SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

HALL OF JUSTICE

TENTATIVE RULINGS - December 02, 2021

EVENT DATE: 12/03/2021 EVENT TIME: 01:30:00 PM DEPT.: C-69

JUDICIAL OFFICER: Katherine Bacal

CASE NO.: 37-2020-00030308-CU-TT-CTL

CASE TITLE: SAVE OUR ACCESS VS CITY OF SAN DIEGO [IMAGED]

CASE CATEGORY: Civil - Unlimited CASE TYPE: Toxic Tort/Environmental

EVENT TYPE: Hearing on Petition
CAUSAL DOCUMENT/DATE FILED:

TENTATIVE RULING

Petitioner Save Our Access' petition for writ of mandate is **GRANTED**.

Preliminary Matters

Respondents' request for judicial notice of exhibit 1 and fact number 1 is denied as irrelevant. Only relevant evidence is admissible. Evid. Code § 350. Respondents' fact number 1 and exhibit number 1, were not before the agency at the time it made its decision and thus cannot be considered by this Court. See Pub. Res. Code § 21167.6(e). As our California Supreme Court has made clear, "extra-record evidence can never be admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision." *Western States Petroleum Assn. v. Superior Ct.* (1995) 9 Cal.4th 559, 579; see also *Manderson-Saleh v. Regents of University of California* (2021) 60 Cal.App.5th 674, (citing *Western States* but explaining that the extra-record evidence was admissible to explain the course of conduct between the parties). While this Court acknowledges the importance of the will of the voters as expressed in the post-Ordinance, Measure E Election results, those results cannot be considered as within the exception expressed in *Western States* or *Manderson-Saleh.* The results would do nothing other than raise (or answer) a question regarding the wisdom of the City's decision.

The parties' requests for judicial notice are otherwise granted.

Background

Petitioner asserts five causes of action in its petition for writ of mandate under the California Environmental Quality Act ("CEQA"): (1) failure to follow CEQA procedural requirements; (2) failure to prepare an initial study to determine what environmental analysis was necessary; (3) failure to prepare an environmental analysis; (4) failure to prepare an environmental impact report; and (5) failure to adopt feasible mitigation measures and alternatives. The petition alleges the City Council voted to approve placing the measure E on the November 2020 ballot, including approval of Ordinance No. 0-21220 (the "Ordinance") to submit to voters the ballot measure to remove the 30-foot height limit for the coastal zone within the Midway-Pacific Highway Community Plan Area. Pet. ¶ 16. The petition alleges the City did not require environmental review beyond the 2018 Midway-Pacific Highway Community Plan Update Final Program EIR. *Id*. Petitioner seeks a writ of mandate vacating the approval of the project, and enjoining any further steps until lawful approval is obtained after an adequate environmental analysis is

prepared and considered, adequate notice and opportunity is given to interested parties, and findings supported by substantial evidence are adopted. ROA # 1.

Discussion

- **Standard of Review**

An Environmental Impact Report ("EIR") provides both the public agencies and the general public detailed information about the effects a proposed project is likely to have on the environment, the ways in which effects of the project might be minimized and to indicate alternatives to such a project. *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 511. "If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees." *Id.,* internal citation omitted.

In reviewing an agency's compliance with CEQA, the court's inquiry "shall extend only to whether there was a prejudicial abuse of discretion." *Sierra Club, supra,* at 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.*

- **Program EIR and Future Environmental Review**

After a public agency prepares an EIR for a project, CEQA does not require a further EIR unless substantial changes are proposed or will occur that require major revisions or if new information becomes available. *Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal.App.4th 192, 196, citing Pub. Res. Code § 21166; Cal. Code Regs., tit. 14 ("Guidelines") § 15162. However, when an agency prepares a "program EIR" the agency may limit future environmental review for later activities it finds to be "within the scope" of the program EIR. *Id.,* citing Guidelines § 15168(c)(2).

Where a court reviews an agency's decision (under section 21666) to not require a subsequent or supplemental EIR, "the traditional, deferential substantial evidence test applies. The court decides only whether the administrative record as a whole demonstrates substantial evidence to support the determination that the changes in the project or its circumstances were not so substantial as to require major modifications of the EIR." *Latinos Unidos de Napa*, *supra*, 221 Cal.App.4th at 200–201 (the presumption flips in favor of the agency and against further review because in-depth review has already occurred).

On the other hand, in situations where a program EIR is certified and a later project is proposed, then section 21166 is inapplicable. *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1319. In those situations, the agency is obligated to consider if there is a fair argument the new proposal might cause significant effects on the environment that were not examined in the prior program EIR, and if so, require preparation of a tiered EIR under section 21094. *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1319-1321; see also *Center for Sierra Nevada Conservation v. County of El Dorado* (2012) 202 Cal.App.4th 1156, 1171 (a program EIR does not always suffice for a later project; sometimes a tiered EIR is required and if a proposed new activity is a separate project, the fair argument test applies to whether a tiered EIR is required).

The question here is whether the Ordinance constitutes a new project under the CEQA that requires environmental review under a tiered EIR (as petitioner asserts) or whether it is merely a later activity that falls within the scope of the program EIR and thus reviewed under section 21666 (as respondent asserts).

- **Whether the Ordinance is a New Project or a Later Activity within the Program EIR**

An agency-initiated ballot measure is a discretionary project that requires CEQA review before it is placed before voters. *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 171, 191. Here, the administrative record shows the City Council initiated the ballot measure to submit to the voters to amend the Height Limit Ordinance codified in the Municipal Code to exclude the Midway-Pacific Highway Community Plan Area from the 30-foot height limit in the Coastal Zone. AR233, AR14237. Thus, the Ordinance is not merely a "later activity" within the scope of the program EIR.

It follows that the applicable inquiry is whether the evidence supports a fair argument that the project may have significant environmental impact that was not examined in the prior program EIR. *Sierra Club v. County of Sonoma, supra,* 6 Cal.App.4th at 1316, 1318 (under this standard, the agency's decision not to require a subsequent or supplemental EIR can be upheld only where there is no credible evidence to the contrary). The Court thus examines whether substantial evidence in the record shows the project may arguably have significant effects on the environment. If so, then the respondent should have prepared a tiered EIR. *Id.* at 1321.

- **Fair Argument Application**

Petitioner argues the program EIR did not examine the Ordinance's potential impact on scenic vistas or views. Petitioner's argument is buttressed by substantial evidence in the record. Though the program EIR considered whether the project would result in a substantial obstruction of a vista or scenic view from a public viewing area in the community plan, the analysis stated that future projects "would not result in new obstructions to view corridors along public streets where view opportunities largely exist" and the "proposed CPU area *would blend with the existing urban framework through established and regulated height and setback regulations*...." AR905, emphasis added. Based on this analysis, the program EIR stated the proposed CPU would not substantially alter or block public views from critical corridors, open space areas, public roads or public parks. *Id*. The program EIR's use of the language "existing" framework and that it would "blend with" the "established" height regulations show they considered the existing limitations, and not the maximum structure heights mandated by the proposed base zones if the 30-foot limitations were removed. Petitioner thus has put forth substantial evidence that the Ordinance has effects that were not examined by the program EIR.

Respondent's arguments to the contrary are not compelling. Respondent cites to record evidence showing it considered generally the possibility of no 30-foot height limits in the area. AR709 (map of proposed zoning with various base zones ranging from 30 feet up through 100 feet), AR8555 (Appendix N stating the land use projections were based on maximum permitted densities based on the proposed zoning, and that the project assumes development at "100 percent of permitted residential density"). Respondent also cites to a memorandum, in which the planning department states it considered whether the ballot measure would result in environment effects above those analyzed in the program EIR, including visual impacts. AR14365. Yet none of these sources show an analysis of the impacts to those public scenic vista or viewpoints by buildings exceeding the height limits. Respondent also does not cite to any drawing renderings or public commentary as to the ways in which those vista and views may be impacted by buildings exceeding the 30-foot height limit. For these reasons, substantial evidence in the record shows a tiered EIR should have been prepared to consider the impact of the Ordinance on the environment.

Petitioner also asserts additional significant environmental impacts may occur. MPA at 8 (citing potential other significant environmental impacts to traffic/transportation, air quality, water quality, housing, greenhouse gas emissions). Because an environmental review of the impacts of removing the height limit is being directed for the reasons noted above, it is anticipated such environmental review will analyze the potential other impacts associated with the Ordinance.

Conclusion

For the reasons stated, petitioner's petition for writ of mandate is **GRANTED**.

The minute order is the order of the Court.

Petitioner is directed to prepare the proposed writ in accordance with this order and Pub. Res. Code section 21168.9, and to serve notice on all parties within two court days of this ruling.