SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE

TITLE:	DATE & DEPT:	MASTER NUMBER:
FRIENDS OF THE NORTHERN SAN JACINTO VALLEY, et al., v. COUNTY OF RIVERSIDE, et al.	04/11/12 D10	RIC10007572 RELATED CASES: RIC10007574 RIC10007586
COUNSEL: NONE	REPORTER: NONE	

PROCEEDING:
PROPOSED STATEMENT OF DECISION

This is a consolidated matter in which Friends of Northern San Jacinto Valley, Sierra Club, Center for Biological Diversity, San Bernardino Valley Audubon Society, and the City of Riverside all challenge the approval of a project proposed by real party in interest Nuevo Development Company. The Project is the Villages of Lakeview extending over 2,800 acres consisting of 11,350 dwellings, a mixed use town center including some 500,000 square feet of retail, office and commercial uses, public facilities including four schools and a library, and nearly 1,000 acres of open space/conservation areas. Respondent County of Riverside approved the Project and certified the Environmental Impact Report on March 23, 2010. Petitioners filed a joint opening and reply brief. Respondents and real party also filed a joint opposition and will be referred to collectively as "Respondents."

DISCUSSION

I. The EIR failed to adequately evaluate GHG impacts and possible mitigation of these impacts.

Petitioners contend that the County failed to proceed in the manner required by CEQA in that the EIR improperly assessed the significance of the greenhouse gas (GHG) emissions by

comparing them to a potentially unrealistic, unreasonable hypothetical scenario rather than to existing conditions as required by *CBE vs. SCAQMD* (2010) 48 Cal. 4th 310, 322.

Respondents contend they first measured the Project's total GHG emissions against the baseline of existing conditions (zero emissions) to generate the Project's GHG inventory, quantified as 137,637 tons of CO2e annually and that this satisfied CEQA's mandate that project impacts be disclosed and compared to the existing physical environment which serves as a baseline for CEQA purposes. Next, the County exercised its discretion by utilizing compliance with AB 32 as the threshold against which to evaluate the impact on GHG, and compared the Project's GHG inventory against a business-as-usual (BAU) scenario to make its impact significance determination. This approach, according to respondents, provided an opportunity to evaluate the Project's emissions reduction strategy. According to respondents, the BAU hypothetical used represents the Project as proposed absent its voluntary design features, GHG reduction commitments and mitigation measures not require by existing mandates. Respondents contend that the analysis was reasonable and supported by substantial evidence in the record.[1]

It is true that agencies can exercise discretion in formulating and establishing thresholds of significance for each potentially adverse environmental effect (Guidelines §15064(b)), and may use performance standards or guidance documents adopted or issued by regulatory agencies as thresholds of significance (§15126.4(a)(1)(B)). It is also true that, at this time, no agency with particular expertise or jurisdiction over the Project's air quality and GHG emissions has established a quantitative or numeric threshold for determining when or to what extent emissions are significant for CEQA purposes in relation to GHG.

[1] In support of their contention that this BAU approach was proper, respondents ask the court to take judicial notice of a decision from a Kern County trial court proceeding and an appellant's opening brief. The request is denied.

Nevertheless, the hypothetical project proposed for the EIR does not accurately reflect business as usual because it uses an unrealistic scenario which ignores local planning and zoning laws, strips all vegetation from the project, and contemplates development on mountainous portions of the project site. In addition, the hypothetical scenario fails to account for the fact that project approval under CEQA contemplates a process whereby the adverse environmental effects of a project of this nature are identified and analyzed; alternatives are considered; and potential impacts are eliminated or mitigated. The hypothetical project, which ignores not only local planning and zoning laws as well as potential adverse impacts, is not one that could ever be expected to actually occur in the County let alone on the project site. It does not appear the EIR used a "business as usual" approach but instead adopted a "worst-case" scenario as it began its evaluation of the GHG emissions.

Respondents' reliance on *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327 is misplaced. While the *Chula Vista* case did conclude that compliance with AB 32 was a proper threshold of significance and implicitly approved use of a "business as usual analysis" in assessing the significance of the impact, that case is factually distinguishable. In that case, business as usual was based on the existing store – not some hypothetical scenario like here.

Chula Vista simply does not support respondents' use of a hypothetical "BAU" that has no correlation to baseline conditions or to the project as proposed and is not even based on what could be realistically developed in this area in light of existing zoning and other land use regulations.

As the Supreme Court noted in *CBE v. SCAQMD, supra*, 48 Cal.4th 310 at p. 322: "An approach using hypothetical allowable conditions as the baseline results in 'illusory' comparisons that 'can only mislead the public as to the reality of the impacts and subvert full consideration of

the actual environmental impacts,' a result at direct odds with CEQA's intent. [Internal Citation Omitted.] The District's use of the prior permits' maximum operating levels as a baseline appears to have had that effect here, providing an illusory basis for a finding of no significant adverse effect despite an acknowledged increase in NOx emissions exceeding the District's published significance threshold."

Notwithstanding that the Supreme Court was addressing the issue of baseline conditions whereas here we are discussing a proper BAU model, the concerns expressed in *CBE* are the same. The use of this hypothetical "BAU" here which is tied neither to existing conditions or reasonably likely conditions serves only to mislead the public and the decision-makers in their understanding of the actual significance of the GHG emissions, and their effect on the environment. Further, because the EIR improperly assessed the significance of GHG emissions, the EIR could not and did not properly analyze and evaluate feasible mitigation for GHG impacts.

II. The County was required to recirculate the EIR.

The Court finds that new information was added after the close of the public comment period that revealed a substantial increase in the severity of environmental impacts.

In response to comments to the DEIR, a transportation analysis was conducted which indicated an increase of 100 million additional vehicle-miles traveled (VMT) per year (50% increase), and $PM_{2.5}$ concentrations 300% greater than previously disclosed and 95 times higher than Air District's threshold for determining the significance of impacts. Petitioners contend that an agency is required to recirculate an EIR when it adds significant new information after the public comment period has closed, citing §21092.1 and *American Canyon Community vs. City of American Canyon* (2006) 145 Cal.App.4th 1062, 1075-76).

Respondents argue that substantial evidence supports the County's determination that the new information merely clarified, amplified, or made insignificant modifications to the general assumptions that were presented in the draft EIR. According to respondents, the new information did not change the severity of the Project's impacts on global climate changes (GCC) or air quality. They contend that even with the new VMT estimates, the Project would still reduce emissions consistent with AB 32. They conclude that the County's decision not to recirculate was proper, citing *Silverado Modjeska Recreation and Parks vs. County of Orange* (2011) 197 Cal.App.4th 282.

The Court finds that the new information did constitute a substantial increase in the severity of GCC and air quality impacts which required recirculation. (Guidelines §15088.5; Pub. Res. §21092.1, §21166.) The new analysis which revealed the substantial increase in GHG and fine particulates was conducted after the comment period. This new information did not merely supply additional requested details or merely explain the DEIR's analysis. Instead, the methodology used in connection with the DEIR was discarded. A new, more accurate methodology disclosed air quality impacts more severe than previously disclosed.

In addition, the County's reliance on its BAU hypothetical and analysis fails. The County cannot rely on alleged consistency with AB 32 as discussed above.

Petitioners did not have an adequate opportunity to comment on the newly disclosed impacts. The determination that the increased impacts did not warrant recirculation is not supported by substantial evidence.

III. The EIR did not adequately analyze the project's impacts on air quality and the related health impacts.

The Court finds that there is inadequate analysis in the EIR as to the Project's impacts on air quality and related health effects. In discussing significant environmental impacts, direct and

indirect significant effects of the project should be clearly identified and described, giving due consideration to both the short-term and long-term effects on matters including health and safety problems caused by the physical changes. (*Guidelines §15126.2(a).*) Here, the EIR makes only general references to respiratory and pulmonary conditions and cancer health risks. However, it provides little information or analysis as to the specific impacts on the general population versus sensitive receptors, or as to the degree of impacts and the specific effects on the public's health. When the informational requirements of CEQA are not met, an agency has failed to proceed in a manner required by law. (*Bakersfield Citizens for Local Control vs. City of Bakersfield* (2004) 124 Cal. App. 4th 1184, 1220).

The County's reliance on the South Coast Air Basin region-wide Air Quality Management Plan does not relieve it of its obligation to provide a reasonable analysis of the Project's cumulative impacts. (*Guidelines §15130(b).*) Pursuant to *Berkeley Keep Jets Over the Bay Committee vs. Bd. of Port Commissioners of the City of Oakland* (2001) 91 Cal. App. 4th 1344, 1371, the County is required to use its best efforts to find out and disclose all that it reasonably can. Here, Petitioners provided the County with numerous studies addressing the health effects of particulate pollution, yet County's only response was to discredit one of the reports, and to continue to rely on the SCAQMD methodology. Absent any attempt to use its best efforts to find out and disclose all that it reasonably can, the County failed to meet its obligations.

IV. The EIR failed to conduct an adequate review of the project's impacts on regional traffic.

The Court finds that the EIR failed to conduct adequate environmental review of the Project's impacts on regional traffic. The record establishes that the Project will result in over 85,000 vehicle trips per day, and will add 17,000 new car trips to the I-215 each day. Many of the residents will be driving to Moreno Valley and Riverside via the I-215, and those commuting

to Orange and Los Angeles Counties will contribute to the existing problems at the I-15/SR91 interchange.

The EIR failed to analyze the impacts on any of these freeways, and instead restricted its analysis based upon the Riverside County Traffic Impact Analysis Preparation Guide (TIA) and a supplemental analysis. In accordance with the TIA, County studied the area within a five-mile radius of the Project site and conducted a supplemental analysis including 17 additional intersections and 10 additional street segments. An EIR must include a description of the environment in the vicinity of the Project from both a local and regional perspective. (*Bozung vs. Local Agency Formation Comm. (1975) 13 Cal. 3d 263, 283; Guidelines §15125.*) By failing to analyze the Project impacts on the surrounding freeways, County failed to proceed as required by CEQA.

County also argues that it specifically noted there would be a need for subsequent environmental review related to potential traffic impacts and that significant changes with respect to development of regional transportation systems are expected to occur. CEQA, however, requires that the impacts of a proposed project are to be compared to the actual environmental conditions existing at the time of the analysis. (*Sunnyvale West Neighborhood Assn. vs. City of Sunnyvale* (2010) 190 Cal. App. 4th 1351, 1380-1384.) The EIR fails to provide any specific analysis as to the impacts of the Project on the existing freeways.

V. The EIR project description was adequate.

The question concerning which acts constitute the "whole of an action" for purposes of Guidelines §15738 is a question of law. (*Tuolumne County Citizens for Responsible Growth, Inc. vs. City of Rancho Cordova* (2007) 155 Cal. App. 4th 1214, 1224.) As such, it is to be determined by the trial court's independent judgment. In this case, the Court finds that the

construction of the electrical substation and transmission lines, as well as the training dike, are not part of the Project.

The EIR does acknowledge that the new electric substation is necessary to the Project: the existing Nuevo substation only has the capacity to meet projected demands through 2012, after which additional substation capacity (and the extension of transmission lines) will be necessary to provide power to support the current and future growth. The construction of the off-site training dike is necessary to significantly reduce flooding within the Project. However, neither the substation nor the dike, are component parts of the Project and there has been no improper segmentation.

There are general principles used to determine whether a particular act is part of the activity that constitutes a CEQA project. One way is to evaluate how closely the related acts are to the overall objective of the project (the relationship being sufficiently close when the proposed act is among the "various steps which taken together obtain an objective"). (*Tuolumne, supra, p. 1226.)* Another is to consider how closely the act and project are related in time and physical location, and the entity undertaking the action. (*Id.*, at p. 1227.)

In this case, both the substation and dike were planned independently of the Project, and will serve development in addition to the Project. The substation will be built by a separate entity, Southern California Edison to accommodate regional development growth beyond 2012. The dike is part of a previously approved County infrastructure plan to serve regional needs. As such, neither the substation and transmission lines nor the dike are component parts of the Project. (See *Anderson First Coalition vs. City of Anderson* (2005) 130 Cal. App. 4th 1173.)

VI. The EIR adequately addressed the project's noise impacts.

Petitioners contend that the EIR does not properly account for the already existing noise environment attributable to some of the roadways which will serve the Project. They argue that

the EIR improperly uses thresholds of significance to avoid having to confront the possibility that any additional amount of noise might well be significant given the already existing problems. Petitioners contend that the EIR also fails to consider that the Project's incremental noise impacts might be cumulatively considerable. Petitioners conclude that the EIR avoids having to adopt feasible measures to mitigate the Project's contributions to noise.

On the contrary, the EIR acknowledges that because the cumulative noise without the Project is significant, any additional noise contributed by the Project would be significant. The EIR admits that the effect of the Project together with other cumulative impacts will result in significant area-wide cumulative noise impacts. Instead of refusing to examine mitigation for the noise impacts, the EIR considered the use of sound walls to mitigate the significant noise impacts. This mitigation was found not to be feasible, and the EIR concluded that the noise impacts were therefore significant and unavoidable. Petitioners do not dispute the finding that sound walls were not feasible. Nor do they suggest that there were other mitigation measures that could have been considered.

Petitioners also contend that the EIR fails to analyze specific noise impacts resulting from construction of the Project. However, the County was not required to speculate regarding construction activity for project buildup expected to take place over a 20-year period. (See *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 932-933.) Instead, given the conceptual level of the Project, the County properly considered construction impacts to the extent possible and identified mitigation measures.

VII. EIR did not adequately address concerns raised with respect to the Habitat Conservation Plan.

CEQA requires the lead agency to respond to each significant environmental issue that is raised by commenters. (Pub. Res. C. §21091(d)(2).) Major environmental issues raised when

the lead agency's position is at variance with recommendations and objections should be addressed in detail with reasons why specific comments and suggestions were not accepted. (Guidelines §15088(c).) Responses to comments should at least demonstrate a good faith reasoned analysis. (*Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 378.)

Commenters pointed out that the Project's plan to construct "JJ Street" interferes with so-called "Constrained Linkage 20," a habitat block identified in the MSHCP. The Constrained Linkage allows space for migration, plant propagation, and increased mating opportunities between other habitat blocks. JJ Street will be constructed across the Constrained Linkage and will create another barrier to wildlife attempting to travel between the Wildlife Area and the Lakeview Mountains.

The County's responses to comments first maintained that JJ Street does not actually cross the wildlife corridor. But JJ Street is in fact perpendicular to the linkage and will be constructed directly across it.

The County also took the position that JJ Street should be considered part of the planned Mid-County Parkway, which includes the existing Ramona Expressway. This roadway also crosses the linkage and was already anticipated and contemplated by the MSHCP. Comment responses contend that the culvert/wildlife corridor under the Mid-County Parkway will be extended and will run under JJ Street. Petitioners point out that the MSHCP indicates that small mammals are not known to use culverts longer than 64 meters. With the addition of JJ Street, even if parallel to the Mid-County Parkway, the culvert will be at least 87 meters in length. The MSCHP anticipated a 67-meter wildlife crossing, and extending it an additional 20 meters for JJ Street may make the undercrossing unusable for the species and may compromise the integrity

of the Constrained Linkage. The County's analysis failed to address the additional length of the culvert which will be required in order to extend the undercrossing under JJ Street.

VIII. The EIR failed to adequately address the project's growth-inducing impacts.

Petitioners argue that EIR's brief analysis of growth-inducing impacts fails to meet the requirements of Guidelines §15126.2(d). The Project includes improvements to roads, the extension of energy services, and the extension of water lines and sewer services to serve future projects and urbanization. Petitioners further argue that pursuant to *Napa Citizens for Honest Government vs. Bd. of Supervisors* (2001) 91 Cal. App. 4th 342, 370, the EIR should have disclosed information about the housing units the infrastructure will accommodate, and the effect of the additional growth on public services.

The Court agrees that additional information about the Project's growth-inducing impacts should have been provided and analyzed. Although the County submits that such would be speculative, the record indicates that existing information is available which makes such discussion viable. The County references the expansion of the Ramona Expressway and incremental roadway improvements; the construction of new roads; and water and sewer improvements and infrastructure sized to serve future urbanization within the area. It also references "developing communities," and states how the infrastructure improvements and expansions could eliminate potential constraints for future development in the area. Given the extent of vacant and unimproved land surrounding the Project, the County should have been able to provide additional information and analysis about growth-inducing impacts.

IX. The EIR's Discussion of Project Alternatives was adequate.

Petitioners first argue that the Project's objectives are so narrow that they preclude consideration of a reasonable range of alternatives, citing *National Parks & Conservation Assn. vs. Bureau of Land Management* (9th Cir. 2010) 606 F.3d 1058, 1072. The Court finds that

argument unavailing. While certain Project objectives may be possible due to the existing circumstances (e.g., single ownership and location), the objectives overall reflect the County's goals as evidenced in Chapter 2 of the County's General Plan. This is distinguishable from *National Parks*, where only one of the four project objectives served the needs of the BLM. (*National Parks*, supra, at pp.1071-72.)

Petitioners then argue that the EIR improperly failed to analyze an off-site alternative, which is necessary given the significant amendments and zoning changes and the inconsistencies with the General Plan. *(Citizens of Goleta Valley vs. Bd. of Supervisors ("Goleta I")* (1988) 197 Cal. App. 3d 1167, 1179-80; Guidelines §15126.6.) Again, the Court disagrees and finds that the EIR properly considered and then rejected an alternate site. Guidelines §15126.6 requires the EIR identify alternatives that were considered and rejected as infeasible during the scoping process, and briefly explain the reasons underlying the determination. The factors that may be used to eliminate alternatives from detailed consideration in an EIR are failure to meet most of the project objectives, infeasibility, or inability to avoid significant environmental impacts. (§15126.6(c).) Here, the County included such discussion at AR 3403-04. The Court finds that discussion sufficient and distinguishable from that in *Goleta I, supra*.

X. The Project is inconsistent with the General Plan Circulation Element.

Petitioners argue that the Project is inconsistent with various General Plan policies: Land Use (L.U.) Policy 2.1(e) (to concentrate growth near or within existing urban and suburban areas to maintain the rural and open space character to the greatest extent possible); L.U. Policy 17.3 (to ensure development does not adversely impact the open space & rural character of the surrounding area); L.U. Policy 10.1 (to provide sufficient opportunities to increase local employment levels and minimize long-distance commuting); L.U. Police 7.12 (to improve the

relationship and ratio between jobs and housing); L.U. Policy 2.1(a) (to provide a land use mix at the countywide and area plan levels based on projected need); and Air Quality Policy 8.2 (to emphasize job creation and reductions in VMTs in job poor areas to improve air quality. Petitioners also contend the project is inconsistent with General Plan Circulation Element 2.1 which requires the County to maintain target Levels of Service: LOS "C" along all County-maintained roads and conventional state highways.

The question is whether the Project is compatible with and will not frustrate the General Plan's goals and policies. *(Napa Citizens for Honest Government vs. Napa County Board of Supervisors* (2001) 91 Cal. App. 4th 342, 379.) If the Project will frustrate the General Plan's goals and policies, it is inconsistent with the General Plan unless it also includes definite affirmative commitments to mitigate the adverse effect or effects. (*Id.*)

Here, the record establishes that the Project will frustrate the General Plan's policy of maintaining the County's Level of Service standards as described in the General Plan Circulation Element. The EIR admits that at full build-out of both the current General Plan roadway system and the Project, some roadway segments and intersections will not meet the required standards. The General Plan Circulation Element establishes definite standards regarding traffic congestion, not mere guidelines or flexible goals. The County cannot establish specific traffic requirements and at the same time approve a project that will cause unacceptable congestion without taking affirmative steps to handle that increased congestion. (*Napa Citizens, supra*, 91 Cal.App.4th, at p. 380; *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 782-783.) No such affirmative steps or mitigation measures have been developed. This is particularly unacceptable given the improper/inadequate analysis concerning traffic impacts from the Project discussed previously.

Otherwise, the Court accepts the Board's findings of consistency as being supported by substantial evidence despite some inconsistency with a handful of land use policies articulated in the General Plan. A given project need not be in conformity with each and every land use policy. It need only be compatible with the objectives, general land uses and programs set forth in the General Plan. (*Families Unafraid To Uphold Rural El Dorado County v. Board of Supervisors* (1988) 62 Cal.App.4th 1332, 1336.) The County's determination of consistency with its own General Plan is entitled to great deference. It has the unique competence to balance the plan's policies when applying them and has the broad discretion to construe its policies in light of the plan's purposes. (See *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 373-374.)

XI. One of the County's findings in support of the extraordinary amendment to the general plan is inadequate.

The County's General Plan discourages amendments to the foundational elements of the Plan outside of the County's regular five-year amendment cycle. Foundational elements may not be amended outside of the five-year cycle unless specific findings are made that the amendment is justified as a result of extraordinary events. This "Extraordinary Amendment" procedure requires three particular findings to justify an Extraordinary Amendment. (General Plan, Ch. 10 at A-12; Riv. Co. Code §17.08.060(F)). These findings were necessary here because the Project included General Plan Amendment 720 which raised development densities in connections with existing foundational elements. As discussed below, the Court finds the second and third required findings were sufficient and are supported by substantial evidence.

The second required finding to support an extraordinary amendment is that a condition exists or an event has occurred that is "unusually compelling." The County's finding regarding the unusually compelling event cites "an opportunity that is presented by having 2,786 acres

under the control of one entity...to pursue a comprehensive master plan." This finding is sufficient and is supported by substantial evidence.

The third required finding is that a component change is necessary to facilitate implementation of open space or transportation corridor designations arising from MSHCP and CETAP programs that could not be accomplished by a lesser change in the General Plan. The County supports this finding with the real party's commitment to widen the Ramona Expressway, the fact that real party has much of the land necessary for the expansion without the County having to condemn it, and the fact that the Project's circulation system is designed to align with planned access points for the Expressway obviating the need for a frontage road. This third finding is sufficient and is supported by substantial evidence.

The first required finding is that new conditions or circumstances justify modifying the General plan, that the modifications do not conflict with the overall County Vision, and that the modifications would not create an internal inconsistency among the elements of the General plan. Unlike the second and third findings discussed above, when the board made this required finding it did so merely by quoting the language in the extraordinary amendment procedure. The "new conditions or circumstances" are not defined and there is no indication as to what evidence the board relied on to support this finding.

To be adequate, a finding must apprise the reviewing court of the basis for the board's actions. In other words, the finding must "bridge the analytic gap between the raw evidence and the ultimate decision or order." (*Topanga Assn. for a Scenic Community vs. County of Los Angeles* (1974) 11 Cal. 3d 506, 514.) It is not the responsibility of the reviewing court to comb the record to find some evidence that might have supported the board's finding. (*Id.*, at p. 516.) Here, because the board merely quoted the language of the required finding, this Court does

not know and cannot determine the basis for the county's decision. This first finding is not sufficient.

CONCLUSION

Pursuant to California Rules of Court rule 3.1590(c), this tentative decision is the Court's proposed statement of decision with respect to the petitions for writ of mandate filed in RIC10007572, RIC10007574 and RIC10007586 subject to any party's objection under rule 3.1590(g). If timely objections are not filed and served within 15 days of service of this statement of decision, petitioners in RIC10007572 and RIC10007574 are hereby ordered to prepare, serve and submit proposed judgments and peremptory writs of mandate. In RIC10007586, this proposed statement of decision addressed only the first and second causes of action. Unless the City wishes to dismiss its third and fourth causes of action for declaratory relief and injunctive relief, respectively, a final judgment cannot be entered in that case at this time.

A hearing for receipt of proposed judgment in RIC10007572 and RIC10007574 and for status conference on the City's remaining causes of action in RIC10007586 is hereby set for April 30, 2012, at 8:30 a.m., in Dept. 10.

Sharon Waters, Judge
L. Hall (cmg), Clerk