

Ballona Wetlands Land Trust v. City of Los Angeles (2011) 201 Cal.App.4th 455

This litigation was the latest in a series of lawsuits over development of the Playa Vista project. The City certified an EIR and approved the Playa Vista Phase 2 mixed use project that is the subject of this lawsuit in 2004 (the adjoining Phase 1 is already built). The City was sued in 2005 and that litigation ended in 2008 with the trial court issuing a writ ordering the City to vacate its approval and EIR certification, and to revise the EIR if it wished to approve the project.

The City revised sections of the EIR relating to land use, archaeological resources, and wastewater. It also added new section discussing the impacts of global climate change on the project. When the City petitioned the trial court to discharge the writ, Ballona objected. In 2010, the trial court overruled the objections, discharged the writ, and granted costs to the City and developer. Ballona appealed that decision.

Ballona and its fellow appellants contended on appeal that the revised EIR failed to discuss “preservation in place” as a means to mitigate impacts on archaeological resources, failed to discuss impacts relating to sea level rise resulting from climate change, included a misleading project description that didn’t disclose that the developer previously agreed to eliminate land use entitlements that it allegedly included in Phase 2, the finding of no significant impact on land use consistency is inconsistent with the City’s Thresholds Guide, and that the City and developer were not prevailing parties entitled to costs. The Court of Appeal upheld the trial court’s decision.

The project site contained two historic archaeological sites, both of which adjoin a riparian corridor that was built as part of the project (disturbing both sites). Guidelines Section 15126.4(b)(3) states that preservation in place is the preferred method of mitigating impacts to historic archaeological sites and requires that an EIR include a discussion of preservation in place. When there are several measures available to mitigate the impact, the EIR should discuss each and the basis for selecting a particular measure.

The City’s revised EIR discussed preservation in place, but noted that after removal of archaeological resources, preservation in place is infeasible. Although the revised EIR examined alternative locations for the riparian corridor, it ultimately found them to be infeasible because returning the archaeological resources to their prior resting places and relocating the riparian corridor would disturb additional archaeological resources and destroy the existing riparian habitat. The City also implemented other mitigation measures, including compliance with an archaeological treatment plan, monitoring, and work stoppage if unknown resources are encountered. The Court found that the City’s approach satisfies the requirements of Section 15126.4(b)(3).

The revised EIR’s new section on climate change focused on the project’s contribution to greenhouse gas emissions, while briefly noting that climate change may result in sea level rise and the inundation of coastal areas. Ballona’s comments on the draft EIR stated that the revised EIR must address both the impacts of sea level rise on the project and any project-related changes in sea level rise’s impacts on the surrounding area. Ballona

submitted a draft report by the California Climate Change Center that included a map allegedly showing the project site within an area that could be inundated as a result of flooding in combination with sea level rise. The City countered with an engineer's report contradicting the Climate Change Center report, based on site-specific information about the topography of the area, the fact that the site is two miles from the ocean, and other factors that would indicate the site would not be inundated.

The Court opined that while an EIR must identify and analyze the significant environmental effects that may result from a project, it is not required to examine the significant effects of the environment on the project. The Court noted that Guidelines Section 15126.2(a) states that an EIR "shall also analyze any significant environmental effects the project might cause by bringing development and people into the area affected," but concluded that this Guideline is neither consistent with CEQA's legislative purpose nor required by the CEQA statutes. Accordingly, the Court stated:

Contrary to Guidelines section 15126.2, subdivision (a), we hold that an EIR need not identify or analyze such effects. (*City of Long Beach, supra*, 176 Cal.App.4th at p. 905; cf. *SOCWA, supra*, at pp. 1616-1618.) Although the Guidelines ordinarily are entitled to great weight, a Guidelines provision that is unauthorized under CEQA is invalid. (*Laurel Heights I, supra*, 47 Cal.3d at p. 391, fn. 2; *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 109-110.)

Ballona also argued that the City's response in the final EIR to its comments about the impacts of sea level rise on the project were inadequate. The Court held that the engineer's report cited by the City in its response was an adequate response.

The Playa Vista project Phases 1 and 2 was described in a specific plan that set out zoning requirements as well as an overall limit on the allowable level of development within the two phases. The Phase 2 project included a proposed specific plan amendment that would substantially increase the amount of development on the Phase 2 site. The original 2004 EIR's project description was found to be "materially misleading" by the Court because it had actually described the change as reducing the amount of development that could be allowed. Accordingly, in 2008 the Court had ordered the city to revise these discussions in the EIR and the City had done so. Ballona now challenged the adequacy of the project description on the grounds that it did not reflect commitments allegedly contained in the statement of overriding considerations that the City had adopted with approval of the original project in 1994. The Court dismissed this new challenge on the grounds that it reflected facts that could have been litigated in 2004, but were not. In the words of the Court: "[t]he failure to assert such a challenge before the entry of judgment or the failure to successfully appeal the judgment on an issue arising from facts in existence before the entry of judgment precludes a party from asserting the challenge in connection with postjudgment proceedings concerning compliance with the writ."

The Court upheld the grant of costs to the City and developer. Although Ballona had

prevailed in the 2004 litigation, the award of costs related to the 2010 decision which Ballona had lost. As prevailing parties, the City and developer were entitled to recover their costs.

In mid-April 2012, the California Supreme Court denied requests to review or depublish this case. As a result, the decision stands as precedent.