



Slam Dunked! First District Rejects All CEQA And Land Use Challenges To Golden State Warriors Event Center Project And EIR In Expedited Litigation

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In a lengthy published opinion filed November 29, 2016, the First District Court of Appeal rejected all legal challenges to the City of San Francisco's Final Supplemental Environmental Impact Report (FSEIR) and related land use approvals for a 488,000-square-foot multipurpose event center project on 11 acres in the City's Mission Bay South redevelopment plan area (the "Project"). *Mission Bay Alliance, et al. v. Office of Community Investment and Infrastructure, et al. (GSW Arena LLC, et al., Real Parties in Interest)* (2016 1st Dist., Div. 3) ____ Cal.App.5th ____, 2016 WL 6962504. The event center would host home games of the Golden State Warriors NBA basketball team, concerts, conferences, conventions and other sporting and cultural events, and the overall Project would also include "a variety of mixed-use structures, including two 11-story office and retail buildings, parking facilities, and 3.2 acres of open space."

Tiered FSEIR For Certified Environmental Leadership Development Project Subject To Expedited CEQA Litigation

The Project FSEIR tiered to a 1998 FSEIR for the Mission Bay North and South area redevelopment plans. In April 2015, Governor Brown certified the proposed Project as an "environmental leadership development project" under Public Resources Code § 21178 et seq, requiring fast track CEQA review and litigation. The Court of Appeal observed that the 270-day target for resolution of judicial proceedings established pursuant to Public Resource Code § 21185 carries no penalty for noncompliance, is implicitly qualified by feasibility considerations, and was not met here (largely due to delay associated with transferring one of two consolidated CEQA actions that was improperly filed in Sacramento); however, it noted the parties and courts met most applicable deadlines and resolved the CEQA petitions at the appellate level "considerably sooner than would have been the case had the project not been certified under Section 21184 as an environmental leadership development project."

Environmental Impact Topics Held Properly Excluded From Detailed FSEIR Analysis

In upholding the City's environmental review, the Court first held the FSEIR properly "scoped out" land use consistency, biological resources, hazardous materials and recreational resources from detailed analysis based on the Initial Study's findings that the Project's effects in these areas were either insignificant or adequately examined in the prior program EIR (1998 FSEIR). It noted the "substantial evidence," rather than the "fair argument," standard of review applies to such determinations in the context of review of a later project following a prior program EIR.

The Court observed that "land use" consequences, including the Project's impacts on the character of and circulation within the Mission Bay South neighborhood and adjacent UCSF hospital/campus facilities, were fully analyzed and disclosed through the EIR's studies of other impact areas (e.g., traffic, noise) despite the fact that land use was not expressly designated as a separate study subject. It characterized plaintiffs' land use claims as "essentially a policy disagreement with OCII's determination that an event center will enhance the neighborhood."

The Court also rejected – as unsupported by substantial evidence or fair argument – plaintiffs' argument that loss of a half-acre excavation pit (with ruderal vegetation and limited biological value) resulting from a prior environmental cleanup would significantly impact biological resources. It further rejected plaintiffs' challenges to the adequacy of an existing risk management plan to address the site's contaminated soils (from prior heavy industry), and to the initial study's conclusion that the Project (especially given its on-site open space) would not degrade existing parks and recreational facilities.

Disposition Of Plaintiffs' FSEIR Challenges

With respect to the "big ticket" issues analyzed in the FSEIR and challenged by plaintiffs, the Court addressed a number of complex issues and rendered some interesting holdings. Some highlights include:

Transportation Impacts:

- The FSEIR disclosed significant traffic and congestion impacts, and analyzed extensive mitigation measures, and the City recognized and overrode significant and unavoidable impacts on identified intersections and on regional transit. The Project was defined to include a Transportation Management Plan (TMP), new or upgraded signals or lane reconfigurations at 20 intersections, six newly constructed street segments, expanded/modified light rail passenger platforms, and newly constructed, expanded and relocated sidewalks and bike lanes. The TMP includes strategies to reduce single-occupancy vehicle use, increase rideshare, transit, bicycle, and walk modes for Project-related trips, and expand the existing Mission Bay Transportation Management Association Shuttle Program, as well as event transportation and travel demand management strategies. It incorporated SF Muni's existing special event transit service plan, included a "local/hospital access plan" for residents and UCSF access, and contained specific performance standards and provisions for monitoring and refinement, e.g., maximum 53% car attendees for weekday events, 59% for weekends, etc., to be met by the middle of the Warriors' third season at the event center, with various enforcement measures also included. Transportation impacts of various activity scenarios (e.g., no event, 9,000-attendee convention event, 18,000-attendee basketball game,

same with overlapping SF Giants game) were evaluated, resulting in transit impact findings requiring additional BART trains and cars, and Golden Gate Transit buses and ferry service.

- Addressing the sometimes elusive distinction between *mitigation measures* imposed by the lead agency on a proposed project, and environmentally-beneficial *project components* incorporated by the applicant in the proposal, the Court rejected plaintiffs' argument that the FSEIR improperly included the Muni TSP as part of the Project, rather than as a mitigation measure, and hence failed to consider alternative feasible mitigation measures. Noting that "[p]roject applicants are encouraged to develop comprehensive transportation management plans" (citing *City of Hayward v. Trustees of the California State University* (2015) 242 Cal.App.4th 833, 851-852), the Court also acknowledged that "[t]he distinction between elements of a project and measures designed to mitigate impacts of the project may not always be clear" (quoting *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 656, fn. 8), and that "cases have wrestled with this distinction[.]" (Citing *Save the Plastic Bag Coalition v. City and County of San Francisco* (2013) 222 Cal.App.4th 863, 882 [10-cent disposable bag fee held part of proposed ordinance from inception, not mitigation measure].) Per the Court: "Arguably, some components of the [Muni] TSP might be characterized as mitigation measures rather than as part of the project itself. Any mischaracterization is significant, however, only if it precludes or obfuscates required disclosure of the project's environmental impacts and analysis of potential mitigation measures." Here, "the environmental impacts of the project on vehicle traffic and transit are fully disclosed in the FSEIR[, ...] which includes analysis both with and without implementation of the Muni TSP and applies the same threshold standards to determine the significance of those impacts."
- The Court ultimately rejected plaintiffs' arguments that Muni transit impacts were inadequately analyzed as being speculative and unsupported, noting that "CEQA requires an EIR to reflect a good faith effort at full disclosure; it does not mandate perfection, nor does it require an analysis to be exhaustive." (Quoting *Dry Creek Citizens Coalition v. County of Tulare* (1990) 70 Cal.App.4th 20, 26.) Nor did it find merit in plaintiffs' argument that funding for the Muni TSP was so uncertain that alternate mitigation of the Warriors paying for it should have been considered. While funding at the analyzed levels was not unequivocally guaranteed, an independent fiscal feasibility analysis peer reviewed by Keyser Marston Associates, Inc. evidenced more-than-adequate City funding would be available, a conclusion the Court observed that nothing in the record contradicted, and performance standards and alternative mitigation strategies further ensured transit impact mitigation.
- The Court further rejected plaintiffs' "deferred mitigation" arguments. Plaintiffs argued that certain FSEIR mitigation measures requiring the Warriors to "work with" the regional transit agencies "to provide" the needed additional service were unenforceable and constituted improperly deferred mitigation with no specified performance standards. The Court noted these measures require the Warriors to gather transit use data and coordinate providing necessary required transit, and are backstopped by the TMP's specific performance standards and the MMRP's requirement of OCII corrective action. Further, despite lack of a guaranteed outcome, the City's past experience with commonly providing additional regional transit service during special events (e.g., SF Giants games) constituted substantial evidence supporting the measures' expected efficacy. In connection with the impacted regional agencies' history and expressed willingness to "work with" the Project proponent to meet transit demands, the Court noted (1) CEQA's "can and should" finding option (citing Pub. Resources Code, § 21081(a), Guidelines § 15091(a)(2), *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 465); (2) substantial evidence that necessary funding will be available (despite a specific funding source not

being secured); and (3) the existence of backstopping performance standards requiring corrective action if they are not met.

- The Court rejected plaintiffs' arguments that "reasonable certainty that these regional transit impacts will be mitigated" was not good enough; observing that the FSEIR deemed regional transit impacts significant and unavoidable solely because "full funding for the service has not yet been identified," the Court held: "CEQA ... does not require identification of a guaranteed funding source for mitigation measures specified in the EIR[,]" but only "substantial evidence to conclude that 'feasible mitigation measures will actually be implemented.'" (Citing and quoting *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2007) 157 Cal.App.4th 149, 163, and other authorities.) In sum, substantial evidence supported the FSEIR's conclusions; failure to identify a specific funding source for increased regional transit did not render it inadequate; the City's statement of overriding considerations was adopted in an overabundance of caution; and the FSEIR was a fully adequate informational document with respect to transit impacts.

Noise Impacts:

- The FSEIR concluded that construction and *stationary* operational noise impacts (e.g., on-site generators, and mechanical, public address and amplification equipment) of the Project would be less than significant with mitigation, but that *mobile* operational noise sources (e.g., vehicular traffic and crowd noise) would result in significant and unavoidable "permanent, long-term increases in ambient noise levels" even after implementation of mitigation.
- The Court rejected plaintiffs' attack on the FSEIR's various noise thresholds of significance, which compared Project-caused increases in ambient noise levels to increments recognized by Caltrans as readily perceptible increases. A "lead agency has substantial discretion in determining the appropriate threshold of significance to evaluate the severity of a particular impact." (Citing Guidelines § 15064(b); *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1068; *Lotus, supra*, 223 Cal.App.4th at 655, fn. 7.) While plaintiffs criticized the "ambient-plus-increment" methodology as ignoring the severity and health impacts of noise increases, and ultimately resulting in "an unsustainable gradual increase in ambient noise[,]" the Court disagreed and found the approach was supported by the CEQA Guidelines' Appendix G, which "identifies a noise impact criterion to address whether the proposed project would result in 'exposure of persons to or generation of noise levels in excess of standards established in the local general plan or noise ordinance, or applicable standards of other agencies....'" Here, the S.F. Police Code employed an "ambient-plus-increment" methodology, Appendix G sets forth an inquiry "whether the proposed project would result in a 'substantial permanent increase in ambient noise levels in the project vicinity above levels existing without the project,'" and the FSEIR's incremental thresholds followed the Federal Transit Administration's and Federal Interagency Committee on Noise's widely accepted methodologies by imposing more stringent thresholds on already-noise-impacted environments. The FSEIR also analyzed and acknowledged significant cumulative noise impacts, and while plaintiffs disagreed with the thresholds of significance, they did not challenge the accuracy of the FSEIR's data or conclusions that the Project's noise impacts would be significant and unavoidable. Finally, the FSEIR clearly and adequately disclosed the significance of the noise impacts on human health in a comprehensive section referencing relevant findings of the World Health Organization (WHO); its analysis was sufficient to foster informed public participation and reasoned decision making, and a separate health-based threshold to determine the significance of

noise impacts was not required. (Citing *Berkeley Keep Jets Over The Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344, 1356.)

Wind Impacts:

- The FSEIR determined that under existing-plus-Project conditions, the number of off-site locations where wind speed would exceed the 36-miles-per-hour hazard criterion would actually be reduced from 7 to 6 (out of 46 off-site study locations). Rejecting plaintiffs' argument that the FSEIR was insufficient because it failed to "address significant impacts at the publicly accessible areas on the project site[.]" the Court held: "Defendants argue correctly that CEQA does not require analysis of the wind impacts on the project" and "the city was not required to consider in the FSEIR the extent to which patrons of the project may be subject to windy conditions." (Citing *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 473; *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 905; *Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464, 1468.) Nonetheless, the FSEIR included such an analysis for informational purposes and identified mitigation measures to mitigate identified impacts, thus negating plaintiffs' arguments.

Greenhouse Gas (GHG) Emissions:

- In perhaps the most significant part of its opinion, the Court upheld the FSEIR's *non-quantified* analysis of the Project's GHG emissions, which it concluded would have no significant adverse environmental effects because its "construction and operation meet San Francisco's energy and efficiency standards designed to reduce [GHG] emissions." As a preliminary matter, the Court noted that the Governor's certification of the Project and related finding that it would not have any net GHG emissions after purchase of carbon credits "serves a distinct purpose and is not a substitute for a CEQA determination on the significance of [GHG] emissions[.]" and framed the issue on appeal as "whether consistency with San Francisco's [GHG] strategy alone is sufficient to support the FSEIR's finding that the project's [GHG] emissions will have no significant effect on the environment."
- The Court rejected plaintiffs' arguments that the FSEIR's "exclusive reliance on performance based standards – the project's consistency with San Francisco's [GHG] strategy – is inadequate and that CEQA requires the FSEIR to quantify the project's expected [GHG] emissions and the amount those emissions will be reduced by implementation of the [GHG] strategy or specified mitigation measures." Noting the inherent difficulties of assessing the environmental significance of a single project's GHG emissions, and the nature of the analysis as addressing a *cumulative* impact's contribution to global-scale climate change (citing *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 219-220), the Court quoted CEQA Guidelines §§ 15064.4(a) and 15183.5(b) as granting lead agencies discretion to "[r]ely on a qualitative analysis or performance based standards" and to "determine that a project's incremental contribution to climate change is not significant if the project complies with the requirement of [a] previously adopted [area wide GHG reduction] plan." The Court cited a 2010 BAAQMD Guidelines Update encouraging local agencies to adopt and use such plans in making CEQA significance determinations, and noted San Francisco's 321-page plan was adopted in 2010 and approved by BAAQMD, which found its planned GHG reductions surpassed State standards.

- The Court appeared to harmonize some ostensibly inconsistent Guidelines provisions with regard to the need to quantify a project’s GHG emissions, coming down on the side of lead agency discretion. Per the Court: “[While] ... the Guidelines ... provide that an agency ‘should make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of [GHG] emissions resulting from a project ... and to consider ‘[t]he extent to which the project may increase or reduce [GHG] emissions as compared to the existing environmental setting’”, they “do not compel a numeric estimate of every project’s [GHG] emissions.” Citing the Natural Resources Agency’s statement of reasons for adopting the GHG Guidelines, the Court noted that even though there was no dispute here as to the *feasibility* of quantifying the Project’s GHG emissions, a lead agency is nonetheless not required to use a quantitative analysis if it determines quantification is not possible, not helpful, or otherwise “not appropriate in the context of a particular project[.]” Here, the FSEIR’s qualitative methodology was supported by substantial evidence, was not unreasonable or unprecedented, and plaintiffs failed to show it constituted an abuse of discretion.

Toxic Air Contaminants (TACs):

- The Court rejected plaintiffs’ challenges to the FSEIR’s conclusions that the Project’s construction and operational TAC emissions will not have significant adverse effects on air quality and human health. TACs are not regulated by numerical air concentration limits, but using a health-based approach: “The known health risk from those TACs that cause cancer is evaluated by estimating the increased risk of cancer from exposure over a defined period of time, commonly 70 years, and is generally expressed as excessive cancer cases per one million exposed individuals. That is, cancer risk is estimated as the incremental probability that an individual will develop cancer over a lifetime as the direct result of exposure to airborne carcinogens.”
- Here, the health risk assessment (HRA) appended to the FSEIR followed the CEQA Guidelines by focusing on the pollution’s impact on the most sensitive members of the public, identified as nearby children residents and hospital patients; these “sensitive receptors” are at greatest risk due to higher breathing rates, longer lifetime exposures, and greater sensitivity during development. The HRA’s highly conservative assumptions and analyses resulted in conclusions that Project construction, as mitigated, would increase a child resident’s lifetime cancer risk by 11 in one million, and Project operation would increase it by 7.2 in one million. While the Project would thus increase (by 18 in one million) the existing cancer risk, taking it from 26 to 44 in one million, the FSEIR concluded the health impact was less than significant because it would still be below the cumulative threshold of significance of 100 in one million.
- While Plaintiffs argued the threshold of significance should be a project-specific cancer risk increase of 10 or more in one million, the Court held that substantial evidence supported the FSEIR’s methodology deeming an effect not to be significant “unless it *both* increases cancer risk by 10 or more per million *and* increases the cumulative risk for the neighborhood to greater than 100 per million.” (Emph. added.) This threshold is not inconsistent with any valid BAAQMD standards, is consistent with the U.S. EPA’s standards and guidance, and was within the lead agency’s discretion to adopt.

Non-CEQA Zoning And Permit Issues:

- Finally, to the extent they were not waived, the Court rejected plaintiffs' arguments that the Project violated applicable zoning by exceeding the allowable square footage for retail establishments in Zone A of the Mission Bay South redevelopment plan. An OCII staff memo properly classifying and counting the event center's retail components against the remaining allocation supported the conclusion that the Project was consistent with zoning in this regard.
- The Court similarly rejected plaintiffs' challenges to the "place of entertainment" permit required under the City's Police Code because that Code's noise limits did not apply to "mobile noise emanating from disbursing crowds" and, in any event, by its own terms did not inflexibly mandate project denial for temporary increases of 8 decibels above ambient noise levels, as plaintiffs argued. Substantial evidence supported City's findings that mitigating measures would be adequate to prevent Project "events from substantially interfering with the peaceful enjoyment of the surrounding property."

Conclusion and Implications

The Court's lengthy published opinion contains significant analysis and discussion on numerous important CEQA topics. These include the nature of expedited CEQA litigation for certified environmental leadership development projects; standards for tiering from prior program EIRs; transportation and transit impact analysis (including related project component/mitigation, and feasibility/funding issues); lead agencies' broad discretion to develop thresholds of significance and study methodologies for impacts; the lack of any CEQA requirement to assess on-site impacts on future project patrons; agencies' discretion to rely solely on non-quantitative methodologies for assessing GHG impacts; and agencies' discretion in selecting evidence-based cumulative thresholds of significance for use in health risk assessments for TAC emissions.

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