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Fourth District Rejects CEQA And Municipal Code Challenges To City Of Santa Cruz's Project Approvals And EIR For Small Multifamily Housing Project.

In an opinion filed on December 16, 2021, and belatedly ordered published on January 13, 2022, the Fourth District Court of Appeal rejected a CEQA challenge to a small multifamily project in the *City of Santa Cruz. Ocean Street Extension Neighborhood Assn. v. City of Santa Cruz* (2021) 73 Cal.App.5th 985 ("OSENA"). The case contains valuable guidance regarding mitigation for biological resources impacts, lays out some common sense principles that may help condense the EIR preparation process, and also provides useful guidance to developers and agencies dealing with water supply issues during the current drought.

The Project, City's Review And Approval Process, And The Litigation

The project at issue is a multifamily development on a vacant parcel of land in the City of Santa Cruz, a portion of which has slopes in the 15+ and 30+ percent categories. In 2010, the real parties applied for a design permit, planned development permit (PDP), tentative map, general plan amendment, and rezoning to build 40 residential units on the parcel. The PDP entailed two variations from the City's usual regulations for the site to allow tandem parking and development within 10 feet of the 30+ percent slope.

As part of the review process, the City prepared an initial study/mitigated negative declaration to address CEQA compliance. However, the project stalled while issues with a nearby crematorium were addressed. In 2016, the project was renewed and the City prepared a new initial study and then a draft environmental impact report (as well as recirculated draft EIR) before preparing the final EIR. The FEIR included three project alternatives, one of which reduced the number of units to 32. The City Council approved that alternative, approved the PDP and design permit, and certified the FEIR; it subsequently approved the general plan amendment and rezoning.

Petitioner OSENA sued the City under CEQA and the City's municipal code. With respect to the CEQA claim, it argued, *inter alia*, that (1) it was improper for the City to rely on analysis and mitigation contained in the initial study rather than the body of the EIR itself, (2) that certain of the mitigation measures were inadequate, (3) that the EIR's stated project objectives were improper, and (4) that the EIR did not fully analyze cumulative impacts. As for the claim under the City's municipal code, OSENA argued that the project had to comply with the slope variance standards, which could not be properly addressed via the PDP, and that the project improperly created new lots requiring the residences to be sited within twenty feet of a 30+ percent slope.

The trial court rejected all of OSENA's CEQA arguments but granted its petition as to the PDP and slope variance issue. Both OSENA and the City appealed. The Court of Appeal affirmed the trial court's ruling rejecting the CEQA claim, but reversed on the municipal code claim, thus giving the City and real parties a complete win and upholding the project approval in all respects.

The Court Of Appeal's Opinion

EIR's Reliance On An Initial Study, Sufficiency Of Impacts Analysis, Informational Discussion, And Mitigation

The first substantive issue the court addressed was the location of the EIR's discussion of impacts to biological resources. The EIR proper did not include this discussion; rather, it had been undertaken in the initial study, which concluded there would be no significant impacts with the imposition of certain mitigation measures. The DEIR and FEIR incorporated the initial study by reference and included it as an appendix.

OSENA argued this violated CEQA Guidelines § 15063(c)(2). The City countered that Guidelines § 15128 permits the inclusion of the information in the initial study if the possibly significant effects could be reduced to less than significant with mitigation. Section 15063(c)(2) states that the purpose of an initial study allows for the mitigation of potentially significant impacts "enabling the project to qualify for a negative declaration." However, section 15128 states: "An EIR shall contain a statement briefly indicating the reasons that various possible significant effects of a project were determined not to be significant and were therefore not discussed in detail in the EIR. Such a statement may be contained in an attached copy of an Initial Study." Moreover, as the Court noted, section 15143 states: "Effects dismissed in an Initial Study as clearly insignificant and unlikely to occur need not be discussed further in the EIR unless the Lead Agency subsequently receives information inconsistent with the finding in the Initial Study. A copy of the Initial Study may be attached to the EIR to provide the basis for limiting the impacts discussed." Looking at the CEQA checklist in Appendix G to the Guidelines, the Court noted that if all impacts are "less than significant with mitigation," no EIR is required, and thus, "that an environmental factor that is 'less than significant with mitigation incorporated' is not considered 'potentially significant' for purposes of triggering the EIR."

The Court therefore concluded that "nothing prohibits the discussion of impacts that are less than significant with mitigation in an initial study rather than in an EIR so long as the EIR complies with its purpose as an informational document." The Court then went on to review the discussion of biological impacts in the EIR via the initial study (which was included with and incorporated into the FEIR) and concluded that it was legally adequate. The Court specifically rejected OSENA's argument that the EIR's analysis was inadequate because it should have, but did not, address "the types of birds that could be affected, the likelihood that they could be found at the site, and the likelihood and magnitude of the project's impact on them." The Court held that while such "details may have enhanced the discussion, their absence does not undermine the adequacy of the EIR as an informational document because the initial study makes clear that whatever the birds affected, their nests will not be removed when in use; thus, any impact to bird mortality has been eliminated." The Court further held the related mitigation measures were legally adequate, and that they could properly be included in the initial study as well.

OSENA's next claim was that the EIR was inadequate because the mitigation measures it included were vague and consisted of impermissibly deferred mitigation. While OSENA had failed to raise this in the trial court, the Court of Appeal nonetheless addressed it on the merits, rejecting it and concluding that the City's determination was supported by substantial evidence. The mitigation measures at issue concerned impacts to trees and bird species, including limiting the time of year trees can be removed, establishing buffer zones, preconstruction surveys, fencing, root protection, and other measures. The court found these to be sufficiently specific, detailed, and mandatory so as to be enforceable and lawful mitigation measures.

EIR's Statement of Project Objectives

OSENA fared no better with its argument that the project objectives set forth in the EIR were "too narrow" because they focused on a 40-unit count and were "vague and misleading" because they

used descriptors such as “work force housing opportunities, “affordable-by-design,” and “moderate cost housing opportunities” which simply described the project to be built.

The Court analyzed this claim in the framework of project alternatives, as the range of alternatives is necessarily constrained by the project’s objectives. OSENA argued that the project was not truly affordable and only offered limited affordability options. The Court rejected these arguments because the project did offer affordable units under the City’s inclusionary housing ordinance and increased the housing stock available citywide. Likewise, OSENA claimed that the project did not increase housing for people with disabilities because it did not provide services to the disabled. Again, the Court rejected this because the project did provide ADA-accessible units. OSENA also claimed that the project goal of providing development fees is illusory because all development has to pay such fees. But because all of the project alternatives would attain this objective, its inclusion or exclusion as an objective had no impact on the outcome, and the Court thus rejected OSENA’s challenge. Finally, OSENA claimed that the objectives relating to affordable housing conflicted with the objective relating to providing free market housing. The Court noted that these goals are not in conflict and that the project provides both types of housing.

The Court concluded this part of its analysis by stating that the EIR included sufficient information justifying its objectives and alternatives, and that the City had the discretion to choose among the alternatives where the discussion was sufficient. Thus, there was no basis to invalidate the EIR on that ground.

EIR’s Cumulative Water Supply Impacts Analysis

One of the more interesting and salient aspects of the decision is its discussion of cumulative impacts relating to water supply. The project would add less than .01% (one hundredth of one percent) to the City’s water demand. The City already faced a water deficit during prolonged droughts, which the project could be considered to exacerbate. However, the City had plans to augment water supply through conservation, recharging aquifers, and treated recycled water. Moreover, the project had to mitigate its water use via water-conserving fixtures and landscaping, reduced usage during drought, and financial contributions to pay for system improvements and conservation. OSENA argued that under *Kings County Farm Bureau v. City of Handford* (1990) 221 Cal.App.3d 692 and *Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019 the City’s cumulative impact conclusion was an improper “ratio” analysis that failed to account for actual cumulative and combined impacts. The Court disagreed, noting that the project’s total water usage was evaluated in the EIR in context of water demand citywide, that the EIR analyzed its significance in light of current supply conditions and future demands, and that it incorporated mitigation measures. It determined the impact was less than significant “because the project’s consumers will not cause additional curtailment requirements and will be subject to city-wide conservation requirements”; further “[t]he project’s contribution is not cumulatively considerable because its contribution is already accounted for in the UWMP [Urban Water Management Plan] estimates.” Thus, the Court concluded the cumulative impacts conclusion was supported by substantial evidence.

The final CEQA issue concerned cumulative impacts related to traffic. Because the Natural Resources Agency adopted revised criteria for evaluating traffic impacts that substituted vehicle miles traveled (VMT) for the old level of service (LOS) metric, and OSENA only challenged the EIR’s LOS evaluation (even though the EIR ALSO included a VMT analysis), the claim was not cognizable.

Municipal Code Claims

The last portion of the decision deals with OSENA’s claim under the City’s municipal code. In

essence, OSENA argued that the City could not grant the developer a modification under the restrictions on development adjacent to a slope under the auspices of the PDP. In essence this was a question of statutory interpretation, as the PDP ordinance allowed a “variation” from “[s]lope modifications pursuant to procedures set forth in Chapter 24.08, Part 9 (Slope Regulations Modifications).” The question was whether the PDP approval process itself could allow for the variation, or if it also required action “pursuant to” the slope regulations. The Court concluded that the City’s interpretation of its own Code provision was entitled to deference, and consistent with the provision’s purposes and language; thus, it held the City’s interpretation was correct and a variation could be approved via PDP without also separately processing a slope modification. Accordingly, the Court of Appeal reversed on this point and directed the entry of judgment in favor of the City and developer.

OSENA’s last gasp was to argue that the project improperly created new lots requiring residences to be sited within 20 feet of a 30+ percent slope, but the Court rejected this contention as inconsistent with the terms of the municipal code. Because the project created a condominium plan on a single existing lot, it did not run afoul of this provision.

Conclusion And Implications

The *OSENA* case embodies some useful principles for CEQA practitioners. By allowing required impacts analyses and mitigation measures to be included in an initial study incorporated by reference in and appended to the EIR, it potentially streamlines the preparation of EIRs and avoids duplicative or redundant work. (Any jurisdiction relying on this principle should, of course, make sure the analysis in the initial study is sufficiently robust so as to withstand the ordinary substantial evidence level of scrutiny.) The case also may be helpful for projects dealing with water supplies in drought impacted areas of the state – which at this point is more or less California as a whole. Because any new project will entail some water demand, cumulative impacts will always be a potential achilles heel in the face of ongoing shortages; however, this case helpfully holds that where a project’s incremental contribution to demand will not require additional curtailment measures than would otherwise occur during such shortages, and is accounted for in the UWMP, its cumulative effects are properly found less than significant.

Miller Starr Regalia - Matthew Henderson and Arthur F. Coon

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