impacts. Information that has no bearing upon the physical environment has no business in an EIR." Speculation, social and economic concerns unrelated to a significant physical impact, and public controversy absent a factually supported environmental impact do not implicate CEQA and cannot form the basis for a finding that the failure to identify the end user rendered the EIR legally inadequate. Speculation about increased public scrutiny and opposition that may have resulted if the end user had been known failed to impress the court:

In essence the argument merely forwards the position that CEQA cares whether the public would be more likely to agree with Town's approval of an otherwise identical project if it were to be operated by a competitor as opposed to Wal-Mart. The crux of the issue is that the project itself, and therefore its environmental impact, is identical regardless of who will operate it. The only possible reasons for the public to object to accepting Wal-Mart but not a competitor under these circumstances have nothing whatsoever to do with the aims and purposes of CEQA.

MODE claimed the end user identity was necessary because Wal Mart's delivery policy would cause congestion impacts. The court, however, found no supporting evidence in the record.

Rejecting claims that knowledge of the end user would allow the public to double-check the traffic data, the court observed that the public could have investigated the project proponent and discovered it as the real estate division of Wal-Mart. The court characterized claims that Wal-Mart has a history of past environmental abuses as unsupported theory, conjecture, and

innuendo insufficient to find the EIR inadequate. The court also was not persuaded by the argument that the end user's financial capability influences the feasibility of mitigation measures and alternatives. The court observed "if the project can be economically successful with mitigations, then CEQA requires that mitigation, regardless of the proponent's financial status."

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