Third District Affirms Judgment Rejecting CEQA Challenges To EIR For Cordova Hills Master Planned Community Project

By Arthur F. Coon on March 6, 2019

In an opinion filed January 30, and later ordered published on March 2, 2020, the Third District Court of Appeal affirmed a judgment denying a writ petition filed by plaintiffs Environmental Council of Sacramento and the Sierra Club challenging the EIR for Cordova Hills, a large master planned community project approved by Sacramento County. *Environmental Council of Sacramento v. County of Sacramento (Cordova Hills, LLC, et. al., Real Parties in Interest)* (3d Dist. 2020) ___ Cal.App.5th ___.

Standard Of Review

The project is to be located on an undeveloped 2,669-acre site in southeastern Sacramento County currently used to graze cattle. In accordance with County's general plan criteria and principles for special planning areas (SPAs) in new growth areas, it was required to (and did) include an affordable housing plan, urban services plan, fiscal impact analysis, public facilities plan, air quality mitigation plan, GHG plan, and development agreement (DA). Its approved uses are residential, office, retail, a university campus, schools, parks and trails, and it provides for construction of 8,000 residential units for a population of 21,379 persons. The university would also have a campus population, adding 4,140 more. In addition to the foregoing, project approvals included general plan and zoning amendments, and a tentative subdivision map.

The crux of plaintiffs' action was that the EIR was deficient for not analyzing the impacts of project buildout *without* the university because the university is unlikely to be built. The EIR stated that the Cordova Hills SPA reserved 224 acres for a future unidentified college campus with 6,000 undergraduate and graduate students (with 65% of them living on campus), 2,036 employees, and 1,870,000 square feet of facilities; it analyzed impacts based on a *conceptual* plan and full buildout of the university. In fact, the University of Sacramento was originally contemplated as the university tenant, but it withdrew from the project and no specific university tenant has been identified. However, the approved DA contains a number of robust provisions designed to obtain such a tenant. It provides that if a university is not located on the site within 30 years, the land will be transferred to the County. Further, during the 30-year window

the property owner is precluded from seeking or applying for a change in land use designation and must provide the County with annual updates on the status of its efforts to find a university for the site. The DA also requires the owner to establish a "University Escrow Account" which it would fund with $2 million after the issuance of 1,000 building permits, an additional $2 million after 1,750 building permits, and a final $2 million after 2,985 building permits. If a university is built, the escrow money will be released to it; if a university does not locate on the site, it will be released to the County to be used for efforts to attract a university to the location.

The County's approval findings and statement of overriding considerations found that the reserved 223-acre university/college campus area provides the opportunity for such an institution; that there is demand in the State and Sacramento region for such an institution; and that it is beneficial to have land designated for such a use in advance to avoid the "important deterrent" to would-be major university employers of having to go through a lengthy entitlement and permit process prior to construction.

Plaintiffs' action challenged the adequacy of the EIR's project description and analysis of environmental and land use impacts, and the County's alleged failure to adopt feasible mitigation measures. They lost, appealed, and the judgment against them was affirmed by the Court of Appeal.

The Court of Appeal's Opinion

Key takeaways of the published opinion include:

- CEQA is interpreted to afford the fullest possible protection to the environment within the reasonable scope of the statutory language, and "[t]he EIR is the heart of CEQA" with its purpose of giving the public and government the detailed information about environmental consequences, potential mitigation, and alternatives needed to make informed decisions. However, "CEQA does not necessarily call for disapproval of a project having a significant environmental impact, nor does it require the selection of the alternative most protective of the environmental status quo. Instead, when economic, social or other conditions make alternatives and mitigation measures infeasible, a project may be approved despite its significant environmental effects if the lead agency adopts a statement of overriding considerations and finds the benefits of the project outweigh the potential environmental damage." (Citing *California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, 383.)

- Agencies must use best efforts to find out and disclose all they reasonably can in an EIR, but perfection is not required and courts look for "adequacy, completeness, and a good faith effort at full disclosure." A prejudicial abuse of discretion standard applies on review, with such abuse shown where the agency fails to proceed in a manner required by law or makes conclusions unsupported by substantial evidence. If the dispute is predominantly one involving facts or conclusions (as opposed to improper procedure), the court upholds the agency's findings if supported by substantial evidence.

- The Court of Appeal, like the trial court in CEQA and other mandate cases, reviews the administrative record for legal error and substantial evidence; it reviews the agency's action, not the trial court's decision, and resolves reasonable doubts in favor of the administrative finding and decision.

- The EIR's project description here was not legally inadequate because development of a university was uncertain, and attracting one was a daunting task. The difficulties in attracting a university were taken into account in the EIR, which (as reflected in the DA) imposed substantial

obligations on both the developer and the County to advance that goal, and in drafting the EIR, the County was required to assume all project phases, including the university, would be built. (Citing *Vineyard Area Citizens for Responsible Growth v. City of Ranch Cordova* (2007) 40 Cal.4th 412, 431.) The record contained numerous statements by educational figures and civic leaders regarding the need for a university and the desirability of the reserved site, and the project included approximately $87 million of commitments to the university, including those discussed above. In sum, plaintiffs failed to present credible and substantial evidence that the university was an illusory and speculative project element included only to minimize environmental effects. And, should the developer not locate a university despite all efforts and commitments toward that end, and should it thus return the property to the County after 30 years, any future developments that might be undertaken by the County at that time would themselves be too speculative and uncertain to discuss in an EIR.

- Per the Court, Plaintiffs' argument that the EIR failed to adequately disclose Project impacts without the university component also lacked merit: "Nor do we find the EIR's analysis of air quality, climate change, and traffic impacts is erroneous because it did not consider the possibility the university would not be built, or might not be built for some time." Regarding air quality, the EIR found the Project would have significant and unavoidable impact from NOx and ROG (ozone precursor) emissions exceeding Air District standards despite a required air quality management plan that would reduce them by 35%. Along with its statement of overriding considerations, the County adopted mitigation measure AQ-2 requiring that all future SPA amendments analyze potential changes in ozone precursor emissions and ensure that they not be increased beyond the original 35% reduction. Per the Court: "Therefore, if Project changes require alterations to the Cordova Hills SPA, for example if a university is not built, the changes cannot increase NOx and ROG emissions beyond that 35 percent reduction absent County approval. AQ-2 undercuts [plaintiffs'] contention that [the] EIR fails to adequately address air quality."

- The Court also rejected plaintiffs' related claim that recirculation of the EIR was required to address revisions to AQ-2 based on County's position it would mitigate NOx and ROG emissions even if the university were not built. Plaintiffs argued that without a university NOx and ROG emissions would only be reduced by 20%, not 35%, and that this was significant new information showing a substantial increase in the severity of air emissions impacts. Assuming for the sake of argument that plaintiffs exhausted this contention at the administrative level, the Court held it lacked merit. In either case, the impact was significant and unavoidable even as mitigated, and "even accepting Petitioners' argument as true, it is debatable whether a 15% reduction in mitigation is a substantial increase in the severity of these particular environmental impacts." Further, the revisions to mitigation measures AQ-2 and CC-1 of the which plaintiffs complained did not increase environmental impacts at all, much less substantially so, so recirculation was not required.

- Plaintiffs' challenge to the EIR's climate change analysis also failed. Mitigation measure CC-1 was revised to ensure that any future project changes (made through SPA amendments) would require an analysis quantifying potentially resulting GHG emissions and a revised GHG reduction plan ensuring they would not cause an exceedance of the 5.80 metric-tons-per-capita SPA-wide significance threshold.

- Plaintiffs also failed to carry their burden to show the EIR underestimated traffic impacts. Substantial evidence supported the EIR's responses to plaintiffs' comments – which they repeated as litigation arguments – that the transportation analysis underestimated traffic impacts of the project by assuming reductions based on a university that will never occur. Plaintiffs

mistakenly assumed that the large non-automotive mode assumed by the EIR for university area trips had more than its actual small impact on overall mode-share in the SPA. They also mistakenly assumed a major portion of trip reductions were due to the university, when they were actually based on other factors including the proposed transit system, Neighborhood Electric Vehicle system, pedestrian and bicycle trails, and proximity to uses. Finally, they overlooked that removing the university would result in 9,000 fewer daily trips, and there was simply no basis for their argument that such removal was certain to result in a "worst-case" traffic scenario.

- Plaintiffs' argument that the EIR failed to address the project's consistency with SACOG's MTP/SCS was *waived* because they failed to exhaust their administrative remedies by raising it to the County in the administrative process. (Citing *Sierra Club v. California Coastal Com.* (2005) 35 Cal.4th 839, 864.) Further, nothing in SB 375 requires such a consistency analysis, nor did plaintiffs cite any evidence that a project must be evaluated under CEQA for consistency with an SCS.

- Finally, the Court rejected as forfeited plaintiffs' arguments that the County failed to adopt feasible mitigation measures requiring the "phasing" of Project construction – meaning not building all or part of the Project until a university was located – so as to ensure a university would be constructed. Plaintiffs failed to cite any record evidence to support their assertions that such "phasing" was a feasible mitigation measure, or that County's decision not to phase was unsupported by substantial evidence, and the Court observed it was not its duty to independently review the record for such evidence. (Citing *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 934-935; *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1028-1029.)

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