"This Woeful Record": First District Affirms Judgment Rejecting CEQA Challenges To Marin County's Approval of 43-Home Mountaintop Subdivision Opposed For Nearly Five Decades By Neighbors And Town of Tiburon

By Arthur F. Coon on May 23, 2022

On May 12, 2022, the First District Court of Appeal filed a 108-page published opinion affirming a judgment denying a CEQA writ petition that challenged Marin County's approval of a 43-lot single-family residential subdivision on a 110-acre parcel atop a mountain overlooking the Town of Tiburon and San Francisco Bay. *Tiburon Open Space Committee v. County of Marin (The Martha Company, Real Party in Interest, and Town of Tiburon, Intervenor and Appellant)* (2022) ___ Cal.App.5th ___. Apart from its factual background of nearly a half-century of intense legal battles over (and effectively blocking) the property's development – which the Court described as "this woeful record before us" – the decision is notable for its legal analysis of how CEQA applies when a lead agency's discretion in considering a project for approval is constrained by legal obligations. While in this case the legal obligations stemmed from stipulated federal court judgments mandating that the County approve a minimum level of development on the property, the Court's reasoning and holdings that the scope of CEQA adjusts and is limited commensurate with legal limitations on an agency's discretionary authority will clearly apply to other contexts. Most obviously, and topically, they plainly will apply to housing development projects when state housing laws impose legal obligations that limit local agencies' legal authority to disapprove or reduce the density of those projects. (See, e.g., Gov. Code, § 65589.5 (the "Housing Accountability Act").)

That the opinion's CEQA analysis in this regard is intended to so broadly apply is underscored by the "concluding observations" contained in its final four pages, following the Court's lengthy and systematic dismantling of the appellants' myriad meritless CEQA arguments. Those rather candid judicial observations express the considered views of a Court that is quite evidently frustrated with a number of things about the CEQA process and CEQA litigation, including: CEQA litigants who routinely ignore their burden under the deferential substantial evidence standard of review on appeal, and fail even to address the supporting substantial evidence identified in detailed trial court statements of decision (prepared in

larger counties by judges with specialized CEQA expertise); the lengthy delays so often inflicted on project developers in the EIR preparation and certification process, and in subsequent litigation challenging the EIR and the process; and the perversion of CEQA's intended "noble purpose" of addressing truly significant environmental impacts through its manipulation into a "formidable tool of obstruction" aimed at blocking needed new housing, and particularly against projects that will increase housing density.

The Court ends its "concluding observations" with: "Something is very wrong with this picture." Whether this is merely a frustrated court lamenting the current state of CEQA litigation abuse, or a muted call for legislative reform, or both, from this practitioner's perspective it is certainly accurate. As Hillel the Elder observed, "the rest is commentary."

Factual Background of the Project and Related Litigation

In the face of intense and unrelenting local opposition, including the opposition and hostility of two levels of local government (the County and Town of Tiburon), the Martha Company (Martha) has tried for many decades to obtain the County's approval of development of its 110-acre ridgeline property overlooking Tiburon and the Bay. "[P]eriodic bouts of litigation in federal district court, starting in 1975" – with Martha's regulatory taking action seeking $6 million for County's downzoning of its property from a minimum of 300 to a maximum of 27 units – resulted in "two stipulated judgments, one in 1976, the other in 2007[,]" the "most significant aspect [of which] was that the County twice solemnly – and publicly – agreed to approve Martha building no fewer than 43 units [on minimum half-acre lots] on the property." The County found such development was consistent with its general plan and would permit Martha's economic use of the property, and the judgments required Martha to dedicate about half its land to County for open space and hiking trails. County Counsel explained to the County at the time of the first judgment that procedural and hearing requirements, including an EIR, would still need to be followed.

After further years of study, and two development applications by Martha to the County, which it refused to process to a decision, the County returned to federal court in 2005 seeking relief from the 1976 judgment in an action not only naming Martha, but the Town and a number of neighboring owners as defendants (presumably because they had threatened to sue the County if it complied with the judgment). County's contention was essentially that the 1976 judgment was void and unenforceable because environmental laws had changed in the subsequent 30 years and it had also become clear in that time that County could not "contract away" its police power to evaluate minimum project density without conducting full CEQA review. The property owners echoed County's position in their counterclaims.

The district court dismissed the County's complaint and the property owners' counterclaims, leading to another stipulated judgment – the 2007 judgment – reaffirming and setting forth procedures for enforcing Martha's rights under the first judgment, including requiring the County to certify a "full scope EIR" in compliance with CEQA within 14 months after Martha's latest application, and noting County's acknowledgement that any alternatives or mitigation measures not according Martha its rights under the 1976 judgment – i.e., to develop 43 homesites on minimum half-acre lots – are legally infeasible unless required to assure health and safety. Among other details, the 2007 judgment required prompt processing and approval of the project's final map, and required County to defend any litigation challenges to the EIR and project approvals.

Martha filed its current development application in late 2008, and the County circulated a draft EIR in early 2011 that analyzed the environmental setting, the project's impacts and mitigation measures in numerous areas, and four (4) alternatives, including: (1) no project; (2) reduced density (32 units);

(3) smaller lots/lower elevation homesites; and (4) reconfigured site plan of smaller lots to reduce biological impacts.

There followed over 6½ years of further hearings, processing, and project refinements, and another trip by Martha to federal court, resulting in stipulated revised plans and processing deadlines. During all of this time there was continued intense and dedicated opposition to the project by the public, property owners, and other groups (one of which unsuccessfully sued Martha on a public recreational trail easement theory in an attempt to defeat the project).

Finally, in 2017, after a number of further hearings, the County's Board of Supervisors, which was acting under the legal constraints of the federal judgments and continuing district court supervision, voted 3-2 to certify the EIR, and conditionally approve the project with a statement of overriding considerations addressing significant and unavoidable impacts.

Private plaintiffs then sued, challenging the EIR on numerous grounds, and contending the judgments were based on void County agreements that illegally contracted away its police power. Ten months later, in August 2018, the Town of Tiburon intervened on plaintiffs' side, largely reiterating their arguments. The trial court denied all challenges in an "exceptionally detailed 86-page Order After Hearing," and plaintiffs and the Town appealed the ensuing judgment.

The Court of Appeal's Opinion
General Principles Relevant to Judicial Review of EIRs

In affirming, the Court of Appeal led off its discussion with an overview of familiar and relevant CEQA principles, including:

- "Too much should not be expected of an EIR. It is not to have the exhaustive scope of a scientific textbook."
- "The judicial attitude to EIRs is deferential."
- The least agency is the finder of fact and courts must indulge all reasonable inferences from the evidence and resolve all evidentiary conflicts in favor of its decision.
- Courts presume a public agency's decision to certify an EIR is correct and the opponent has the burden to establish otherwise.
- Errors that are insubstantial, de minimis, or merely technical are not prejudicial.
- "Legal error, in the form of failure to comply with CEQA, is reviewed independently, but all factual determinations are reviewed according to the substantial evidence standard."
- Under the substantial evidence standard, the appellant must lay out the evidence favorable to the other side and show it is lacking, and a reviewing court will not independently review the record to make up for an appellant's failure to carry its burden.

The Impact of County's Legal Obligations Under the Federal Judgments On Its CEQA Review

The Court *rejected* the Town's and private plaintiffs' contentions that because of the federal judgments the County ignored or overrode CEQA and abnegated its police power, such that "the administrative proceedings were a lengthy and pointless kabuki performance" with a preordained result. Rather than viewing them as the product of void and illicit agreements, the Court of Appeal observed of the federal court judgments that CEQA compliance was implicitly required in the 1976 judgment and explicitly required by the 2007 judgment. It further noted that nearly 850-page EIR prepared by the County was

"not a pro forma exercise" and was "utterly at odds with the conduct of a public entity that believed itself free to blow off CEQA." During the lengthy administrative process on the EIR, there was extensive public input and participation, and active County engagement (through its Planning Commission and Board) on environmental issues, which culminated in the Board making required CEQA findings and confirming that it exercised its independent judgment in approving the project, and retaining full discretion to consider and condition subsequent phases of the process. During the 6-year-plus proceedings since Martha's latest application, other agencies (including the Marin Municipal Water District and Tiburon Fire Protection District) also examined aspects of the project. Per the Court: "If the Board truly felt itself free to ignore CEQA, it would certainly have felt itself free of any need to go through such a protracted charade."

The Court agreed with Martha's and the County's position that CEQA did not "displace" the federal judgments' specific provisions. Rather, "the scope of environmental review [under CEQA] must be commensurate with an agency's retained discretionary authority, including any limitations imposed by legal obligations." Citing *Sequoyah Hills Homeowners Association v. City of Oakland* (1993) 23 Cal.App.4th 704, 714-716, the Court approvingly quoted the trial court's order, stating in a key passage of the opinion:

"CEQA… recognizes that an agency's discretion is limited by its own legal obligations. Accordingly, where a legal obligation limits an agency's discretion, the scope of environmental review likewise is limited. [citation] This is also consistent with CEQA's requirement that an agency exercise its powers in a manner 'consistent with express or implied limitations provided by other laws.' [citing CEQA Guidelines, § 15040(e).] Where a lead agency's discretion already is limited by legal obligations, therefore, the scope of environmental review adjusts in relation to the amount of discretion…. [¶] Accordingly, an EIR must reflect any applicable legal obligations that limit the agency's discretionary authority, and thus the scope of review."

The Court went on to note that a lead agency's duty to avoid or mitigate a project's significant environmental impacts exists only to the extent *feasible*, and that mitigation measures and alternatives that conflict with legal obligations are *legally* infeasible and need not be proposed or analyzed. If it is not feasible to mitigate or avoid significant effects, an agency can so find and proceed to approve the project anyway with a statement of overriding considerations finding that identified project benefits outweigh the significant and unavoidable impacts.

Distinguishing the instant case from others in which cities and counties had improperly abnegated their police powers in various ways, the Court noted "[t]here is nothing intrinsically suspect about a governmental entity settling a lawsuit brought by a property developer" and stated that "the judgments clearly did exist and did have consequences" as recognized by the past conduct of the plaintiffs and the Town. Per the Court: "Twice, the County pledged its name and good faith in accepting that Martha would be allowed to build at least 43 units on lots of at least one-half acre. To judge from the County Counsel's remarks to the Board, it may safely be assumed that the County acceded to the 1976 Judgment in recognition that its 1974 re-zoning attempt exposed it to significant monetary liability."

Contrary to plaintiffs' arguments, the judgments were valid and "did not change the essence of the County's CEQA responsibilities[.]" Although they "did have the effect of deciding what was for Martha's opponents *the* most important issue, namely, whether they could continue to prevent any and all development of the site[,]" "[t]hat decision was not the result of haste or secrecy." Again invoking its *Sequoyah Hills* decision as "unusually instructive[,]" the Court reasoned: "If a state statute can render less dense alternatives legally infeasible, no reason in law or logic prevents a final federal court judgment from having the same effect." While "legal infeasibility" is a legal conclusion on which courts reserve the final word, here, "the Board's conclusion that the stipulated judgments made it "legally infeasible" to

approve less than 43 residential lots has survived scrutiny by state and federal courts." The federal judgments did not require or compel any violation of state law, "but were on the contrary respectful of preserving state law."

Nor did the Court accept plaintiffs' arguments that the judgments prevented the County's supervisors from regularly performing their official duty, or deprived their finding that they exercised "independent judgment" of substantial evidence support. With respect to the first contention, the Court bluntly noted: "Recognizing unpleasant realities is often the essence of official duty for elected office-holders." Addressing the second it stated: "If a lead agency could only exercise independent judgment by disregarding a binding federal judgment, so equally it could be said that the agency could only exercise a true independent judgment if it was free to disregard provisions of CEQA that prove inconvenient."

Observing that a central purpose of CEQA is to publicly disclose why an agency approved a project as it did, the Court stated: "The draft EIR did that, in spades. Some members of the Board clearly felt they had been maneuvered into approving the project, but the means of that maneuver were on the record, in the EIR, and clearly a matter of common knowledge. But not liking the deal struck in 1976 and again in 2007 was no ground for repudiating it."

The Court rejected appellants' attack on the FEIR's 34-page project description as "artificially narrow" (given its recognition of the legal constraints imposed by the judgments), as simply a meritless "variation on the theme that the County "abdicated" its responsibilities under CEQA by complying with the stipulated judgments, an argument we have already rejected." In fact, the EIR's lengthy project description had significantly more detail than required by CEQA, such that "an actual attack on [its] adequacy… would almost certainly qualify as frivolous." In a footnote, the Court observed: "It is one of the ironies of CEQA in operation that the EIR, prepared and paid for by the developer of the proposed project, ends up being more comprehensive than absolutely required by CEQA. The very completeness of a draft EIR may simply produce more targets for opponents of the project to attack."

The Court's Rejection of Appellants' Remaining Arguments

In greater detail than can fully be conveyed here, the Court rejected all of appellants' remaining CEQA arguments. Per the Court, their alternatives analysis challenge was another failed attempt to evade the stipulated judgments, and the "feasible" requirement is a "flexible concept" that can "outrank and overpower" what might otherwise qualify as alternatives requiring study in an EIR. Here, the 32-unit alternative could legitimately have been omitted from the EIR as infeasible because the judgments legally bound the County to approving a minimum of 43 units; an EIR is not required to study infeasible alternatives "even when such alternatives might be imagined to be environmentally superior." (Quoting *Saltonstall v. City of Sacramento* (2015) 234 Cal.App.4th 549, 576, my 2/23/15 post on which can be found *here*.)

The Court rejected appellants' substantial evidence challenges to County's findings that traffic safety impacts could be mitigated. Speculation that another agency with exclusive jurisdiction (Town of Tiburon) might not agree was insufficient to show the lead agency violated CEQA by approving the project with a "can and should be adopted" finding. A "reasonable plan" for mitigation – such as removing traffic obstacles like trash receptacles and enforcing speed limits on narrow winding roads – is all CEQA requires.

Traffic impacts were adequately mitigated by fair share fees for signal and lane improvements, and VMT has now replaced LOS methodology as the metric for such impacts.

Pedestrian safety impact mitigation was adequate even without an explicit "can and should be adopted" finding for improvements within the Town's jurisdiction, both because the issue was not exhausted, and because the finding's absence was an insubstantial and non-prejudicial "scrivener's error" that did not undermine what was a well-analyzed and "reasonable plan for mitigation."

California red-legged frog (CRLF) mitigation including enhancement of existing wetlands, more than 3:1 preservation-to-loss ratio, and a requirement to follow best management practices, was not inadequate or improperly deferred. Required preparation of a SWPPP and Resource Management Plan for all sensitive habitats was not deferred mitigation, but a requirement to comply with existing regulations and consult with agencies, which is a common and reasonable mitigation measure, as were the requirements to comply with BMPs, a Stormwater Control Plan, and an NPDES permit already in existence.

Regarding project hydrological impacts potentially reducing water supply to a downstream pond (Keil Pond) on adjacent property where CRLF live and breed, County had developed a reasonable plan of mitigation – involving a piping system to deliver intercepted upslope groundwater and monitor flows – but it was infeasible, albeit only because the pond's owner, an obdurate project opponent, refused to cooperate in any way. Regardless, the EIR was adequate.

The EIR's water tank and fire flow analysis and mitigation, vetted by relevant agencies such as the Marin Municipal Water District and the Tiberon Fire Protection District, was also adequate, as was the MMRP which was evaluated under the "rule of reason" and contained a "reasonably feasible" program. The Court rejected appellants' arguments that would require a "level of detail that is at odds with the fundamental concept of the EIR" and which were based on appellants' distrust of the relevant public agencies (MMWD and TFPD) to develop an adequate water supply plan with adequate water pressures: "Nothing in CEQA authorizes an EIR to be held hostage to such unjustifiable suspicions."

Appellants' arguments about allegedly unmitigated public safety impacts from use of a planned onsite construction road with a steep, 25% grade (in excess of standard 18% and 21% maximums) were also meritless. Two construction firms and one traffic expert concluded the road was feasible and could be made safe, and the credibility of that evidence was for the County Board to determine. Further, the temporary road would not exacerbate existing environmental conditions (e.g., steep slopes, fire, or landslide risks), and the safety issues raised by appellants were not physical changes in the environment within CEQA's purview, as the only persons at risk from construction or use of the temporary construction road were project workers, not the public in general. No authority requires CEQA review of safety risks posed by the existing environment to workers building the project. (Citing *Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768, my 1/3/14 post on which can be found *here*.) Per the Court, the County and the EIR went above and beyond what CEQA requires in discussing the issue and should not be penalized because the EIR is more comprehensive than CEQA demands.

Conclusion and Implications

As already indicated at the beginning of this post, the First District here has issued an extremely well-reasoned, significant, and consequential CEQA decision, notable for, inter alia, its analysis of the effect of laws restricting an agency's discretion to disapprove or reduce the density of projects on the scope of related CEQA review, and its explicit recognition of the harsh current reality of CEQA litigation abuse. The decision bodes well for public agencies and developers defending housing projects against similarly meritless CEQA challenges that refuse to recognize the constraints of legal obligations imposed by pro-housing laws on the agencies' discretion. While there is, indeed, "something…very wrong" with the "picture" presented to the Court by the litigation in this case, the opinion addressing that picture – and affirming the trial court's judgment rejecting the litigation – is exactly "right."

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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