SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 12/14/2023 TIME: 03:33:00 PM DEPT: C-69

JUDICIAL OFFICER PRESIDING: Katherine Bacal
CLERK: Calvin Beutler
REPORTER/ERM:
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2022-00035094-CU-TT-CTL** CASE INIT.DATE: 08/31/2022
CASE TITLE: **Petition of Save Our Access [E-FILE]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Toxic Tort/Environmental

APPEARANCES

The Court, having taken the above-entitled matter under submission on 12/1/2023 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

The petition for writ of mandate, filed by Save Our Access, is **DENIED.**

Preliminary Matters

Petitioner's unopposed requests for judicial notice of exhibits 1 through 4 in support of the opening brief [ROA # 27] and for judicial notice of exhibit 1 in support of the reply brief [ROA # 39], are granted. See Evid. Code § 452(c),(d), & (h). ROA # 27, 39.

This matter was originally set for hearing on November 3, 2023. At that time, the Court requested supplemental briefing on certain specified matters. See ROA # 48. Both parties filed the requested briefing. ROA ## 51, 52.

On December 1, 2023, the parties appeared in Court to make oral arguments. The Court took the matter under submission to consider those arguments and, in particular, specified citations to the administrative record ("AR"). Having fully considered the matter, the Court now issues its ruling.

Discussion

In its petition for writ of mandate, petitioner seeks to invalidate the City of San Diego's approval placing a measure on the November 2022 ballot for voters to consider whether to exclude the Midway Area from the 30-foot coastal zone height limit, asserting that the City failed to comply with the California Environmental Quality Act ("CEQA"). ROA # 1.

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. "[A]n agency may abuse its discretion under CEQA either by failing to proceed in the manner CEQA provides

or by reaching factual conclusions unsupported by substantial evidence." *Id.*, citing Pub. Res. Code § 21168.5. Whether the agency employed correct procedures is reviewed *de novo*, whereas the agency's substantive factual conclusions are accorded "greater deference." *Id*. "The ultimate inquiry, as case law and the CEQA guidelines make clear, is whether the EIR includes enough detail 'to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.'" *Id.* at 516 (citations omitted).

1st Through 3rd Causes of Action

The petition's first through third causes of action allege that the City failed to follow procedures mandated by CEQA, the City failed to prepare further environmental analysis consistent with CEQA, and that the City's supplemental environmental impact report ("SEIR") is legally inadequate and insufficient.

"The lead or responsible agency may choose to prepare a supplement to an EIR rather than a subsequent EIR if: (1) Any of the conditions described in Section 15162 would require the preparation of a subsequent EIR, and (2) Only minor additions or changes would be necessary to make the previous EIR adequately apply to the project in the changed situation." 14 Cal. Code Regs. ("Guidelines") § 15163(a). Additionally, "[t]he supplement to the EIR need contain only the information necessary to make the previous EIR adequate for the project as revised." Guidelines § 15163(b).

SEIRs are prepared where "(a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report;" "(b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report;" or "(c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available." Pub. Res. Code § 21166. The purpose behind either a subsequent or supplemental EIR "is to explore environmental impacts not considered in the original environmental document," and not to "revisit environmental concerns laid to rest in the original analysis. Only changed circumstances ... are at issue." *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist*. (2016) 1 Cal.5th 937, 949 (citations omitted, ellipses in original).

Here, the "new project" placing a measure to remove the 30-foot height limit in the Midway area on the November 2022 ballot is the "changed circumstance" that the City determined required a supplemental EIR to address the project modification. See City Oppo [ROA # 34] 7:2-14; AR 8926 & 9186 (SEIR purpose and intended use). "Because the Project only proposed to remove the height limit from the CP area and did not change any other elements of the 2018 CPU, the EIR was intended to supplement the 2018 PEIR to address any significant impacts of the Project not analyzed by the 2018 PEIR." City Oppo, 7:16-19; AR 9186, 9072 (response to comments, explaining the SEIR is addressing the project modifications of removing the 30-foot height limit).

Petitioner advocates two primary arguments in support of its position that a writ of mandate must issue: (1) the 2018 Program Environmental Impact Report ("PEIR") said nothing "about a possible modification or removal of the height limit," and (2) the SEIR addressed only visual impacts and neighborhood character but removing the height limit will lead to additional, significant environmental impacts. P's Opening Brief [ROA # 30].

However, the administrative record shows the SEIR – which was undertaken to analyze implications of the height limit – was given "the same kind of notice and public review as is given to a draft EIR." 14 CCR § 15163(c); AR 9315-9319 (notice of preparation of SEIR and scoping meeting and draft SEIR),

AR 8901 (draft SEIR). Thus, petitioner's first argument is unpersuasive.

The Court thus turns to the second argument, that the SEIR addresses "only visual impacts and neighborhood character" and finds in a conclusory fashion that other impacts were adequately examined in prior EIR. It is accurate that the SEIR finds either that environmental resources were adequately examined or the environmental effects were not significant. See AR 9280. Previously, the Court of Appeal found the 2018 PEIR did not discuss or analyze building heights, and that the administrative record did not support the City's argument that removal of the height limit was within the scope of the PEIR. *Save Our Access v. City of San Diego* (2023) 92 Cal.App.5th 819, 852. The Court of Appeal also concluded that, "[i]t is not apparent the analysis adequately considered all potential issues related to building heights above 30 feet." *Id.* at 861.

Here, the administrative record for this SEIR materially differs from the administrative record for the 2018 PEIR. This time around, the City specifically examined and determined removal of the 30-foot height limit will not increase building density in the area or impact resources (such as the energy use, air quality, and greenhouse gas emissions) above the levels previously studied. AR 37:9340-9343 (Initial Study for SEIR considered and determined air quality was adequately examined in 2018 PEIR because removal of 30-foot height restriction does not change the total allowable density building in the area and does not change the total construction and operational emissions previously analyzed; thus, there are not any "new significant environmental effects or a substantial increase in the severity of previously identified significant effects regarding Air Quality Plan consistency"), AR 9347-9350 (removal of the 30-foot height limit does not change the total allowable density buildout; the total allowable density buildout would be the same as analyzed under the 2018 PEIR), AR 9356-9358 (similar re: gas emissions), AR 9374-9377 (similar re: land use), AR 9390 (similar re: population and housing, and explaining that the "removal of the 30-foot height restriction would not result in a change to total allowable density buildout in the CP area; would not change the underlying base zone regulations, including the base zone's height limit; and would not allow development to extend beyond the footprint analyzed in the 2018 PEIR. Therefore, the CP area population would not increase beyond what was previously analyzed in the 2018 PEIR"). Accordingly, and contrary to petitioner's assertion, the record shows the City assessed the project's environmental impacts of removing the 30-foot height limit in the SEIR. On this record, the City's conclusions are supported by substantial evidence in the administrative record, and thus no abuse of discretion has been shown.

4th and 5th Causes of Action

The petition alleges under the fourth cause of action that the City failed to adopt feasible alternatives and feasible mitigation measures. Pet. ¶¶ 39-41. The petition alleges under the fifth cause of action that the evidence in the record is inadequate to support a finding that the mitigation measures reduce impacts below a level of significance. Pet. ¶ 44. Petitioner does not address the fourth and fifth causes of action in its opening brief. The sole reference petitioner makes to mitigation measures is in the factual background section of the brief. Given this, petitioner has not met its burden to show a prejudicial abuse of discretion as to the fourth and fifth causes of action.

Conclusion

For the reasons stated, the petition for writ of mandate is **DENIED.**

The City is ordered to file and serve a proposed judgment.

The Clerk to serve notice.

IT IS SO ORDERED.

Judge Katherine Bacal