

Save the Agoura Cornell Knoll v. City of Agoura Hill
(March 17, 2020) Cal.App.5th

This case involves the mitigated negative declaration (MND) adopted by the City with approval of a mixed-use commercial and residential development of 35 residential apartment units plus retail, restaurant, office, and open space on an 8.2-acre site. The project site is on an undeveloped hillside in the city, most of which is located within the Agoura Village Specific Plan (AVSP). .

The trial court held in favor of Save the Agoura Cornell Knoll (STACK), concluding that there was a fair argument that the project may have significant environmental impacts on cultural resources, sensitive plant species, oak trees, and aesthetic resources, and that the MND's proposed mitigation measures are inadequate to reduce those impacts to less than significant levels. The trial court also granted attorney's fees to STACK. The Court of Appeal affirmed the trial court's decision.

Cultural resources surveys of the site found that it contained a Native American archaeological site (CA-LAN-1352) that is eligible for listing on the California Register. This site would be destroyed during site grading. During consideration of the project, tribal and other commenters noted that the City had not consulted with involved tribes under AB 52, that the site was a tribal cultural resource, and asserted that the mitigation measures for cultural resources were inadequate to avoid the impact. The mitigation called for tribal monitors during construction, notification of likely descendants in case of the discovery of human remains, and data recovery if the site can't be avoided.

The Court concluded that the City had not complied with CEQA with regard to tribal cultural resources:

Appellants claim that the MND's mitigation measures are sufficient "to ensure that CA-LAN-1352 will be avoided and undisturbed" because CS-CR-1 mandates that "the tribal cultural resources will be preserved in place," while CS-CR-3 requires the completion of a data recovery program if "preservation becomes impossible." Contrary to their contention, however, neither of these measures is designed to ensure the avoidance of CA-LAN-1352 as a tribal cultural resource. CS-CR-1 provides for the monitoring of ground-disturbing activities with allowances for work stoppages so that "appropriate actions" can be taken for any significant archeological or paleontological resources that are discovered at the site. CS-CR-3 in turn provides for a Phase III data recovery excavation program prior to any project-related ground disturbance "[i]f avoidance of CA-LAN-1352 is not possible." Yet the MND does not set forth any analysis of whether CA-LAN-1352 can be avoided, nor does it specify any performance criteria for evaluating the feasibility of avoidance as an alternative to excavation. As the trial court observed, an important step in determining whether avoidance is feasible would be to define the boundaries of the archaeological site. However, in their 2014 peer review, Rincon Consultants noted that prior studies did not completely define the boundaries of the CA-LAN-1352, and that the boundaries would need to be defined if the site cannot be avoided by the project. There is nothing in the record to suggest that, following the 2014 peer review, the City attempted to

define the boundaries of CA-LAN-1352 to determine if the site could be avoided, or that it was impractical or infeasible for the City to make this determination as part of its initial review. (CEQA Guidelines, § 15126. subd. (a)(1)(B) [specific details of mitigation measure may be developed after project approval only “when it is impractical or infeasible to include those details during the project’s environmental review,” and the agency “adopts specific performance standards the mitigation will achieve”].)

On the other hand, the record contains substantial evidence to support a fair argument that avoidance of CA-LAN-1352 is not feasible based on the existing project footprint. In his February 2016 letter, Dr. King stated that he specialized in the study of the archaeology and history of Native Americans in Southern California. He had studied the archeology of the Santa Monica Mountains for 54 years. After reviewing the prior studies of CA-LAN-1352 and the MND, Dr. King opined that the “proposed Cornerstone project will destroy [the] archaeological site,” and that “avoidance is not feasible without changing the project footprint.” Dr. King offered a similar opinion at the City Council hearing, stating: “I’m concerned that an archaeological site is going to be destroyed by this project. The [MND] kind of skirts around this issue, says maybe it’ll be destroyed. Well, if it’s going to be like it’s shown, the site will be destroyed. Once an archaeological site is destroyed, it can’t be replaced... .” Dr. King’s comments thus support a fair argument that the proposed monitoring of the project’s extensive grading activities, as mandated by CS-CR-1, will be ineffective to avoid the site and the significant impacts to it.

If, as Dr. King opined, avoidance of CA-LAN-1352 is not feasible, then CS-CR-3 requires the implementation of a Phase III data recovery excavation program. Dr. King explained that a proper excavation of the site would be “a significant undertaking” in terms of scope and cost. However, the MND does not consider whether a large-scale excavation program of the kind described by Dr. King would be feasible, and whether alternative measures could effectively mitigate the harm caused by the loss of the site.

Moreover, like CS-CR-1’s avoidance plan, CS-CR-3 improperly defers mitigation of the project’s impacts to the site by delaying formulation of several components of the data recovery plan until some future time. CS-CR-3 simply provides a generalized list of measures to be undertaken by a qualified archaeologist and Native American monitor, but it does not set forth any performance standards or guidelines to ensure that these measures will be effective. For instance, the program calls for the future “preparation of a technical report” that “shall include a mitigation monitoring and reporting plan.” Yet the MND does not explain how the undefined monitoring and reporting plan would mitigate the potentially significant effects on the site’s cultural resources, nor does it specify any criteria for evaluating the efficacy of that plan. There is also no indication in the record that it was impractical or infeasible for the City to articulate specific performance criteria for these data recovery measures at the time of project approval. (See, e.g., *Preserve Wild Santee v. City of Santee*, *supra*, 210 Cal.App.4th at p. 281 [city impermissibly deferred mitigation where EIR did not state why specifying performance standards for mitigation measure “was impractical or

infeasible at the time the EIR was certified”]; *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 670 [mitigation improperly deferred where “no specific criteria or standard of performance is committed to in the EIR”]; *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 792 [deferral not proper where proposed “mitigation measure does no more than require a report be prepared and followed”].)

With regard to sensitive plant species, the site contained three such species: Agoura Hills dudleya, the Lyon’s pentachaeta, and the Ojai navarretia. The plants are located in portions of the site that would be subjected to project-related fuel modification, such as mowing, pruning, and brush removal. The MND identified three mitigation measures for impacts on sensitive plant species: CS-BIO-1 provides for plant surveys, onsite restoration, and offsite preservation and enhancement for the Agoura Hills dudleya and the Lyon’s pentachaeta; CS-BIO-3 requires onsite restoration, offsite preservation, or offsite enhancement for the Ojai navarretia at a 2:1 ratio; and CS-BIO-2 requiring that prior to fuel modification activities a qualified biologist will locate and flag all Agoura Hills dudleya, Lyon’s pentachaeta, and Ojai navarretia plants within the fuel modification area and establish work exclusion zones.

CS-BIO-1 was found inadequate for several reasons:

... the record contains substantial evidence to support a fair argument that this measure is inadequate to mitigate the potential impacts to these species. First, in adopting each of the plant mitigation measures, the City relied on surveys conducted at the project site in 2007, 2008, December 2013, and July 2014. In an August 2016 comment letter to the Planning Director, the California Department of Fish and Wildlife (CDFW) noted that these surveys were outdated, and that the most recent one was done in the summer during an ongoing drought. According to the CDFW, botanical surveys that are older than two years and performed in conditions that do not maximize detection “may overlook the presence or actual density of some special status plant species on the [p]roject site.” The CDFW therefore recommended that “additional botanical surveys be conducted at the appropriate time of year with proper weather conditions and the results incorporated into the environmental document for review and comment.” While CS-BIO-1 calls for future surveys during the blooming period, there was no showing that it was infeasible for the City to perform these surveys prior to project approval so that the MND could provide an accurate assessment of the sensitive plant populations that may be impacted. (CEQA Guidelines, § 15126.4, subd. (a)(1)(B).)

Second, CS-BIO-1 provides for a restoration plan involving salvage and replanting if avoidance is not feasible, but there is substantial evidence that restoration may not effectively mitigate the impacts to the dudleya and pentachaeta species. In its letter, the CDFW explained that these species could suffer adverse impacts from project-related construction, maintenance, and fuel modification activities. The project also could introduce invasive ant species onto the habitats occupied by these plants, which could interfere with pollination and dispersal. The CDFW further stated that the “impacts will continue to be significant because CS-BIO-1 will not result in adequate avoidance

or successful mitigation..." With respect to the restoration plan, the CDFW cautioned that "[c]reation or restoration using transplanting or topsoil collection should be considered experimental in nature and not be considered as a mitigation measure" for the dudleya and pentachaeta species. A similar observation was made in the 2008 AVSP EIR, which noted that "most of the attempts to re-establish Lyon's pentachaeta have failed." Based on this evidence, it can be fairly argued that restoration, whether onsite or offsite, is not an effective form of mitigation for these plant species. (*California Native Plant Society v. County of El Dorado, supra*, 170 Cal.App.4th at p. 1060 [substantial evidence supported fair argument that MND's plant restoration measure was inadequate where experts opined that transplanting affected species was an "experimental" and "unproven method"].)

Third, the MND defers formulation of certain components of CS-BIO-1 without setting specific performance criteria to ensure that these measures, as implemented, will be effective. For instance, CS-BIO-1 mandates a 200-foot minimum setback to avoid dudleya and pentachaeta plants found at the site unless "avoidance would not be feasible" or an "active maintenance plan is implemented for the known occurrence." Yet the MND does not specify performance standards for determining the feasibility of avoidance or for evaluating the efficacy of any maintenance plan that may be adopted in lieu of the minimum buffer zone. (See *Preserve Wild Santee v. City of Santee, supra*, 210 Cal.App.4th at p. 281 [“EIR is inadequate if “[t]he success or failure of mitigation efforts ... may largely depend upon management plans that have not yet been formulated, and have not been subject to analysis and review within the EIR””].) Additionally, while CS-BIO-1 sets standards for measuring the success of the restoration plan, it does not provide for any feasible alternatives if those salvage and replanting efforts fail. Because substantial evidence indicates that restoration may fail, there is a fair argument that CS-BIO-1 may be ineffective in offsetting the loss of dudleya and pentachaeta plant life at the project site.

Mitigation measure CS-BIO-3 was found to be insufficient to reduce the impact to a less than significant level:

The evidence shows that, like CS-BIO-1, CS-BIO-3 may be ineffective in mitigating the project's impacts to sensitive plant species. The CDFW's stated concerns about the unreliability of the prior botanical surveys and the need for updated surveys as part of the environmental review process applied equally to the Ojai navarretia. Moreover, unlike CS-BIO-1, CS-BIO-3 does not require that any field surveys be performed prior to the issuance of a grading permit. While it is possible, as Appellants assert, that the surveys mandated by CS-BIO-1 for "listed plants" might include the Ojai navarretia, this species is not listed as endangered or threatened under state or federal law. Rather, it is considered a special-status species based on the CNPS's rare plant ranking system. Thus, there is uncertainty as to what future studies, if any, will be done to obtain accurate, up-to-date information about the site's navarretia population and how it may be impacted by the project.

Additionally, although CS-BIO-3 expressly provides that "[o]nsite restoration is

preferred” over offsite alternatives, there is substantial evidence in the record that replanting the Ojai navarretia outside the project footprint may not be a feasible mitigation measure. In its comment letter, the CDFW indicated that, like the dudleya and pentachaeta species, the navarretia is at risk of adverse impacts from the project, including the possible introduction of invasive weeds and ant species that may interfere with navarretia pollinators and dispersal agents. The CDFW further stated that the transplanting of special-status plants was uncertain and often failed, and hence, it should “not be viewed as a mitigation measure” for the Ojai navarretia. In response to this evidence, Appellants again cite to the analysis in the 2008 AVSP EIR that active plant management could reduce the impacts to a sensitive plant species to a less than significant level. However, as discussed, that prior analysis concerned the Lyon’s pentachaeta, not the Ojai navarretia. It also made clear that active management would need to continue in perpetuity rather than the five-year period required by CS-BIO-3.

Mitigation measure CS-BIO-2 was also found to be insufficient by the Court:

In its comment letter, the CDFW expressed the following opinion about the efficacy of CB-BIO-2 as a mitigation measure: “The effects of entering into vegetative communities supporting sensitive plant species for the purposes of clearing wildfire fuel is by its nature a disruptive activity with a high probability of resulting in incidental take of special status plant species including state and federal listed species. Fuel modification also alters the ecosystem of the community and may result in direct adverse effects to special status plant species. Therefore, CDFW is concerned that Mitigation Measure CS-BIO-2 … will not adequately avoid direct and/or indirect impacts … to onsite populations of Lyon’s pentachaeta, Agoura Hills dudleya, or the Ojai navarretia … within the proposed fuel modification zone.” The CDFW’s opinion supports a fair argument that CS-BIO-2 does not provide adequate mitigation for the sensitive plant species in the fuel modification zones.

On oak trees, the City concluded that the project’s removal of 29 of the site’s 59 oak trees would have a significant impact, but that such impact would be reduced to a less than significant level by two mitigation measures: CS-BIO-9 generally provided for the 4:1 replacement of oak trees or, where onsite replacement is not feasible, an in-lieu fee to be paid to the City to acquire land to plant new oak trees; and CS-BIO-10 required that, prior to the issuance of a grading permit, the project applicant must submit an oak tree survey, an oak tree report, and an oak tree preservation program for review and approval by the City.

The Court found both these measures to be inadequate to avoid the significant impact.

The evidence in the record supports a fair argument that CS-BIO-9 is inadequate to mitigate the significant impacts on oak trees. First, the record contains substantial evidence that mass grading from the project may cause a loss of water to both the retained and replacement trees. According to the 2008 Oak Tree Report prepared by Appellants’ consultant: “Mass grading of a site … will disrupt the natural subsurface water flowing along the bedrock and supplying moisture to the trees. This will likely cause a water deficit to indigenous oaks of this site.” The report noted that “[i]t will be

necessary to immediately respond to this problem by establishing a method for replacing this water loss.” In 2014, the City’s Oak Tree Consultant similarly opined that there would be impacts to the retained oaks from the “severe alteration of underground water availability as a result of grade alteration.” The City’s consultant recommended that the project arborist “provide supplemental irrigation details in order to mitigate for the loss of seasonal flow from upslope.” … Despite these risks from mass grading, CS-BIO-9 does not include any provisions for mitigating the loss of water for the retained or replacement trees. Moreover, while the MND states that the retained oaks will have “no direct construction impacts,” it fails to provide any analysis of the potential impacts to trees from the disruption of subsurface water flow.

Second, there is substantial evidence that prior efforts at oak tree restoration have failed. In a September 2016 letter to the City’s Planning Director, the Resources Conservation District of the Santa Monica Mountains reported: “To date, there have been no successful restorations of oak woodlands. It is relatively easy to plant oak trees, but the extensive ecological network and soils that make a forest from those trees has been thus far impossible to recreate.” In its comment letter, CBC similarly stated that [a]ttempts to recreate oak woodlands as mitigation for other developments are often unsuccessful.” In addition, CNPS cautioned that planting a boxed tree from a nursery would not mitigate the loss of fauna and plant life that are part of the oak community. As the trial court noted, the MND contains no analysis showing that CS-BIO-9 would be likely to succeed in recreating or restoring the oak woodland lost to project development.

Third, … CS-BIO-9 improperly defers formulation of the in-lieu fee program as an alternative to onsite tree replacement. “In-lieu fee programs … may offer the best solution to environmental planning challenges, by providing some certainty to developers while adequately protecting the environment. But in order to provide a lawful substitute for the ‘traditional’ method of mitigating CEQA impacts, that is, a project-by-project analysis, the fee program must be evaluated under CEQA. [Citation.]” (*California Native Plant Society v. County of El Dorado*, *supra*, 170 Cal.App.4th at p. 1053.) Here, CS-BIO-9 provides that the in-lieu fee payment will be used by the City to acquire land or plant oak trees on another site, preferably in close proximity to the removed trees. However, the MND does not specify the fees to be paid or the number of trees to be planted offsite, nor does it identify whether any other sites might be available to the City for the planting of new oak trees. The MND also does not contain any analysis of the feasibility of an offsite tree replacement program. Given the evidence that prior efforts to recreate oak woodlands have been unsuccessful, it cannot be presumed that the offsite planting of oak trees through an in-lieu fee payment is a feasible alternative to the onsite replacement of oak trees in their native habitat….

… Like CS-BIO-9, CS-BIO-10 does not address the risk that mass grading may disrupt the subsurface water flow at the project site and cause a water deficit to the site’s oak trees. Appellants claim that CS-BIO-10 is sufficient to mitigate the risk of water loss because it provides for an oak tree preservation program with several components that

are designed to ensure the health of the retained oak trees. However, the program's components are primarily aimed at protecting the oak trees from damage caused by encroachment during grading and construction. They do not address the long-term survival of the retained or replacement oak trees whose natural source of water is reduced by mass grading. While Appellants point to the program's watering and irrigation requirements as an example of potential mitigation, those provisions actually limit the supply of water to the oak trees by prohibiting permanent irrigation and watering during the summer months. Neither these components nor any others required by an oak tree preservation program provide for lost water to be replaced.

On the topic of aesthetic resources, the City didn't challenge the trial court's ruling that the MND inadequately mitigated the project's impacts to aesthetic resources. Instead, it contended that STACK failed to exhaust administrative remedies as to their aesthetic resource claims. The Court found sufficient evidence in the record that various commenters had raised aesthetics concerns during project proceedings.

Finally, the Court found that STACK had essentially met all requirements of Code of Civil Procedure section 1021.5 for the award of attorney's fees.