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CEQA Mixed-Use "Mix and Match" Upheld: Second District Holds Stable Project Description Requirement Does Not Mean Ultimately Approved Version of Revised Mixed Use Project Must Match An Alternative Analyzed In EIR, And New Project Alternative Added to FEIR Does Not Require Recirculation

By Arthur F. Coon on July 7, 2022

On March 7, 2022, the Second District Court of Appeal (Div. 4) filed its published opinion in *Southwest Regional Council of Carpenters, et al. v. City of Los Angeles, et al (The Icon at Panorama, LLC, Real Party in Interest)* (2022) 76 Cal.App.5th 1154. In reversing the trial court's judgment and writ setting aside the approvals and EIR for a mixed-use commercial and residential infill development project, the Court held the Project EIR did not violate CEQA's requirement of an accurate, stable, and finite project description even though the project itself was revised and ultimately approved with components not matching those of any individual alternative studied in the EIR. The Court further held that the City's addition of a fifth alternative to the Final EIR (FEIR) that was not significantly different from its other previously analyzed alternatives did not require recirculation for additional public comment, and that the City's response to the sanitation department's comment about local sewer line and sewage treatment plant capacity was adequate.

Factual and Procedural Background

Developer Icon proposed a mixed-use residential and commercial development on a 9-acre infill site in Panorama City occupied by three commercial buildings (a Montgomery Ward, restaurant, and auto repair shop) that have been vacant since 2003. The City's 2017 DEIR for the project described it as demolishing the vacant structures and constructing seven new buildings containing 422 market-rate residential units (totaling 387,000 square feet), 200,000 square feet of commercial space (including a theater complex and grocery store), and a multi-story parking structure with 1,690 spaces. While the

project would create needed new housing and eliminate blight, it would result in significant unavoidable environmental impacts including air pollution emissions from increased traffic.
The DEIR studies four alternatives: (1) "no project"; (2) "reduced project" with 283 residential units (257,300 square feet), 134,000 square feet of commercial space, and 1,132 parking spaces, which had about one-third less mass than the project; (3) "all commercial" with no housing, 583,000 square feet of commercial uses, and 2,500 parking spaces; and (4) "by-right" with 350 residential units (259,600 square feet), 160,000 square feet of commercial development, 1,350 parking spaces, and no zoning changes required.

Public comment on the DEIR by petitioners' consultants focused on hazardous soil contamination impacts to construction workers and groundwater, and traffic congestion impacts at a nearby intersection, and petitioners requested the City to adopt an alternative addressing these impacts. The LA Sanitation Department (LASAN) submitted a comment that project wastewater would be handled by the Hyperion Water Reclamation Plant, which had sufficient treatment capacity, but that detailed gauging would need to occur at the permitting stage to ensure sufficient local sewer line capacity immediately adjacent to the project site, with the developer being required to construct and pay for any needed improvements to connect to a point in the system with sufficient capacity.

City released a Revised DEIR (RDEIR) for public comment almost 5 months later in 2017 that focused primarily on traffic, but retained the same project description and alternatives and did not add any new alternatives. Petitioners' consultants argued the RDEIR underestimated the severity of the significant and unavoidable traffic impact and therefore underestimated air pollution impacts, and that an updated traffic analysis was required.

In early 2018, the City issued its FEIR retaining the same project description but adding a new "Alternative 5" with 675 residential units (615,000 square feet), and 60,000 square feet of commercial (office) use, while deleting the theater, grocery store, and parking structure, and providing a total of 1,200 parking spaces (940 for residential and 260 for commercial use). Alternative 5 was intended to reduce the traffic and air quality impacts that had been the focus of petitioners' comments while increasing housing to address regional shortages. In response, petitioners' consultants continued to complain that, inter alia, the FEIR understated traffic impacts and proposed inadequate mitigation, and also argued the FEIR's response to LASAN's sewer line capacity comment was inadequate.

To eliminate some of the original project's unavoidable impacts, the City's staff recommended and its Advisory Agency approved a "Revised Project" which was a smaller version of Alternative 5 with 623 residential units (and 99,430 fewer square feet of residential construction) and 60,000 square feet of commercial apace. The Revised Project's approval was upheld on Petitioners' two subsequent administrative appeals to the Planning Commission and City Council. The City rejected Petitioners' arguments that the project description had changed and that the FEIR added significant new information after the close of public comments, thus requiring recirculation for additional comments.

The trial court granted Petitioners' ensuing petition for writ of mandate, however, finding that City's EIR failed to provide a stable, accurate and finite project description "because the project described in the DEIR, RDEIR, and FEIR differed significantly from the Revised Project" that was ultimately approved, and that the EIR also failed to address LASAN's comment adequately.

The Court of Appeal's Opinion
Project Description Issue

Upon the City's and Real Party's appeals, the Court of Appeal saw things quite differently and reversed in full. After an overview reciting CEQA's familiar purposes and standard of review principles, the Court analyzed CEQA's "accurate, stable and finite" project description requirement and discussed in detail the "quintet of [leading] cases" on that topic. (Per the Court, those cases are: (1) *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185 ("*Inyo*"); (2) *Washoe Meadows Community v. Department of Parks and Recreation* (2017) 17 Cal.App.5th 277 ("*Washoe Meadows*") (my 11/17/17 post on which can be found ***here***); (3) *South of Market Community Action Network v. City and County of San Francisco* (2019) 33 Cal.App.5th 321 ("*SOMA*") (my 4/5/19 post on which can be found ***here***); (4) *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036 ("*Treasure Island*") (my 7/14/14 post on which can be found ***here***); and (5) *STOP THE MILLENNIUMHOLLYWOOD.COM v. City of Los Angeles* (2019) 39 Cal.App.5th 1 ("*Stop the Millennium*") (my 8/29/19 post on which can be found ***here***).)

The Court of Appeal distilled "[a] salient conclusion…from these cases: a stable [project] description permits informed public participation in the environmental review process" without which "the purposes of CEQA are nullified and the statute is violated." Applying the cases' holdings and principles to the issue at hand, the Court held that the City's approval of the Revised Project, which was a variant of Alternative 5, complied with CEQA: "[T]he City did not violate CEQA's requirement of an accurate, stable, and finite project description. The project, from inception through approval, was a mixed-use commercial/residential development project on a defined project site. The only changes involved the composition and ratio of the residential to commercial footprint, but the proposals demonstrate that the overall size of the project remained consistent, and the site remained the same."

In summarizing its conclusion, the Court stated:

> "An analysis of the various permutations of the project alternatives establishes that if residential units were added, commercial space was subtracted. Various arrangements of building profiles were proposed within this framework, yet the physical layout of the project itself remained consistent and within the defined outline of the project site. Admittedly, the approved project had a slightly different mix of residential versus commercial development than the alternatives presented in the DEIR and FEIR. While the number of residences in the approved project exceeded the number of housing units in the various alternatives in the DEIR, it was less than the number of residences in the FEIR's alternative 5. Under the circumstances, the project definition was sufficiently accurate and stable."

The Court pithily distinguished the "quintet of cases" it had earlier analyzed in detail. Whereas in *Inyo* the EIR's project description was "internally inconsistent within the DEIR" and the "actual project was much larger in scope than some versions…in the DEIR," here the public had "the opportunity to consider and comment on various alternative [residential/commercial mixed-use] compositions…all within a defined project footprint." Further, "[t]he alternative selected, although not included within the DEIR or FEIR, mitigated traffic impacts by altering the residential/commercial mix, stayed within the project footprint, and was consistent with the mixed-use project definition."

The Court distinguished *Washoe Meadows* as a case involving "multiple project alternatives, all with different footprints and differing environmental impacts" such that "the public was confused about which project to comment on." Here, by contrast, the alternatives had the same footprint "and the Revised Project was very similar in scope and use to alternatives considered[,]" with "no evidence of widely varying environmental impact[s] between [them]."

In *Treasure Island*, the scope of necessary environmental remediation work was not included in the project because it was unknown at the time, whereas here "the size and condition of the property was fixed and did not necessitate future evaluations."
While here the Revised Project was not "fully vetted" in the EIRs, as were the two alternatives considered in *SOMA,* "it was not so significantly different from the project alternatives in the DEIR to conclude the project definition was unstable."

"Finally, unlike *Stop the Millennium,* which had no meaningful project description, the descriptions of the initial project, all alternatives, and the Revised Project were [all] sufficiently detailed [with]…site renderings and layouts, square footages, and building descriptions."

The Court also "agree[d] with the City's arguments that consideration of additional alternatives after a draft EIR is circulated does not render a project description unstable" and held that "the DEIR contained all the mandatory elements under CEQA, including a general description of the project's characteristics (including environmental impacts), its objectives, and its intended uses." (Citing CEQA Guidelines, § 15124.)

While acknowledging the public had no opportunity to comment (i.e., in the sense of a formal CEQA comment period) on the final version of the project approved since it wasn't included in any EIR circulated for public comment, the Court noted that CEQA does not explicitly require such an opportunity, and that CEQA Guidelines § 15088.5(a)(3) mandates recirculation of an EIR only where a feasible alternative or mitigation measure considerably different from others analyzed would clearly lessen environmental impacts, but the project proponent declines to adopt it. The Court found that situation was not presented in the case before it and that, in any event, petitioners had (as the trial court found) waived any recirculation challenge.

Per the Court (in an apparent sop to the California Attorney General and Natural Resources Defense Counsel, who had weighed in with amicus briefs unsuccessfully urging affirmance): "Although we believe decision-makers and the public would be better served if the public had an opportunity to comment on the actual project before approval, we decline to engraft that requirement into CEQA." (Citing Pub. Resources Code, § 21083.1; *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1186, 1107.) Here, the Court pointed out, the City had provided 92 total days of public comment on the DEIR, which led to revision of the project to address public comments, and after staff identified the Revised Project recommended for approval the public had another "five months and multiple hearings to comment on the Revised Project[.]" The Court further noted that, with the exception of petitioners, commenters overwhelmingly supported the approved Revised Project, which both reduced environmental impacts and increased "critically needed housing."

Recirculation Issue Under Guidelines § 15088.5

Further analyzing the recirculation issue (even though petitioners had waived it), the Court held that recirculation was not required by CEQA "because the Revised Project was not "considerably different from other alternatives previously analyzed" in the DEIR" and therefore wasn't "significant new information" requiring recirculation under CEQA Guidelines § 15088.5(a). Substantial evidence thus supported the decision not to recirculate because "the Revised Project was presaged by the various alternatives [studied] in the original DEIR" and the various [project] components were revised per the public commentary; this type of "mix-and-match" approach, where "components from different alternatives were substituted for one another," sufficiently encouraged informed decision-making and public participation and was permissible under CEQA. (Citing *California Oak Foundation v. The Regents of the University of California* (2010) 188 Cal.App.4th 227, 274, 276.) The Court observed that the FEIR (or, as

also pertinent here, the approved project) will necessarily contain new information, and not every proposed alternative emerging during the decision-making process will trigger recirculation, particularly where the alternative is substantially similar to those already evaluated by the EIR. Per the Court: "We [also] should not strain to require recirculation under the guise of an unstable project definition or by relying on a "materially different" standard not present in CEQA, for by doing so, we [would] engraft unnecessary requirements that CEQA does not sanction."

Adequacy of Response to LASAN Comments

Finally, the Court held the City's response to LASAN's comments on sanitary sewer capacity issues was adequate to constitute a good faith, reasoned, factually supported response under CEQA's applicable standards. (Citing Pub. Resources Code, § 21091(b), 21021(d)(2); CEQA Guidelines, § 15088.)

Per the Court:

> "In addition to verifying the Hyperion Plant has sufficient capacity for the Project, LASAN noted that the Project might require additional local sewer line capacity and further study would be required to determine where to connect to the local sewer trunk lines. LASAN made clear it would determine during the permitting process whether additional local sewer line capacity would be required to service the additional residential units being proposed, and that if required, additional capacity would be constructed at the developer's expense."

The Court noted that while LASAN's comments were directed at the original 422 residential-unit project, they applied equally to the 623-unit Revised Project, and that there was "no evidence in the record that any needed local sewer construction work would cause any environmental problems, other than possible temporary traffic delays" during the opening of streets for construction of the upgrades, which constituted "an insufficient reason to require additional [CEQA] review or invalidate the City's [Project] approvals."

Conclusion and Implications

The heavy amicus participation in this appeal reflected that important CEQA issues were involved and that an important housing project was at issue. As noted above, the Attorney General and NRDC unsuccessfully urged affirmance of the trial court's judgment, while the California Renters Legal Advocacy and Education Fund (a housing rights watchdog group), the League of California Cities, the California State Association of Counties, and the California Building Industry Association all successfully urged and supported the Court's ultimate holding reversing the judgment and writ.

It is disappointing – to say the least – that the Attorney General would lend the considerable power and prestige of its office to a labor union litigation effort to impermissibly engraft additional procedural requirements onto CEQA, in violation of the legislative prohibition against doing so (Pub. Resources Code, § 21083.1), while simultaneously trying to defeat or delay a project that would provide 623 units of much-needed housing amidst a dire statewide housing crisis. In my opinion, taking extreme and meritless stances like this can only result in a loss of judicial respect for the AG's office; one can only wonder what Rob Bonta's recently constituted "Housing Strike Force" was thinking when the office's "left hand" took such a legally unsupported and tone-deaf position.

The Court of Appeal here got it right. The "stable project description" principle is not an "end run" around the established CEQA requirements for DEIR recirculation; recirculation is intended to be the exception, not the rule; and local agency decisions on recirculation are properly reviewed under the deferential substantial evidence standard. Nor is CEQA a straightjacket formalistically freezing the project ultimately

approved into the precise mold of the project initially proposed or one of the alternatives; rather, it is an iterative process whereby project revisions responsive to public comments can – and hopefully do – lead to a better and environmentally superior project ultimately being approved. An EIR's project description can be sufficiently stable, yet still flexible in its details within defined parameters, and nothing in CEQA does or should foreclose the lead agency's discretion to follow a pragmatic "mix-and-match" approach such as the city did here in deciding the precise details of the project components of the mixed-use project ultimately approved.

This is how CEQA is supposed to work – it is actually about making projects better by avoiding and lessening their environmental effects where feasible, not defeating them through endless rounds of pointless public process and economic attrition when a dedicated opponent does not get its way.

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