SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 03/03/2022 TIME: 01:57:00 PM DEPT: C-69

JUDICIAL OFFICER PRESIDING: Katherine Bacal
CLERK: Cecilia Boyle
REPORTER/ERM:
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2020-00038168-CU-WM-CTL** CASE INIT.DATE: 10/21/2020
CASE TITLE: **Preserve Wild Santee vs City of Santee [E-FILE]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

APPEARANCES

The Court, having taken the above-entitled matter under submission on 02/04/2022 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

Petitioners' petition for writ of mandate is **GRANTED.**

Preliminary Matters

The request for judicial notice by Preserve Wild Santee, Center for Biological Diversity, California Chaparral Institute, and Endangered Habitats League's ("petitioners") of exhibit 1, the maps of Mast Boulevard in Santee, and of exhibit B are granted. The relevancy objection by City of Santee and City of Santee City Council's ("respondents") to petitioners' request for judicial notice of exhibit A, the judgment in *Elfin Forest Harmony Grove Town Council v. County of San Diego*, 37-2018-42927-CU-TT-CTL ("*Harmony Grove*"), is sustained as irrelevant extra-record evidence.

Respondents' request for judicial notice of exhibits A through E is granted. Respondents' request for judicial notice of exhibit 1, the appellate court's decision in *Harmony Grove,* is denied as irrelevant.

Background

Petitioners' petition for writ of mandate and complaint alleges three causes of action: (1) violation of the California Environmental Quality Act ("CEQA") – inadequate environmental impact report ("EIR"); (2) violation of CEQA – failure to recirculate the EIR; and (3) violation of CEQA – inadequate findings and statement of overriding considerations. ROA # 1. Respondents and Real Party in Interest Homefed Fanita Rancho, LLC answered and request the petition and complaint be dismissed and denied. ROA ## 10-11.

Discussion

In reviewing an agency's compliance with CEQA, the Court's inquiry extends "only to whether there was

a prejudicial abuse of discretion." *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 512. An agency may abuse its discretion under the CEQA by either: "failing to proceed in the manner CEQA provides" or "by reaching factual conclusions unsupported by substantial evidence." *Id.* Whether the agency employed correct procedures is reviewed de novo, whereas the agency's substantive factual conclusions are accorded "greater deference." *Id.*

- ***Adequacy of EIR (1st COA)***

Petitioners challenge the adequacy of the EIR's wildfire safety and evacuation impacts, arguing that the EIR (1) failed to analyze or disclose project-specific evacuation impacts (e.g., the number of vehicles that would need to be evacuated from the project site, the number of hours it might take to empty the project site, and the extent to which the additional traffic from the site might affect existing residents' evacuation times) (Opening Brief ("OB") at 9-11); (2) failed to analyze a key threshold of significance, in the Appendix G CEQA Guidelines, and thus did not consider mitigation or a determination on the significance for that threshold (OB at 13-15); (3) provided inadequate responses to public comments (OB at 15-16); and (4) failed to disclose significant impacts to the wildfire-related evacuation and safety that resulted from the last-minute change of removing from the project the plan to extend Magnolia Avenue roadway for evacuation (OB at 17-19).

Analysis and Disclosure of Evacuation Impact

A claim that challenges the adequacy of discussion regarding environmental impacts is generally subject to independent review; but where factual questions predominate, a more deferential review under the substantial evidence standard may apply. *Sierra Club v. Cty. of Fresno* (2018) 6 Cal.5th 502, 519-521 ("adequacy of discussion claims are not typically amenable to substantial evidence review").

Here, respondents' Wildland Fire Evacuation Plan environmental impact analysis is nearly forty pages long. AR 12903-40. The Wildland Fire Evacuation Plan ("Plan") identifies three primary roadways for its evacuation routes. AR 12909, 12924. The record shows one of the identified routes -- of using Mast Boulevard to evacuate to Highway 67 -- is not possible because Mast Boulevard does not connect to Highway 67 and instead dead-ends in a park, rendering the Plan's evacuation routes unclear. Pet. RJN, Ex. 1; AR 2177. At the hearing, counsel for respondents/real party in interest argued that while Mast Boulevard does not directly connect to Highway 67, it can be seen as an indirect connection because although drivers would need to take other streets, sheriff deputies would be there to direct traffic accordingly. On the other hand, the record is clear that there are currently "no plans to connect Mast Boulevard" between the City, where it terminates, with the side where it "picks up" in the County. AR 2176.

The CEQA Guidelines provide that impacts in wildfire risk areas and a project's potential to cause substantial adverse effects on humans must be evaluated. Cal. Code Regs., tit. 14 ("Guidelines") §§ 15126.2(a); 15065. Although the Final REIR and Plan contain thematic responses regarding evacuation (AR 13190-13194), the methodology the City chose to assess the evacuation impacts does not contain a sufficient analysis of the Project-related impacts. For example, any assessment of evacuation timing under traffic scenarios is missing.

Respondents argue a myriad of potential modeling scenarios exist; modeling them all would provide little to no value due to variable factors that would make such modeling results unreliable. Response Brief ("R.B.") at 13, citing final REIR (16:13457-13458, 13194-13195). The Court is directed to reject challenges to the methodology used "unless the agency's reason for proceeding as it did are clearly

inadequate or unsupported." *Chico Advocates for a Responsible Economy v. City of Chico* (2019) 40 Cal.App.5th 839, 847, citation omitted; *South of Market Community Action Network v. City and County of San Francisco* (2019) 33 Cal.App.5th 321, 337 (agency has discretion to select methodology in evaluating environmental impact, subject to review for substantial evidence).

Here, even according deference to the factual determinations on whether certain analyses and modeling was required, the EIR does not contain "sufficient detail to enable those who did not participate in its preparation to understand and to consider meaningfully" the evacuation impact. *Sierra Club v. Cty. of Fresno, supra,* 6 Cal.5th at 516. Because there was no analysis of estimated evacuation times, it is not at all clear, for example, whether a "staggered" evacuation would be adequate to safely evacuate project residents and the surrounding community even when compared to the scenario of a simultaneous mass evacuation. *Cf.* e.g., AR 15(gg):12669-12670 (addresses evacuation, but not adequacy as to timing under traffic conditions.) Similarly, it is unclear as to how the ability of project residents and others in the surrounding community to evacuate in the event of a wildfire would be affected. Indeed, it is the lack of adequate information and support as to the agency's methodology that is problematic.

As respondents/real-party-in-interest's counsel noted at the hearing, the record shows the EIR considered and explained why it did not model evacuation scenarios and estimate evacuation times. AR 13194-13195. But the EIR's thematic response methodology does not adequately fill the gaps. Again, it is not clear based on the information presented whether residents and those in the surrounding community would be able to timely evacuate. Counsel noted that an option under plan would be for residents to remain on site while the fires burned around them. What the methodology was employed for residents' safety under this option is not clear. See also AR 13192, 13194 (option of contingency on-site temporary refuge). In sum, the lack of relevant information in the EIR concerning project-specific evacuation impacts constitutes a prejudicial abuse of discretion.

Key Threshold of Significance

"The lead agency has substantial discretion in determining the appropriate threshold of significance to evaluate the severity of a particular impact." *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 884 (also citing *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1068 for the proposition that under CEQA agencies have discretion to "develop their own thresholds of significance".) Both parties recognize that a lead agency has discretion to choose significant thresholds. OB at 20; Resp.Br. at 18.

Here, the lead agency used four of the five Appendix G wildfire-related questions. AR 2327. The EIR did not include an evaluation of the fifth question: whether the project would "[e]xpose people or structures, either directly or indirectly, to a significant risk of loss, injury or death involving wildland fires." Appendix G, sec. IX(g).

The City asserts the project's risks involving wildland fires is addressed elsewhere in Sections 4.18, 4.18.2.1, and 2.18.2.2, based on the newer Section XX questions. Resp. Br. at 18-19, and citing AR 16:13452-13453 [explaining it provided wildfire risk assessment in Section 4.18]; AR 14:2331; AR 13:1031, AR 15(gg):12671, 16:13463. Yet, again, these sections do not evaluate the exposure to risk of injury or death involving wildfires as to evacuation timing with traffic condition scenarios. This is an identifiable quantitative and/or performance level of a particular environmental effect (Guidelines § 15064.7(a)), capable of assessment. See e.g. AR 95808 (vehicle numbers estimation and time estimations performed and disclosed as part of environmental review development projects), AR 116191.

The lack of measureable assessment as to this threshold of significance means the public was not informed as to the extent to which the project would expose them to significant risk of loss, injury or death regarding evacuation timing. Nor does the plan inform as to the risk of injury or death if residents are instructed to remain on site while the fires burn around them. AR 13192, 13194. The lack of this information shows the EIR does not provide sufficient information to foster informed public participation and to enable reasonable decision-making.

Response to Public Comments

Petitioners challenge whether the EIR's responses constituted a good faith reasoned analysis of the public's comments regarding project occupants' ability to evacuate in the event of a wildfire and traffic flow impact. "[T]he major environmental issues raised when the lead agency's position is at variance with recommendations and objections raised in the comments must be addressed in detail giving reasons why specific comments and suggestions were not accepted. There must be good faith, reasoned analysis in response. Conclusory statements unsupported by factual information will not suffice." Guidelines § 15088.

Here, even if emergency responders do not rely on such modeling, the City's response presumes, without support, that evacuation times will be adequate; the City did not undertake measurable assessments to ascertain a range of evacuation time estimates. AR:13194-13195. The fact that emergency personnel can reach any home within the project in a four-minute travel time (AR 16:13457-13459), does not answer the question of whether those seeking to evacuate are anticipated to be able to do so and does not show whether the agency fully considered the implications of project occupants' ability to safely evacuate. The City's responses to these comments were inadequate.

Removal of the Magnolia Ave. Extension for Evacuation

Where an agency "omits an adequate discussion of a project's potential impacts in its EIR, it cannot afterward 'make up for the lack of analysis in the EIR' through post-EIR analysis." *Sierra Watch v. County of Placer* (2021) 69 Cal.App.5th 86, 103 (citing *Save our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 130 (project information revealed in an errata shortly before project approval "does not make up for the lack of analysis in the EIR").) To allow otherwise would "deny the public 'an opportunity to test, assess, and evaluate the [newly revealed information] and make an informed judgment as to the validity of the conclusions to be drawn'" from it. *Sierra Watch, supra,* 69 Cal.App.5th at 103, internal citation omitted.

Here, the proposed removal of the Magnolia Avenue extension from the project was not analyzed or disclosed in the draft EIR. AR 116184-92. Instead, the project information about removing the Magnolia Avenue extension was revealed in a "Second Errata" to the final EIR six days before the vote to certify the final EIR. AR 766:68419; AR 15206-500.

The attachment to the Second Errata explains that without the Magnolia Avenue extension there are three other nearby connector roads 1,300 feet south of the previously planned extension that can be used to connect to Magnolia Ave. AR 17:15258-15259, 15266-15267. The City Fire Chief and Principal Fire Planner also stated at the City Council hearing that eliminating the extension would still allow an appropriate evacuation. AR 17670-17681. However, given the previously stated importance of Magnolia Avenue as being a "primary" route for evacuation (AR 12924), this belated analysis in the errata was not adequate to provide the public an opportunity to test and evaluate this new information. It

is not clear, for example, the extent to which residents living on those other three nearby connector roads may be impacted by traffic from the project occupants in the event of a wildfire evacuation. See AR 116801-03, 15258-59. This denied the public an opportunity to test and evaluate the information.

Decision Not to Recirculate the EIR (2nd COA)

Petitioners also argue the respondents' failure to recirculate an amended EIR for review and comment deprived the public and public agencies of any meaningful opportunity to review and comment on the project, its adverse environmental consequences, and how the new information may impact other environmental effects of the project. OB at 19-20.

A lead agency must recirculate an EIR when it adds "significant new information" after the draft EIR has been circulated for public review. Pub. Resources Code § 21092.1. New information is not "significant" unless the change to the EIR "deprives the public of a meaningful opportunity to comment on a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid" the effect that "the project's proponents have declined to implement." Guidelines § 15088.5(a). "Examples of significant new information include disclosures of 'a new significant environmental impact would result from the project' or 'a substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted.' ... In addition, recirculation is required when the new information shows '[t]he draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.'" *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 850, citing Guidelines § 15088.5(a)(1), (2) & (4).

The test to determine whether removing the Magnolia Ave. extension constitutes significant new information is whether the public was deprived of a meaningful opportunity to comment on the project's wildfire evacuation impacts without the extension. See Guidelines § 15088.5(a). This is reviewed under the substantial evidence test. *Id.* § 15088.5(e).

Respondents point to evidence in the record showing they considered and analyzed the road removal and concluded it would not create significant environmental effects or substantially increase the severity of an impact. Opp. at 24, citing AR5:25-26; 15590-15592; 17:15210-15262; 17:15266-15555. However, the record indicates the public did not have a meaningful opportunity to comment on the removal of the Magnolia Ave. extension's potential impact on the wildland fire evacuation plan. AR 116772, 17583, 17584, 17622 (petitioners and others objecting about not enough time given to review the second errata, which was posted only three business days ahead of the public hearing). While the increase in daily traffic volume without the Magnolia extension was considered (AR 17:15210-15262), there is a lack of substantial evidence regarding the impact on cut-through traffic during a fire evacuation and the impact on those existing residential streets and residents' ability to evacuate on those streets during an evacuation. AR 116801-03. Thus, there is not substantial evidence to support concluding the Magnolia Ave. road removal was insignificant. Respondents do not show substantial evidence to support a finding that the public had an opportunity for meaningful public review and comment upon this change. Indeed, at least some of the citations show that people objected to the short time period they had to review and expressed their need for more time to evaluate and comment. See e.g., ROB at 25, citing, e.g. AR Tabs 1577, 1717. For these reasons, the City's decision not to recirculate the EIR violated CEQA.

Inadequate Findings and Statement of Overriding Considerations (3rd COA)

Petitioners assert the respondents' findings and statement failed to identify the changes or alterations needed to avoid or substantially lessen the project's significant environmental effects and the findings

regarding the impacts, mitigation measures, and alternatives are not supported by substantial evidence. See Pet. ¶¶ 94-97. Petitioners argue that the EIR fails to adequately mitigate gnatcatcher (songbird) impacts and to analyze or mitigate spadefoot toad impacts. OB at 20-23, 23-25.

Gnatcatcher

At the hearing, respondents/real party in interest requested the Court reexamine the record on the exhaustion issue. To advance the exhaustion doctrine's purpose, the "exact issue" must have been presented to the administrative agency. *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 536. The alleged grounds for noncompliance must be presented during the public comment period or before the close of the public hearing on the project. Pub. Res. Code § 21177. "Isolated and unelaborated" comments do not suffice; the objections must be sufficiently specific to put the agency on notice to evaluate and respond. *Sierra Club, supra,* 163 Cal.App.4th at 536.

The record reflects petitioners and others gave notice regarding the gnatcatcher mitigation measures issue at the administrative level. AR 13408 (Sierra Club addressed the inadequacy of preservation as mitigation for coastal sage scrub and chaparral and its effects on the biologically important plants and animals for that habitat), AR 95794 (the San Diego River Conservancy referenced the gnatcatcher as one of the included bird species for which more adequate study and investigation needed to be included), AR13507 (the petitioner's DEIR comments discussed its concerns the BIO-1 and BIO-2 measures would be inadequate to mitigate the impacts to gnatcatchers and gnatcatcher habitat, and that the DEIR does not adequately mitigate impacts to the coastal gnatcatchers and their critical habitat). Thus, petitioners exhausted their administrative remedies and the merits of the matter are addressed.

"An EIR is required to describe feasible mitigation measures that will minimize significant environmental effects identified in an EIR." *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 495, internal citations omitted. Mitigation under the CEQA includes "reducing ... the impact over time by preservation and maintenance operations during the life of the action." Guidelines § 15370(d). It also includes "[c]ompensating for the impact by replacing or providing substitute resources or environments, including through permanent protection of such resources in the form of conservation easements." *Id.* § 15370(e). As both parties recognize, the adequacy of mitigation measures is subject to the substantial evidence standard of review. *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 900-905.

Petitioners assert the EIR's gnatcatcher mitigation plan is inadequate because it will not address the direct net loss of gnatcatchers and instead takes a "preserve what remains" approach after the project destroys more than 400 acres of gnatcatcher habitat and 14 gnatcatcher pairs. OB at 21-23.

At the hearing, the parties brought into focus the crux of the issue: whether substantial evidence exists to show the proposed mitigation measures adequately address the direct permanent loss of gnatcatcher habitat to mitigate the impact on gnatcatchers to less than significant.

Here, the EIR states the project would affect nearly 428 acres of onsite gnatcatcher habitat. AR 1653. To address this, mitigation measure BIO-1 would conserve more than 1,000 acres of suitable habitat. *Id*. The mitigation measure also requires that restoration and enhancement activities be undertaken to *increase* the habitat for the gnatcatcher within the preserved land. Opp. at 28, citing AR 15(e):5041-5044 (restoration and enhancement activities include restoring appropriate native vegetation, mapping disturbed habitat and applying enhancement treatments to increase native habitat resources in the preserve, as identified by the preserve manager), AR 15(e):5055 (recurring field surveys of the

gnatcatcher habitat, and recurring habitat evaluation and threats assessment). Consequently, substantial evidence shows the proposed mitigation measures adequately address the direct loss of gnatcatcher habitat to less than significant.

Petitioners argue that such measures are inadequate because they are voluntary and not required under the plan and only address subsequent events. OB at 22-23, citing AR 5067-68. It is true that the measure states adaptive management strategies will be initiated upon a "significant disturbance" of more than 20% or "if field observations and expert judgment" indicate a change is needed. AR 5067. However, neither of these are "voluntary." Rather, one contains a triggering percentage event and the other defers to the expertise of those on site. Nor do these strategies necessarily indicate they would respond only to subsequent events.

Petitioners also argue the measure's management activities regarding expansion and enhancement are inadequate because they are voluntary. A plain reading of the pertinent portion of the measure shows certain potential additional management actions are "not required" by the plan, and it is "not a requirement" for the Preserve Manager to expand and improve the habitat beyond its original state. AR 5067. However, when read in the greater context, this aspect of the measure indicates that seeking out opportunities to expand the habitat goes beyond those required activities that are already aimed at increasing the habitat of the gnatcatcher through the required restoration and enhancement activities. See AR 5041 (restoration and enhancement treatments "are directed to increase biological resources for ... the coastal California gnatcatcher"), 5042-5043 ("enhancement treatments directed at coastal sage scrub ... will directly benefit" the gnatcatcher), 5044, 5055, 5066-5068. While it apparently would have been ideal if respondent/real party in interest had included in the measure a requirement to expand to create new habitat, petitioners have not shown this to be expressly required by CEQA, nor is it the only way for respondents/real party in interest to meet their mitigation obligations.

In sum, substantial evidence shows the measures are in accordance with Guidelines section 15370, i.e., they will reduce impacts over time by preserving and maintaining operations, and will replace or provide substitute resources or environments through permanent protection of such resources in the form of conservation easements. Thus, substantial evidence supports the gnatcatcher mitigation measures.

Spadefoot Toad

The project would impact more than 230 acres of spadefoot toad habitat. AR 1645. Petitioners assert the mitigation conservation and restoration measures (BIO measures 1, 12 and 13) are inadequate, as it will restore only 0.50 acres of vernal pool sources.

Respondents explains that it is "[p]reserving, re-establishing and creating 2.92 acres of suitable vernal pool habitat within the Habitat Preserve, of which 2.52 acres is re-established or created habitat, which far exceeds the 0.50 acres of vernal pool rehabilitation/enhancement required per the above-referenced ratios." ROB at 32, citing AR 16: 13182-13484. Thus, the ratio rates are of 2:1 to 4:1, and not 1.25:1, as petitioners assert. AR 15(e):4196 (BTR Table 6-4). Respondents have shown substantial evidence to support the City's determination that its mitigation strategy would effectively reduce impacts to less than significant levels. ROB at 33, citing *inter alia* AR 16:13482-13485. The EIR thus contains substantial evidence regarding the efficacy of its mitigation ratio for the spadefoot toad habitat.

Conclusion

For the reasons stated the petition for writ of mandate is **GRANTED**. Parties to meet and confer

regarding the contents of the proposed writ.

The Court declines to take any action in this case on the writs that were issued in the *Fanita I and II* cases. Respondents did not provide any authority that would show such action may be taken in this case.

The status conference scheduled for 3/25/2022 at 1:30 p.m. remains as set.

The minute order is the order of the Court. The Clerk is to give notice.

Judge Katherine Bacal

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Central
330 West Broadway
San Diego, CA 92101

SHORT TITLE: Preserve Wild Santee vs City of Santee [E-FILE]

CLERK'S CERTIFICATE OF SERVICE BY MAIL	CASE NUMBER: **37-2020-00038168-CU-WM-CTL**

I certify that I am not a party to this cause. I certify that a true copy of the attached minute order was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at San Diego, California, on 03/04/2022.

Clerk of the Court, by: C. Boyle C. Boyle, Deputy

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