First District Holds EIR's Analysis of "No Project" Alternative To City of Livermore Residential Development Violated CEQA By Failing To Discuss Feasibility Of Purchasing And Preserving Habitat-Rich Garaventa Hills Project Site, Also Addresses Significant Issues Involving Exhaustion Doctrine And Adequacy of Mitigation

By Arthur F. Coon on April 4, 2022

In a published decision filed March 30, 2022, the First District Court of Appeal (Division 5) reversed a trial court judgment upholding the reissued final environmental impact report ("RFEIR") for a 44-single family residence project on a unique, species- and habitat- rich 32-acre site in the City of Livermore's Garaventa Hills area. *Save the Hill Group v. City of Livermore (Lafferty Communities, Inc., Real Party in Interest)* (2022) ___ Cal.App.5th ___. Both the trial court and Court of Appeal agreed that the RFEIR's analysis of the "no project" alternative was substantively inadequate, because it lacked information about the feasibility of purchase and preservation options that was necessary for the City Council to make an informed, reasoned decision, but the Court of Appeal disagreed with the trial court's conclusion that Petitioner/Appellant Save the Hill's failure to exhaust on this issue barred judicial consideration of it. The Court of Appeal rejected Appellant's remaining arguments that the RFEIR's analysis and mitigation of the project's vernal pool fairy shrimp ("VPFS") and wetlands impacts were inadequate, and that its identified compensatory mitigation for permanent sensitive habitat loss was inadequate. (In a brief concluding portion of the opinion that won't be further discussed here, the Court also held Appellant had forfeited and lacked standing to raise the issue of City's alleged mitigation obligations under two prior settlement agreements to which Appellant was not a party.)

Relevant Background: The Unique Project Site and Project

Since July 2011, Real Party (Lafferty) has been attempting to develop its 32-acre site in the Garaventa Hills with a residential development project consistent with its zoning. Over time and in the face of significant opposition based on the site's unique and valuable special-status species habitat

characteristics, the proposed project has been altered in footprint, and reduced in unit count from 76, to 47, and ultimately to the 44-home project approved by the City Council in April 2019.

The "moderately steeply sloping" Project site is traversed by Altamont Creek, contains two centrally located prominent knowls, is adjacent to the 24-acre Garaventa Wetlands Preserve, and together with the preserve provides habitat for numerous special-status species protected under the State and/or Federal ESA, including the VPFS, California red-legged frog, California tiger salamander (CTS), California burrowing owl, San Joaquin kit fox, western spadefoot toad, and others. It is also hydrologically connected to a unique downstream alkaline wetlands area (the Springtown Alkali Sink) that is owned and managed by the Wetlands Exchange in cooperation with the City and state and federal resources agencies, such that grading and alteration of drainage patterns on the Project site may potentially affect the quantity, timing and quality of precipitation entering the wetlands and needed for their ecosystem to function.

The Litigation

The Alameda County Superior Court denied Appellant's petition for writ of mandate challenging the RFEIR and Project approvals, apparently initially "finding the RFEIR's determination of infeasibility for the no-project alternative inadequate because it failed to disclose and evaluate the possibility of using existing mitigation funding to make the no-project alternative feasible[,]" but then determining based on supplemental briefs that Petitioner failed to exhaust its administrative remedies on, and thus failed to preserve this argument. Petitioner/Appellant appealed, and the Court of Appeal reversed.

The Court of Appeal's Opinion

The Exhaustion Doctrine Did Not Bar Petitioner's Claim

Reviewing the issue de novo, the Court of Appeal reversed the trial court's finding that failure to exhaust barred Appellant's challenge to the RFEIR's "no-project" alternative analysis. Per the Court: "CEQA does not require public interest groups such as Save the Hill, which are often unrepresented by counsel at administrative hearings, to do more than fairly apprise the agency of their complaints in order to preserve them for appeal [sic; litigation]." After reciting in some detail the legal rules and principles relating to exhaustion, the Court "conclude[d] on this record [that] Save the Hill's objections during the administrative process met this standard of fairly apprising the City of the RFEIR's failure to adequately flesh out the feasibility of not going forward with the Project." It cited examples of public comments inquiring about potential alternate locations or sale of development credits so that the habitat could be preserved, and "voic[ing] support for the alternative of preserving the Project Site as open space in perpetuity." In response to these and other comments of Appellant's members urging preservation and maintenance of the "unique" and "pristine" site as open space, council members asked whether the City could buy the land, whether anyone had offered to do so, and whether funds were available to do so, but were told by the City's attorneys that the City could not consider such options (as they were not before it) and that a rezoning to permanent open space would likely trigger a takings lawsuit. Per the Court: "These discussions show the City Council was very much focused, at Save the Hill's prompting, on the feasibility of a no-project alternative. While the superior court discounted them for not specifically referring to the RFEIR's project alternatives evaluation, we conclude they sufficed to fairly apprise the City of its position. [citations omitted]."

Further, the Court of Appeal also held that what is commonly known as the futility exception to the exhaustion doctrine applied: "The record is replete with incidences of Save the Hill representatives urging councilmembers to consider the possibility of obtaining funding to purchase and conserve the Project

Site. While Save the Hill did not frame its urging in the language of the RFEIR's no-project alternative, the evidence is overwhelming that, had it done so, the result would have been the same: The City would have rejected the group's proposal and certified the RFEIR." On the record before it, the Court concluded the City had no intention of considering the alternative of not having this Project go forward, and declined to apply the exhaustion doctrine to bar the no-project analysis challenge.

The RFEIR's "No-Project" Alternative Analysis Was Inadequate

In proceeding to hold the RFEIR's "no-project" alternative analysis was legally inadequate under CEQA, the Court noted that such an analysis must "address 'existing conditions' as well as 'what would be reasonably expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services.' . . . ." (Citations omitted.) Appellant has the burden to show prejudicial error by demonstrating the analysis failed to include relevant information and thus precluded informed decisionmaking and public participation. (Citing *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 463, my 8/9/13 post on which can be found *here*.)

While the RFEIR identified the "No Project, No Development" alternative as environmentally superior to the Project, it rejected it because it would not meet project objectives of providing housing and because the Site was zoned for residential development with no current purchase or preservation proposals on the table. The RFEIR's discussion of the alternative did not mention the existence and feasibility of using available funding sources to purchase and preserve the Site, despite respondents' concession that, due to its high quality habitat characteristics, it is highly eligible for such funding under two settlement agreements to which the City is a party, and evidence suggesting that these potential funding sources could have well over $11 million available. Per the Court, "the Project Site's zoning designation is not unalterable," and the record contained despite evidence that the City had previously purchased a similar and nearby habitat-rich site (the Farber Property) to preserve it from development.

The Court noted that this evidence illuminated the RFEIR's lack of relevant information discussing the feasibility of acquisition and conservation of the Project Site in its no-project alternative analysis. Rather than having their questions on the topic answered in the RFEIR, that document was devoid of relevant information and councilmembers instead "received unsupported answers and warnings from the City's attorneys that any attempt to acquire the Project Site could expose the City to liability under the takings clause." The Court stated that this begged the question, and indicated that if acquisition and preservation were "illegal or otherwise impossible" then the RFEIR's no-project alternative discussion should have contained *that* information, and in any event, the RFEIR's failure to contain the relevant information called for by CEQA constituted prejudicial error regardless of whether a different outcome would have resulted. The Court observed that "the City's potential exposure to liability [does not] excuse its duty to fulfill CEQA's informational mandate." While acknowledging that the City's potential for taking liability was beyond the appeal's scope, it also stated that the right to develop is not "absolute" but is subject to "obtaining certification of a legally adequate EIR."

Acknowledging "many unknown variables exist regarding the feasibility of acquiring Garaventa Hills," the Court observed that an EIR necessarily involves some degree of "forecasting" to make the required "best efforts to find out and disclose all that it reasonably can" (citing CEQA Guidelines, § 15144), and stated: "The fact that two funding sources exist for the precise purpose of enabling the City to acquire environmentally sensitive areas such as Garaventa Hills for conservation is just the sort of information CEQA intended to provide those charged with making important, often irreversible, environmental choices on the public's behalf." The Court held the required CEQA process failed in this case because the Council lacked adequate information about the no-project alternative to make an informed, reasoned

decision on the Project, and therefore the City's RFEIR certification and Project approval decisions could not stand.

The RFEIR's VPFS and Hydrological Impacts Analysis and Mitigation Were Adequate

Appellant abandoned at least two issues it had raised in its opening brief – alleged failure to analyze hydrological impacts to the downstream Springtown Alkali Sink and failure to mitigate VPFS critical habitat loss – by omitting them from its reply brief, but the Court briefly discussed them anyway and found them to be without merit. The RFEIR's VPFS habitat mitigation was to complete USFWS-approved protocol surveys to ascertain VPFS presence in the site's potentially occupied seasonal wetlands, and, if VPFS were found, to obtain USFWS authorization before disturbing the wetlands and to provide compensatory mitigation at a ratio between 9:1 and 11:1 (depending on the mitigation site's location), per recommendations of the East Alameda County Conservation Strategy. These measures were not improperly conditional or deferred; rather, they properly adopted specific performance criteria to follow if VPFS were found at the Project Site, and substantial evidence supported the City's finding that they were adequate.

Similarly, the RFEIR's undisputed finding that the Project would not cause significant hydrological impacts to the adjacent Garaventa Wetlands Preserve was supported by substantial evidence in the form of an expert's hydrological study, and that finding effectively undermined Appellant's arguments that the Project would have significant impacts even further downstream on the alkali sink wetlands. Moreover, Appellant's attempted reliance on allegedly contrary findings of a prior EIR for a different and much-larger 230-acre project with several hundred residential units was misplaced.

The RFEIR's Identified Compensatory Mitigation Measure for Permanent Sensitive Habitat Loss Was Adequate

The RFEIR required developer Lafferty to provide offsite compensatory mitigation at a 2.5:1 to 3:1 ratio for the assumed permanent loss of the entire Project Site – 31.78 acres – as habitat for CTS, California red-legged frog, San Joaquin kit fox, California burrowing owl, and (potentially) American badger. Lafferty proposed the 85-acre "Bluebell site" parcel, located within the Springtown Alkali Sink area, for this purpose since it contains part of Altamont Creek, sensitive soil, vernal pools, and numerous plant and animal species. Appellant argued the Bluebell site is inadequate mitigation because (1) it is already protected open space under local law (and thus cannot make up for lost habitat), and (2) preserving an existing site through a conservation easement without actually creating new resources cannot adequately mitigate under CEQA for permanent habitat loss elsewhere.

The Court rejected both arguments. With respect to the first, the referenced local law protection consisted of "aspirational" general plan goals and policies to preserve the Alkali Sink that did not actually accomplish what the RFEIR mitigation measure called for, i.e., "creation of a perpetual legal restraint on development of the Bluebell site supported by funding for both upkeep and enforcement." The City also reserved the right to require Lafferty to find and protect an alternative site as mitigation if the Bluebell site proved inadequate for any of the identified species, and CEQA generally does not require an EIR to identify the exact location of offsite mitigation property in order to be adequate. (Citing *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 279, my 11/28/12 post on which can be found *here*.)

The Court also rejected Appellant's second argument, which was essentially that conservation easements are categorically inadequate as CEQA mitigation because they do "not result in the provision of any new resources to offset or compensate for the habitat permanently lost to the Project." In doing so, it rejected

Appellant's reliance on *King and Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 875-876 (my 3/3/20 post on which can be found here). *King and Gardiner* held, in the context of a County's ministerial oil and gas well permitting ordinance project that would ultimately consume 7,450 acres of agricultural land (about 289 acres per year), that agricultural conservation easements (ACEs) were inadequate mitigation for the significant impact because they did not create new agricultural land. While distinguishing *King and Gardiner* due to the significantly greater magnitude of the land conversion loss there involved, the Court "[m]ore importantly" pointed out that "CEQA does not require mitigation measures that completely eliminate the environmental impacts of a project. Rather, CEQA permits mitigation measures that would substantially lessen the significant environmental effects of the project" (Pub. Resources Code, § 21002), and "[t]he Guidelines . . . provide that mitigation may include [c]ompensating for the impact by replacing *or providing substitute resources or environments* . . . ." (Citing Guidelines, § 15370(e), emph. Court's.) The Court then cited other cases as additional support for the proposition that "conservation easements are an accepted part of "'agencies' [mitigation] toolboxes . . ." used to mitigate environmental impacts. (Citing *Masonite Corp. v. County of Mendocino* (2013) 218 Cal.App.4th 230, 238-239 (my 8/2/13 post on which can be found here), and *Friends of Kings River v. County of Fresno* (2014) 232 Cal.App.4th 105, 124-126 (my 12/15/14 post on which can be found here).)

Conclusion and Implications

To a large extent, the Court's holding regarding the inadequacy of the EIR's "no project" alternative analysis here appears to have been driven by the case's unique facts, including: a unique project site that was recognized without dispute as extremely high quality and available habitat for numerous special-status animal and plant species; the existence of two local funding sources dedicated to acquiring and preserving precisely this type of land to protect it from development (which funding sources were apparently not even mentioned in the EIR); the related potential availability of over $11 million in acquisition funding from these sources; the City's recent past history in acquiring and preserving a similar property; the keen interest of members of the City's decisionmaking body (expressed at the public hearing) in the feasibility of options to purchase and/or preserve the project site; and the absence of relevant information in the EIR addressing these issues of interest to the councilmembers, coupled with the City's attorneys' admonitions to them that preservation options were essentially off-the-table. This "perfect storm" of "bad facts" – for the developer and City – was a recipe for a holding that the RFEIR failed to fulfill its CEQA-mandated role as an informational document with respect to its "no project" alternative analysis.

The opinion's other holdings are less noteworthy, with the possible exception of the conservation easement mitigation issue; all follow established CEQA rules and principles. This opinion is the most recent to reject CEQA plaintiffs' continuing efforts to have courts declare conservation easements – whether involving agricultural or habitat lands – an invalid form of CEQA mitigation as a matter of law. In that vein, it is interesting that the Court of Appeal arguably failed to fully cite the strongest legal authority supporting that proposition, as it edited out of its quotation of CEQA Guidelines § 15370(e) that section's final clause, which expressly endorses as an example of "mitigation" the "permanent protection of such resources in the form of conservation easements."

Questions? Please contact Arthur F. Coon of Miller Starr Regalia. Miller Starr Regalia has had a well-established reputation as a leading real estate law firm for more than fifty years. For nearly all that time, the firm also has written Miller & Starr, California Real Estate 4th, a 12-volume treatise on California real estate law. "The Book" is the most widely used and judicially recognized real estate treatise in California and is cited by practicing attorneys and courts throughout the state. The firm has expertise in all real property matters, including full-service litigation and dispute resolution services, transactions, acquisitions, dispositions, leasing, financing, common interest development, construction, management, eminent domain and inverse condemnation, title insurance, environmental law and land use. For more information, visit www.msrlegal.com.

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