SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 12/10/2021 TIME: 03:00:00 PM DEPT: C-69

JUDICIAL OFFICER PRESIDING: Katherine Bacal
CLERK: Calvin Beutler
REPORTER/ERM:
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2020-00030308-CU-TT-CTL** CASE INIT.DATE: 08/28/2020
CASE TITLE: **Save Our Access vs CITY OF SAN DIEGO [IMAGED]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Toxic Tort/Environmental

APPEARANCES

The Court, having taken the above-entitled matter under submission on 12/3/2021 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

Petitioner Save Our Access' petition for writ of mandate is **GRANTED**.

Preliminary Matters

Respondents' request for judicial notice of exhibit 1 and fact number 1 is denied as irrelevant. Only relevant evidence is admissible. Evid. Code § 350. Respondents' fact number 1 and exhibit number 1 were not before the agency at the time it made its decision and thus cannot be considered by this Court. See Pub. Res. Code § 21167.6(e). As our California Supreme Court has made clear, "extra-record evidence can never be admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision." *Western States Petroleum Assn. v. Superior Ct.* (1995) 9 Cal.4th 559, 579; see also *Manderson-Saleh v. Regents of University of California* (2021) 60 Cal.App.5th 674, 695-696 (citing *Western States* but explaining that the extra-record evidence was admissible to explain the course of conduct between the parties). While this Court acknowledges the importance of the will of the voters as expressed in the post-Ordinance, Measure E Election results, those results cannot be considered as within the exception expressed in *Western States* or *Manderson-Saleh.* The results would do nothing other than raise (or answer) a question regarding the wisdom of the City's decision.

The parties' requests for judicial notice are otherwise granted.

Background

Petitioner asserts five causes of action in its petition for writ of mandate under the California Environmental Quality Act ("CEQA"), each having to do with the City's alleged failure to follow CEQA procedural requirements, including preparing an environmental impact report ("EIR") and all that an EIR entails. The petition alleges the City Council adopted an Ordinance (O-21220) and approved a ballot

measure (Measure E) to amend People's Ordinance O-10960 and the Municipal Code to exclude the Midway-Pacific Highway Community Plan Area from Coastal Zone Height Limits and remove the 30-foot height limit for the coastal zone without performing an environmental review for the Project beyond the 2018 Midway-Pacific Highway Community Plan Update Final Program EIR. Pet. ¶ 16. (Ordinance 21220 is hereinafter referred to as "the Project.") Petitioner seeks a writ of mandate vacating the approval of the Project and enjoining any further steps until lawful approval is obtained after an adequate environmental analysis is prepared and considered, adequate notice and opportunity is given to interested parties, and findings supported by substantial evidence are adopted. ROA # 1.

Discussion

- **Standard of Review**

In reviewing an agency's compliance with CEQA, the Court's inquiry extends "only to whether there was a prejudicial abuse of discretion." *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 512. An agency may abuse its discretion under the CEQA by either: "failing to proceed in the manner CEQA provides" or "by reaching factual conclusions unsupported by substantial evidence." *Id.* Whether the agency employed correct procedures is reviewed de novo, whereas the agency's substantive factual conclusions are accorded "greater deference." *Id.*
After a public agency prepares an EIR for a project, CEQA does not require a further EIR unless substantial changes are proposed or will occur that require major revisions or if new information becomes available. *Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal.App.4th 192, 196, citing Pub. Res. Code § 21166; Cal. Code Regs., tit. 14 ("Guidelines") § 15162. When an agency prepares a "'program EIR' for a broad policy document such as a local general plan," the agency may limit future environmental review for later activities that are found to be "within the scope" of the program EIR. *Id.,* citing Guidelines § 15168(c)(2).

Where a court reviews an agency's decision under section 21666 to not require a subsequent or supplemental EIR, "the traditional, deferential substantial evidence test applies. The court decides only whether the administrative record as a whole demonstrates substantial evidence to support the determination that the changes in the project or its circumstances were not so substantial as to require major modifications of the EIR." *Latinos Unidos de Napa*, *supra*, at 200–201 (the presumption flips in favor of the agency and against further review because in-depth review has already occurred).

On the other hand, in situations where a program EIR is certified and a *later* project is proposed, then section 21166 is inapplicable. *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1319. In those situations, the agency is obligated to consider if there is a fair argument the new proposal might cause significant effects on the environment that were not examined in the prior program EIR, and if so, require preparation of a tiered EIR under section 21094. *Id.* at 1319-1321; see also *Center for Sierra Nevada Conservation v. County of El Dorado* (2012) 202 Cal.App.4th 1156, 1171 (holding that CEQA required a tiered EIR, explaining that if a program EIR is sufficiently comprehensive it can be used for a series of related actions as long as they were adequately covered in the program EIR but, in this case, the proposed new activity was a separate project, and thus, the fair argument test applied). The Court concludes that this is one of the latter situations.

- **Whether the Project is a New Project or a Later Activity within the Program EIR**

An EIR provides both public agencies and the general public detailed information about the effects a proposed project is likely to have on the environment, the ways in which effects of the project might be

minimized and indicates alternatives to such a project. *Sierra Club v. County of Fresno, supra,* at 511 (holding an EIR to be inadequate). "With narrow exceptions, CEQA requires an EIR whenever a public agency proposes to approve or to carry out a project that may have a significant effect on the environment." *Id.* (citation omitted). An EIR "is a document of accountability": if CEQA is followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, *being duly informed*, can respond accordingly to action with which it disagrees." *Id*. (citation omitted, emphasis added). Again, the Court notes its appreciation of those who participated in the November 20 election; the question here has nothing to do with the election results and everything to do with whether the voters were "duly informed."

Generally, "CEQA compliance is required when a project is proposed and placed on the ballot by a public agency." *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 171 (explaining further that if an EIR is required, the information contained in the EIR must be made available to the electorate for its consideration prior to the election). Here, the administrative record shows the City Council approved Measure E to submit to the voters to approve to exclude the Midway-Pacific Highway Community Plan Area from the 30-foot height limit in the Coastal Zone (again, for purposes of this motion, the City Council's actions are referred to as "the Project"). AR233; AR14237. The question, then, is whether the Project is merely "later activity" within the scope of the program EIR, as respondent argues (and thus would be reviewed under section 21666) or whether it constitutes a new project under CEQA, which requires environmental review under a tiered EIR, as petitioner asserts.

As explained by the Court in *Sierra Club v. County of Sonoma, supra,* there are several types of EIRs. Project EIRs examine the environmental impacts of a specific development project; in contrast, program EIRs are a "quite different type." *Id.* at 1316. Program EIRs may be prepared for a series of actions "that can be characterized as one large project" and are related either (1) geographically; (2) as logical parts in the chain of contemplated actions; (3) part of general criteria governing the conduct of a continuing program; or (4) as individual activities carried out under the same authorizing authority and "having generally similar environmental effects which can be mitigated in similar ways." *Id*. It is undisputed that the 2018 Midway-Pacific Highway Community Plan Update Final Program EIR was a program EIR.

Respondent contends that the Project was a "later activity" that was within the scope of the program EIR and the Court must review its decision not to prepare a subsequent EIR under the deferential substantial evidence standard. At the hearing, respondent further argued that a program EIR need not identify every detail or conceivable development scenario for later activity to be considered within the scope that program EIR, citing *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036. This concept was accurately stated; the application to this case is a different matter.

The issue in *Citizens for a Sustainable Treasure Island* was whether the City abused its discretion by preparing a project EIR *instead of* a program EIR. *Id.* at 1047. The court in *Citizens for a Sustainable Treasure Island* emphasized that in reviewing the EIR in front of it, it detected "no attempt to avoid supplemental review under section 21166," nor did the designation of the EIR as a project EIR, rather than a program EIR, "create any shortcut around the environmental review process as it applies to future site-specific approvals." *Id.* at 1050. Thus, the *Citizens for a Sustainable Treasure Island* court explained, the question was not whether a program EIR should have been prepared, but whether the EIR addressed the environmental impacts of the project "to a 'degree of specificity' consistent with the underlying activity being approved through the EIR." *Id.* at 1052. With that framework, the court had "no quarrel" with case law stating the general CEQA principle that "[a]n accurate, stable and finite project

description is the sine qua non of an informative and legally sufficient EIR." *Id.* (citation omitted). This Court posed to respondent's counsel how the program EIR could be read to have an accurate, stable and finite project description which could be read to include the Project as later activity within the scope that program EIR. It did not get a good answer.

"[A] project description that gives conflicting signals to decision makers and the public about the nature and scope of the project is fundamentally inadequate and misleading." *Id.*; see also *Washoe Meadows Community v. Department of Parks & & Recreation* (2017) 17 Cal.App.5th 277, 290 (the failure to include relevant information that precludes informed decision-making and informed public participation, is prejudicial and requires reversal). So, for example, in *Citizens for a Sustainable Treasure Island* the information on building heights included "representative towers" placed in each zone at the maximum height proposed as part of evaluating the impacts on scenic vistas. This evidenced a "good faith effort at forecasting" what was expected to occur if the project were approved. *Id.* at 1053-1054, Fn. 7. How this authority could be relied on for the proposition the Project here constituted a later activity within the scope of the program EIR is perplexing.

It follows that the applicable inquiry is whether the evidence supports a fair argument that the Project may have significant environmental impact that was not examined in the prior program EIR. *Sierra Club v. County of Sonoma, supra,* 6 Cal.App.4th at 1316, 1318 (under this standard, the agency's decision not to require a subsequent or supplemental EIR can be upheld only where there is no credible evidence to the contrary). The Court thus examines whether substantial evidence in the record shows the Project may arguably have significant effects on the environment. If so, then the respondent should have prepared a tiered EIR. *Id.* at 1321.

- **Fair Argument Application**

Petitioner argues the program EIR did not examine the Project's potential impact on scenic vistas or views. Petitioner's argument is buttressed by substantial evidence. Though the program EIR considered whether the Project would result in a substantial obstruction of a vista or scenic view from a public viewing area in the community plan, the analysis stated that future projects "would not result in new obstructions to view corridors along public streets where view opportunities largely exist" and the "proposed CPU area *would blend with the existing urban framework through established and regulated height and setback regulations*...." AR905, emphasis added. Based on this analysis, the program EIR stated the proposed CPU would not substantially alter or block public views from critical corridors, open space areas, public roads or public parks. *Id*. The program EIR's use of the language "existing" framework and that it would "blend with" the "established" height regulations show they considered the existing limitations, and not the maximum structure heights mandated by the proposed base zones if the 30-foot limitations were removed. Petitioner thus has put forth substantial evidence that the Ordinance has effects that were not examined by the program EIR.

In contrast, respondent cites to evidence showing it considered generally the possibility of no 30-foot height limits in the area. AR709 (map of proposed zoning with various base zones ranging from 30 feet up through 100 feet), AR8555 (Appendix N stating the land use projections were based on maximum permitted densities based on the proposed zoning, and that the project assumes development at "100 percent of permitted residential density"). Respondent also cites to a memorandum, in which the Planning Department states it considered whether the ballot measure would result in environment effects above those analyzed in the program EIR, including visual impacts. AR14365. Yet none of these sources show an *analysis* of the impacts to those public scenic vista or viewpoints by buildings exceeding the height limits. Respondent also does not cite to any drawing renderings or public

commentary as to the ways in which those vista and views may be impacted by buildings exceeding the 30-foot height limit. Indeed, the discussion in the record of vistas and views makes clear that such assumed a height limit of 30 feet – the very opposite of the Project.

At the hearing, respondent argued that the record shows the Planning Department did not consider the 30-foot height limit in the program EIR, and instead analyzed impacts based on the adopted zoning. AR12268 and 12274. While one of the emails states that the analysis did not consider the 30-foot height limit, the record does not support this statement. And, notably, the other emails in the string state the very opposite. At best, the emails cited by counsel raise questions as to the meaning behind the text – i.e., whether the Planning Department's statement that they "did not consider" the 30-foot height limit means the program EIR did not consider – and thus did not analyze – the impacts of removing the limit, or whether "did not consider" means they removed the 30-foot height limitation when conducting their analysis. Even if the Court were to adopt the respondent's interpretation of these emails, they do not suffice to negate petitioner's showing that substantial evidence shows the program EIR did not examine the Ordinance's potential impact on scenic vistas or views for the reasons noted above. Accordingly, a tiered EIR should have been prepared to consider the impact of the Ordinance on the environment.

Petitioner also asserts additional significant environmental impacts may occur. MPA at 8 (citing potential other significant environmental impacts to traffic/transportation, air quality, water quality, housing, greenhouse gas emissions). Because an environmental review of the impacts of removing the height limit is being directed for the reasons noted above, it is anticipated such environmental review will analyze the potential other impacts associated with the Ordinance.

Conclusion

For the reasons stated, petitioner's petition for writ of mandate is **GRANTED**.

The minute order is the order of the Court. The Clerk is directed to give notice of this ruling.

While Petitioner is directed to prepare the proposed writ in accordance with this order and Pub. Res. Code section 21168.9, as agreed in Court the parties will meet and confer regarding the content of the writ.

Judge Katherine Bacal