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Another Call for CEQA Litigation Reform? Second District Rejects NIMBY Group's CEQA, Coastal Act, and Land Use Challenges, Affirms Judgment Upholding Approval of Zoning-Compliant And CEQA-Exempt Eldercare Facility On Flat, Graded, Vacant One-Acre Infill Site Surrounded By Residential and Commercial Development

By Arthur F. Coon on March 21, 2023

In a published opinion filed March 8, 2023, the Second District Court of Appeal (Division 8) affirmed the trial court's judgment denying writ relief in a lawsuit challenging approval of a CEQA-exempt eldercare facility project in Pacific Palisades, an oceanside area of the City of Los Angeles. *Pacific Palisades Residents Association, Inc. v. City of Los Angeles (Rony Shram, et al, Real Parties in Interest*) (2023) ___ Cal.App.5th ___. The decision capped almost six years of "vociferous" NIMBY opposition to a much-needed project – an opposition that failed on its merits at every governmental and judicial level of review to which it was taken, yet relentlessly continued nonetheless.

Background

The project was proposed to address a documented unmet need for senior housing to serve members of the Pacific Palisades and greater Los Angeles communities who wish to age in place. It consists of 82 residential rooms in a 4-story, 64,646 square foot building, with a public bistro on the first floor and underground parking. The building's height would range from 25 to 45 feet, which is compliant with applicable zoning, but would make it one story taller than the tallest nearby buildings. The project's one-acre site is a vacant lot which was graded in the 1970's, zoned for commercial use in 1978, and is today a bare, flat dirt lot with no trees and few plants, located behind a chain link fence. It is also an infill site, located within an urbanized area, and more specifically, within a densely developed 740-unit residential subdivision; half of the homes in the immediate area are multifamily units, many of which are large two- and three-story condominiums, and a restaurant, office and business center, and other commercial developments are also located in the surrounding area.

The project, which required a coastal development permit, was first approved by the City's Zoning Administrator in a 32-page single-spaced decision which found it consistent with the City's applicable general plan and zoning and categorically exempt from CEQA review under the CEQA Guidelines' Class 32 infill exemption. On the opposing neighbors' administrative appeal, the West Los Angeles Area Planning Commission rejected the neighbors' wide-ranging and hyperbolic objections and approved the project with 26 pages of reasons, findings, and conditions of approval. Opponents then simultaneously appealed to both the Planning and Land Use Management Committee of the Los Angeles City Council and the California Coastal Commission, with the former body voting unanimously to recommend that the City Council deny the appeal and approve the project – which the City Council later unanimously did – and the latter unanimously rejecting the appeal on the ground that it presented no substantial issue warranting the Coastal Commission's review. These decisive government approvals and endorsements of the project did not end the matter; there followed the neighbor-opponents' Superior Court action challenging the City Council's and Coastal Commission's actions.

Should readers question my use of the term "NIMBY" to describe the project's opponents, or of the adjective "hyperbolic" to describe their objections to this zoning-compliant infill senior care and housing project, they should review the Court of Appeal Opinion's summary of the objections made in the neighbors' appeal to the West Los Angeles Area Planning Commission, which reads as follows:

> "The project would be inconsistent with the parklike neighborhood, which included features of natural beauty, rugged rocks, and teeming wildlife. The area was a fire hazard zone and vulnerable to flash floods, slides, and earthquakes. The eldercare proposal lacked nearby supporting medical, rescue, and emergency facilities. Neighbors were overwhelmingly opposed to the project. The project was incompatible with the surrounding wilderness and parklands, would ruin scenic values and views, and would bring excessive density. The project would worsen parking and traffic congestion and lacked supporting public transportation. The added traffic would dramatically increase the risk of speeding cars, accidents, injuries, and deaths. The traffic nightmare would create a significant risk of death and serious injury to pedestrians. The facility would create intolerable noise. The proposal did not meet the criteria for a Class 32 categorical exemption. The neighborhood is not highly urbanized. The project would impair views from a scenic highway and would contradict the area's community plan. The lack of proposed landscaping was appalling and would permanently scar the surrounding wildlands.
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> Other objections were that the project would threaten a list of 65 species, including amphibians, reptiles, insects, and birds. The zoning administrator ignored evidence the project site was likely to contain or be near archaeological evidence of early tribes, including the Tongva people The developer low-balled the amount of excavation that would be needed. Dirt hauling operations would cause pollution. The project would unacceptably increase greenhouse gas emissions and posed risks to water quality. Permitting this development would violate the Coastal Act and the zoning code. The modern and unattractive architecture of the proposed building would be out of character with the surrounding Mediterranean and rustic homes.
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> There were many other individual protests. One person wrote that "[w]e need this project like a hole in the head, period." The protests reiterated issues concerning traffic, parking, noise, safety, and fire hazards. Further objections were to the project's architecture and appearance: It would be an eyesore, a "white elephant," and "large and unsightly.""

The trial court, unmoved by such arguments, issued an 18-page statement of decision denying the neighbors' writ petition, which alleged violations of the Coastal Act and CEQA and – rather ironically, after the many levels of administrative review which provided numerous forums for the neighbors to robustly voice their complaints – lack of a fair hearing. In rejecting the neighbors' challenge to the project's Class 32 categorical exemption, the trial court found that the project site's C-1 zoning allowed commercial uses, including, specifically, eldercare facilities, and that its combined residential and commercial components were consistent with the community plan. It found substantial evidence supported the City's findings that the project would have no adverse impact on traffic, noise, scenic views, aesthetics, or threatened species, and rejected all the neighbors' fair hearing and Coastal Act claims as well.

Following the neighbors' inevitable appeal, the Court of Appeal affirmed.

The Court of Appeal's Opinion

As relevant to this blog's subject matter, the Court of Appeal upheld the City's use of the CEQA Guidelines Class 32 categorical exemption for infill projects. As described in the Court's opinion, that exemption's requirements are met when:

> "1. The project is consistent with the applicable general plan designation and ***all applicable general plan policies*** as well as with applicable zoning designation and regulations.
> 2. The proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses.
> 3. The project site has no value as habitat for endangered, rare, or threatened species.
> 4. Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.
> 5. The site can be adequately served by all required utilities and public services."
> (Emph. Court's, citing CEQA Guidelines, § 15332.)

The substantial evidence standard of review applies to a lead agency's findings that a project meets the above elements so as to qualify for the exemption. Here, the arguments pressed by the neighbors in their appeal implicated the language italicized above; they primarily argued that the project was inconsistent with policies in the community plan, which was the part of the City of Los Angeles' general plan governing the Pacific Palisades area.

The problem for the neighbors was that a very deferential standard of review applies to a local agency's general plan consistency determinations, such that they will be upheld by courts unless, based on the record evidence, ***no reasonable person could have reached the same conclusion***. Simply put, it is not the courts' role to micromanage local land use decisions on what are inherently subjective issues within the local body's unique competence arising under its own plans. In rejecting the neighbors' arguments based on the project's aesthetics – alleged unsightliness from public vantage points and lack of architectural uniformity with its surroundings – the Court found ample substantial evidence supported the City's contrary determinations, i.e., its conclusion that the project was "an urban building compatible with the [City's] plans for this [concededly] urban area."

The Court similarly found substantial evidence similarly supported the Coastal Commission's decision rejecting appellant's arguments about architecture and views, and finding no substantial issue regarding violations of either CEQA or Coastal Act policies.

Conclusion and Implications

The Court of Appeal's well-written 41-page opinion demolishes the neighbors' fatally flawed CEQA and other arguments in the manner of "shooting fish in a barrel," based largely on the applicable deferential substantial evidence standard of review, which – as all experienced land use attorneys know – applies with maximum deference to an agency's determinations whether a project is consistent or compatible with the agency's own general plan policies. The cases stating and applying the "upheld unless no reasonable person could agree" standard of review are legion and well known to land use experts. And because such alleged general plan policy inconsistency was the linchpin of the neighbors' legal challenge to the City's use of CEQA's Class 32 infill exemption for this project, that challenge was doomed to failure.

Yet, apart from their numerous, convoluted and illogical zoning code arguments challenging the project's use, which the Court roundly rejected based on the code's plain language, appellant and its counsel administratively appealed and then litigated this matter through *six layers of scrutiny*, and then to the Court of Appeal, essentially arguing as if the Courts could second-guess the City's policy consistency determinations and as if all they needed to do to prevail was to cite to what they considered to be substantial evidence supporting their positions. They stubbornly ignored that courts will not reweigh evidence in this context, and will defer to an agency's factual determinations where supported by any substantial evidence, and to its plan consistency determinations unless no reasonable person could agree. They appeared oblivious to the legal reality that the burden on plaintiffs in cases like this one is not only daunting, but, on facts and a record like those presented here, insurmountable.

Given the huge expenditures of money, government, and judicial resources obviously consumed by the neighbors' quixotic quest, one might ask "why bother pursuing it?" Which question leads to my one minor quarrel with the Court of Appeal's otherwise flawless opinion: I disagree with its characterization, in a short paragraph near its end, of the litigating neighbors' disagreements with the City's and project supporters' positions on subjective issues of aesthetics and views as "heartfelt and honorable disagreements." Given the applicable standard of review, which doomed appellant's arguments from the start, I do not see their administrative or litigation positions challenging this clearly plan- and zoning-compliant and CEQA-exempt project as "honorable," even if truly "heartfelt" by the neighbors. Perhaps I'm being overly cynical – although I don't think so – but what I see here is a case where well-heeled NIMBY opponents of a much-needed eldercare facility project have tried to defeat it through relentless opposition and litigation aimed not so much at success on the merits – which, as discussed above, was not going to occur – but at making the costs of litigation defense and delay so high that the developer would hopefully give up. (For those readers questioning my characterization of the project opponents as "well-heeled," a quick Google search of the average sale price of homes sold in Pacific Palisades, and average household incomes there, will provide ample support.)

Fortunately, for those seniors and their families who would benefit from this project, it appears that the developer hasn't thrown in the towel so far, and thus probably still won't notwithstanding the appellant's inevitable forthcoming petition for review, which the California Supreme Court will also predictably and inevitably deny. But all of this patently meritless CEQA and land use litigation nevertheless imposes a tremendous financial burden on a development that, in my view, it should not have to bear without some recourse to those creating it, and a paltry award of litigation costs to the prevailing party developer is wholly inadequate recompense in a case like this.

What to do? The Legislature or courts should reform CEQA by providing or holding that successful real parties in actions such as this one can recover their administrative and litigation attorneys' fees incurred in defending a legally compliant project. This could happen either under a new explicit statutory

provision, or through judicial decision treating the developers of publicly beneficial projects as private attorneys general (under existing Code of Civil Procedure section 1021.5 legal principles) defending against those who weaponize CEQA to litigate against the public interest. Until project opponents have some real "skin in the game," California will continue to see abusive CEQA litigation (like this case) unfairly burdening courts, local agencies, and developers who could all better and more productively employ their energies and resources elsewhere.

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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