SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE

Historic Court House
Ruling on Matter Submitted

03/15/2024
8:08 AM
Department 1

CVRI2201482
PASS ACTION GROUP vs CITY OF BANNING

Honorable Harold W. Hopp, Judge
E. Escobedo, Courtroom Assistant
Court Reporter: None

APPEARANCES:
No Appearances

Court subsequently rules on matter taken under submission on: 03/13/2024 for Hearing on Writ of Mandate (CEQA).
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Petitioner Pass Action Group brings this action challenging the approval of the Banning Point Project, which it alleges violates CEQA, petitioner's and the public's right to a fair hearing, planning and zoning laws, and the Banning Municipal Code. The Banning Point Project (the Project) includes a tentative parcel map and design review authorizing the subdivision of the site and construction of a warehouse of approximately 620,000 square feet, 10,000 square feet of office space, and 150,000 square feet of high-cube cold storage and six retail buildings comprising 34,000 square feet. The property that would be subject to the development is 47 acres of undeveloped land in the City of Banning. Respondents are the City and its City Council. Real party is Sun Lakes Highland, LLC and Creation Equity, LLC. Petition, ¶¶s 14 to 18.

Right to a Fair Hearing. The petition and complaint raise four issues. First, that three members of the City Council participated in the discussion and approval of the Project despite having made comments allegedly showing bias in favor of it, violating Petitioner's and the public's right to a fair hearing.

"Quasi-judicial or "administrative" hearings are subject to the fair process requirements of California Code of Civil Procedure section 1094.5(b) and, when a vested property or liberty interest is implicated, to the due process requirements of both the federal and state constitutions." The California Municipal Law Handbook (Cal. CEB 2023) § 2.56 citing Today's Fresh Start, Inc. v Los Angeles County Office of Education (2013) 57 Cal.4th 197, 212. "The decision-maker must be fair and impartial." Id. citing, Woody's Group, Inc. v. City of Newport Beach (2015) 233 Cal.App.4th 1012,

1027 (invalidated city council decision on appeal of land use application when council member appealing planning commission decision showed bias and violated local procedures); Golden Day Schools v. Dept. of Education (2000) 83 Cal.App.4th 695, 709 (“initial decision-maker may not sit on review board”). “Fair process and due process require both actual fairness and the appearance of fairness.” Id., citing Nightlife Partners, Ltd. v. City of Beverly Hills (2003) 108 Cal.App.4th 81, 94 (“due process violation when lawyer, advocate for defendant city, later acted as advisor to the judge of administrative appeal”).

“Comments made by an agency member before hearing may constitute evidence of an unacceptable probability of actual bias such that the member could not act as a ‘reasonably impartial, non-involved reviewer.’” Id., citing Nasha v. City of Los Angeles (2004) 125 Cal.App.4th 470, 484. “A personal interest or involvement in the outcome of a matter, or with any participant, that is unrelated to the merits requires disqualification.” The California Municipal Law Handbook (Cal. CEB 2023) § 2.167; see Mennig v. City Council (1978) 86 Cal.App.3d 341, 351. “This rule does not preclude holding opinions, philosophies, or strong feelings about issues or specific projects; it also does not proscribe expression of views about matters of importance in the community, particularly during an election campaign.” Id. City of Fairfield v. Superior Court (1975) 14 Cal.3d 768, 780-782. “The decisionmaker's actions, however, must not ‘cross the line into advocacy’ for or against a project.” Id., citing Petrovich Development Co., LLC v. City of Sacramento (2020) 48 Cal.App.5th 963, 974. Proof of actual bias is not necessary; “it is sufficient to invalidate a decision if ‘an unacceptable probability of actual bias’ by the municipal decision-maker is established.” Id., citing Woody's Group, 233 Cal.App.4th at 1022.

“There is a presumption that administrative adjudicators are unbiased. In the absence of financial or other personal interest, and when rules mandating an agency's internal separation of functions and prohibiting ex parte communications are observed, the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias.” Id., citing Morongo Band of Mission Indians v. State Water Resources Control Board (2009) 45 Cal.4th 731, 741; Petrovich, 48 Cal.App.5th at 973 (“requiring ‘concrete facts’ establishing bias”). “The party asserting bias has the burden of establishing a disqualifying interest.” Id., citing Sweeney v. California Regional Water Quality Control Board (2021) 61 Cal.App.5th 1093, 1144.

Petitioner contends that three council members made statements demonstrating bias. The Court finds that they have met their burden as to one of the three.

Council member Mary Hamlin emailed Petitioner's president, stating that "project appears to be good for the whole community and in the long run will lift the entire community." AR 13051. The email included an attached information sheet that stated the project would have a positive impact on new housing, new businesses and continued growth that would "far outpace" any adverse impact on property values. AR 13054. The information sheet indicated that it would be a mistake for the City to deny approval. AR 13051, 13054. Council member Hamlin also distributed a document on the second day of a Planning Commission hearing on the Project. The document stated that the Project was not a "distribution center" and would have only three large trucks per hour, that she would have opposed it if the Project were a distribution center with hundreds of trucks. AR 17080-17085. In fact, the project is anticipated to have as many as 296 truck trips per day. AR 592. The following day, Hamlin emailed the managing principal of Real Party Creation Equity, congratulating him on the Planning Commission's approval. AR 19736. She asked to be involved in leasing discussions for the project to do damage control and "repair the negativity" to her reputation with constituents. AR 19723-19736. The following week, she further suggested contacting a reporter to correct the record and help her repair her damaged image. AR 17615.

Council member Alberto Sanchez twice posted to social media commenting favorably on the Project before the City Council held a hearing. One post called the Project "great," bringing jobs and tax revenue, reducing homeless population and that that retail aspect "looks great as well." AR 13056. Another added that traffic is being mitigated and that this would be growth, which Banning residents want. AR 19728.

Council member Colleen Wallace, then Mayor, gave a state of the city address in October, 2021, stating that building in Banning is needed to encourage children who grew up in Banning to return and invest. AR 13042-13043.

Council member Sanchez moved for approval of the Project and council member Wallace seconded the motion. However, even with that context, their statements do not overcome the presumption that

they are unbiased. There has been no showing of a financial or personal interest in the Project and no specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias, in the language used by the Court in the Morongo Band of Mission Indians case. 45 Cal.4th at 741.

Councilmember Hamlin, however, demonstrated a personal interest in the success of the Project, rehabilitating her reputation with her constituents. Further, her statements clearly advocate a position in favor of the Project. She not only made statements in favor of the Project, she circulated information that inaccurately understated the number of truck trips the Project would generate, contrary to the final traffic study. AR 592. She stated that the warehouse was not a distribution center but was more like an industrial office building, which is clearly incorrect. AR 13052. While review of the Project was pending, she asked to be involved in leasing discussions. She encouraged the principal of Creation Equity to seek positive press releases and to engage in an "aggressive campaign" to support the Project. AR 17615, 19742. These actions are similar to the "coaching" found in Petrovich, 48 Cal.App.5th at 974-976 (council member took affirmative steps to assist project proponents, acting as an advocate, not as a neutral). That she stated at the hearing that she was unbiased and ultimately voted against its approval does not show her to be unbiased.

City of Fairfield, on which the City relies, is a different situation. As the Supreme Court noted, the "proceedings did not turn upon the adjudication of disputed facts" or applying standards to facts, "the few factual controversies were submerged into the overriding issue of whether the construction of the shopping center would serve the public interest." 14 Cal.3d at 779-780. Moreover, many of the statements made by council members in City of Fairfield were made during election campaigns. The Supreme Court stated that such statements "do not disqualify the candidate from voting on matters which come before him after his election." 14 Cal.3d at 781.

These factors are not present here. The City Council was making a determination as to whether the facts required a subsequent or supplemental Environmental Impact Report or whether an addendum to the Project Environmental Impact Report would be sufficient. Council member Hamlin's statements were not made during an election campaign. Her participation in the City Council's discussion and decision to approve the Project requires the Court to grant the petition. Woody's Group, Inc., 233 Cal.App.4th at 1031 (remedy for participation of biased council member is to grant writ and send

matter back to city council with instructions to reconsider the matter without the participation of the biased council member).

Although the Court is not required to go farther, having found sufficient basis to grant the writ, it will briefly explain its view on the remaining issues. In summary, it does not find that Petitioner has carried its burden of proof on any remaining issue and would not grant the writ but for the fair hearing issue.

There was substantial evidence to support the Council's decision not to prepare a supplemental EIR. Petitioner contends that the City failed to comply with CEQA because it merely prepared an addendum to the Program EIR and did not prepare a supplemental or subsequent EIR for the Project addressing cumulative impacts from the Project and the Sunset Crossroads project, which is currently under environmental review. The Sunset Crossroads project would include 5.5 million square feet of warehouse space and would be located not far from the Project.

Whenever a further discretionary approval by the lead or responsible agency is required for a project for which an EIR or a negative declaration has been certified or adopted, the agency has to consider whether a subsequent or supplemental EIR should be required for that further approval. Kostka & Zischke, Practice Under the CEQA (CEB 2022-2023) § 19.2. "To give a degree of finality to the results, CEQA includes a presumption against requiring any further environmental review once an EIR has been prepared for a project." Id., citing Cal. Pub. Res. Code § 21161; Friends of the College of San Mateo Gardens v. San Mateo County Community College District (2016) 1 Cal. 5th 937, 949; see also CEQA Guidelines § 15162.

As the court explained in the leading case of Bowman v. City of Petaluma (1986) 185 Cal.App.3d 1065, 1073: "[S]ection 21166 comes into play precisely because in-depth review has already occurred, the time for challenging the sufficiency of the original EIR has long since expired [§21167(c)], and the question is whether circumstances have changed enough to justify repeating a substantial portion of the process." Once a project has been approved, no additional steps to comply with CEQA are required, unless a further discretionary approval of the project is necessary. Id. citing Martis Camp Community Ass'n v. County of Placer (2020) 53 Cal.App.5th 569, 604. New information appearing after a project approval does not require that the approval be reopened (CEQA Guidelines

§ 15162(c)), but if another discretionary approval is needed, "the agency considering that approval must determine whether further CEQA review is required due to changes in the project, changes in circumstances, or new information." Id. citing CEQA Guidelines § 15162(a), (c); Willow Glen Trestle Conservancy v. City of San Jose (2020) 49 Cal.App.5th 127, 131.

There are three formats available to add to or amend the EIR depending on the circumstances. If major changes are required to make a previous EIR adequate, a subsequent EIR is required. Kostka & Zischke, Practice Under the CEQA (CEB 2022-2023) § 19.4.

A supplemental EIR may be prepared by the agency if any of the conditions requiring a further EIR exist, "but only minor additions or changes would be necessary to make the previous EIR adequately apply to the project in the changed situation." Kostka & Zischke, Practice Under the CEQA (CEB 2022-2023) §19.5; CEQA Guidelines §15162(a). CEQA Guidelines do not define "minor additions or changes" however, a supplement only has to have the information necessary to make the previous EIR adequate. Id.; CEQA Guidelines §15163(b). "Thus, an EIR supplement need respond only to the project changes, changes in circumstances, or new information that triggered the need to prepare a further EIR …." Id. The discretionary decision to prepare a supplemental EIR as opposed to a subsequent EIR "is tested under a reasonableness standard, with the focus on 'the substance of the EIR, not its nominal title." Id.; City of Irvine v. County of Orange (2015) 238 Cal.App.4th 526, 540.

An addendum to a previously certified EIR must be prepared "when changes or additions to the EIR are necessary but none of the conditions in" CEQA Guidelines §15162 that trigger preparation of a subsequent or supplemental EIR have occurred. Kostka & Zischke, Practice Under the CEQA (CEB 2020-2021) §19.6; citing Friends of the College of San Mateo Gardens, 1 Cal.5th at 946. "Preparation of an addendum is thus a way to make minor corrections to an EIR without recirculating the EIR for further review." Id. at §19.6; CEQA Guidelines §15164(c). "An addendum may also be used to evaluate changes to a project, changes in circumstances, or new information, and to document the agency's determination that a subsequent or supplemental EIR is not required. Id.; CEQA Guidelines §15164(e). "The agency's decision-making body must consider the addendum along with the final EIR before making a decision on the project." Ibid.

Where the agency finds "that impacts resulting from changes to the project do not differ significantly

from those described in the prior EIR, a further EIR is not required." Id. at § 19.13 citing Bowman v. City of Petaluma (1986) 185 Cal.App.3d 1065, 1079 (following a change in access to a project site, an updated traffic report's conclusions were substantially identical to those in the original EIR, which were not considered substantial so, no further EIR was required); see Citizens Against Airport Pollution v. City of San Jose (2014) 227 Cal.App.4th 788, 802 (an addendum's analysis showing that noise and air pollution impacts from airport operations would decrease in the future, supported agency's determination that changes would not result in new significant impacts or substantially different impacts from what was described in prior EIRs); Fund for Environmental Defense v. County of Orange (1988) 204 Cal.App.3d 1538, 1548 (subsequent EIR not required for change in source of water for project because addendum to EIR concluded that impacts were same as those assessed in project EIR even though provider of water service changed).

There is no dispute but that the differences between the original project and the current version of the Project do not result in new significant environmental impacts. Indeed, the current version of the Project is significantly smaller than the original project.

Have there been substantial changes "with respect to the circumstances under which the project is being undertaken which would require major revisions to the environmental impact report"? Cal. Pub. Res. Code § 21166(b); CEQA Guidelines § 15612(a)(2) (adds "due to the involvement of new significant, environmental effects or a substantial increase in the severity of previously identified significant effects.") If there are such changes, a subsequent or supplemental EIR is required only if: 1) the change in circumstances is substantial; 2) the change involves new or more severe significant environmental impacts; 3) the change will require major revisions to the previous EIR on the new or more severe impacts; and 4) the impacts were not covered in the previous EIR. Kostka & Zischke, Practice Under the CEQA (CEB 2022-2023) § 19.14.

Third, has new information that "was not known and could not have been known at the time the environmental impact report was certified as complete" become available? Id. at § 19.18 citing Cal. Pub. Res. Code §21166(c). The CEQA Guidelines explain that the new information could not have been known with the exercise of reasonable diligence and must be of "substantial importance." Id. citing CEQA Guidelines § 15162(a)(3).

Petitioner argues that both the second (substantial changes to the circumstances under which the Project is being undertaken) and third (new information that could not have been known has become available) conditions exist because of the Sunset Crossroads project.

Petitioner asserts that three months after the PEIR was certified, the City issued a notice of preparation for thee Sunset Crossroads project. AR112944-12961. Sunset Crossroads involves over 500 acres and, as noted above, would include 5.5 million square feet of industrial/logistics use. AR 12944, 12950, 12956. It requires an amendment of the City's general plan for much of the acreage, a specific plan creating 19 distinct planning areas, a parcel map and vesting tract map, and a pre-annexation and development agreement. AR 12944-12945. The Sunset Crossroads would be about half a mile away from the Project at the closest point. The Sun Lakes senior community is between the projects. AR 8580, 12954. The Sunset Crossroads would include an extension of Sun Lakes Boulevard, which trucks from the Project could use to access the nearby freeway (although as City points out, there would be a much shorter access to the freeway without using the extension of Sun Lakes Boulevard).

Petitioner is correct, of course, that the PEIR and the addendum do not analyze the cumulative impact of the Project and Sunset Crossroads. However, City argues that Petitioner has not shown that the changed circumstances compel the conclusion that the significant environmental effects will be different or more severe than those previously identified and that "major revisions" to the PEIR are necessary. The Project is smaller—about 30 percent smaller—than what was contemplated by the PEIR. Would the Project have cumulatively considerable incremental effects? CEQA Guidelines § 15130(a). If not, the effect is not so significant as to require a subsequent or supplemental EIR. Id. If other projects by themselves would have significant cumulative impacts—something that is highly likely true for Sunset Crossroads—that "does not constitute substantial evidence that the proposed project's incremental effects are cumulatively considerable." CEQA Guidelines § 15064(h)(4).

City asserts that it relied on SCAQMD methodology in concluding that if the project-specific impacts exceed SCAQMD's local and regional thresholds of significance, only then would the impact be cumulatively considerable. The City determined that the Project would comply with the Air Quality Management Plan, and would not exceed regional or local significance levels. AR 135-138, 224-226, 5861, 2760.

City also argues that the Sunset Crossroads project is too uncertain to constitute a change in circumstances that would require assessing the cumulative impact of the Project and Sunset Crossroads.

To the extent that it is certain, the Sunset Crossroads project if approved would involve far more land, a much larger construction, and a general plan amendment, a specific plan creating 19 distinct planning areas, a parcel map and vesting tract map, and a pre-annexation and development agreement. It would no doubt have far more significant environmental impacts than the Project. If other projects by themselves would have significant cumulative impacts—which seems clearly the case here—that is not substantial evidence that the proposed project's incremental effects are cumulatively considerable. CEQA Guidelines § 15064(h)(4). Accordingly, the Court concludes that substantial evidence supported the City's decision not to include cumulative impacts from the Project and Sunset Crossroads in the environmental documents for the Project and to prepare an addendum instead of a supplemental or subsequent EIR for the Project.

Substantial evidence supported the City's project approval findings. Petitioner argues that there is no guarantee that the office and retail space that is to serve as a buffer between the existing housing and the warehouse element of the Project will be built in time to serve as a buffer and may never be built. City found the tentative map and design review consistent with the general plan and the specific plan amendment.

"Courts will defer to an agency's decision on consistency with its own plan unless, on the basis of evidence before the decision-making body, a "reasonable person" could not have found the project to be consistent." Kostka & Zischke, Practice Under the CEQA (CEB 2023) § 12.33 citing The Highway 68 Coalition v County of Monterey (2017) 14 Cal.App.5th 883, 896 (a determination of consistency between a project and a "general plan can be reversed only if it is based on evidence from which no reasonable person could have reached the same conclusion"); Clover Valley Foundation v City of Rocklin (2011) 197 Cal.App.4th 200, 239 ("no reasonable person would have determined that the project was inconsistent with the general plan").

Notably, perfect conformity between a project and the general plan is not required, only compatibility

with the general plan's objectives and policies is needed. That determination is subject to a highly deferential standard of review. It is Petitioner's burden to establish inconsistency. California Native Plant Society v. City of Rancho Cordova (2009) 172 Cal.App.4th 603, 638. The Court will not substitute its judgment for the City's; the City's determination "comes to this court with a strong presumption of regularity." Ibid. This is because courts recognize that "the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity" and "the governmental agency must be allowed to weigh and balance the plan's policies when applying them." Naraghi Lakes Neighborhood Preservation Assn. v. City of Modesto (2016) 1 Cal.App.5th 9, 18-19.

City's conclusion that the Project is consistent with the general plan and specific plan amendment is supported by substantial evidence. The City found that the Project will not unreasonably interfere with use and enjoyment of neighboring properties because the warehouse is to be built up against the I-10 freeway and the railroad away from residences; it will back up against Sun Lakes Village Shopping Center buildings away from residences to the south and east; and the retail and offices uses will provide screening/buffering from these residential uses "in the future." AR 81 (emphasis added by Petitioner.) However, as argued by the City, there is nothing in its findings that required the retail and office elements (R&S District) would be built before or concurrently with the warehouse or would change the findings if the retail and office space were developed later. That an alternative condition could be proposed to address Petitioner's screening concerns—requiring the landscaping—and was adopted supports the City's finding. City could and did find that landscaping is a reasonable alternative for buffering to the construction of the office and retail space.

Project does not conflict with the noise element of the general plan. Petitioner argues that the Project approval authorizes heavy truck use on Sun Lakes Boulevard, which violates the noise element of the general plan because that street is not designated as a truck route. Program 4.A provides that other than traffic providing location-specific services and deliveries, construction and delivery trucks are limited to designated truck routes, which does not include Sun Lakes Boulevard. The City is within its discretion to interpret its general plan. Naraghi Lakes Neighborhood Preservation Assn. v. City of Modesto (2016) 1 Cal.App.5th 9, 18-19. Its determination is within that discretion.

For the foregoing reasons, the Petition is granted in part. Petitioner to prepare a proposed Writ and to

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circulate it in the manner required by Rule 3.1312 of the California Rules of Court.

Notice to be given by Clerk.
Minute entry completed.