SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
HALL OF JUSTICE
TENTATIVE RULINGS - November 30, 2010

EVENT DATE: 12/03/2010 EVENT TIME: 01:30:00 PM DEPT.: C-72

JUDICIAL OFFICER: Timothy Taylor

CASE NO.: 37-2010-00103095-CU-TT-CTL

CASE TITLE: SAN DIEGANS FOR OPEN GOVERNMENT VS. CITY OF SAN DIEGO

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

EVENT TYPE: Motion Hearing (Civil)
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Tentative Ruling Granting Preliminary Injunction

December 3, 2010, 1:30 p.m.

SDOG v. City of San Diego, Case No. 2010-00103095

1. Overview of Litigation.

On November 16, 2010, the court granted the request of petitioner San Diegans for Open Government (SDOG) for a temporary restraining order precluding further channel clearing work in the Tijuana River Valley (TRV) pursuant to an "emergency" permit dated September 20, 2010. The court ordered the City to show cause why a preliminary injunction should not issue barring further work under the permit during the pendency of this action. SDOG contends the "emergency" permit is an unlawful circumvention of the City's duties under CEQA and the Municipal Code.

This is not the first time the City and SDOG have squared off in CEQA litigation in Dept. 72 regarding channel clearing in the TRV. Case No. 2009-00098375 (*SDOG I*) was commenced by SDOG on September 17, 2009. A little more than a year ago, the court accepted the City's argument that the 2009 channel clearing effort was necessary to forestall an emergency, and thus qualified for a categorical exemption under CEQA [Pub. Res. Code § 21080(b)(4)]. See Minutes and Reporter's Transcript for October 15, 2009 (denial of SDOG's TRO request); Ruling of July 19, 2010 (denial of SDOG's petition for writ of mandate on CEQA issues). The court takes judicial notice of its own decisions in *SDOG I*. This year, the City cannot make the same persuasive arguments it did last year, for several reasons. Accordingly, the court must grant the request for a preliminary injunction.

The papers filed by SDOG on November 15 were deemed the moving papers. The City filed opposition papers on November 16 and November 23. SDOG filed reply on November 30. The court has read the foregoing papers. Except as specifically noted below, the requests of both sides for judicial notice (RFJN) are granted.

2. Standard for Preliminary Injunction.

In deciding whether to issue a preliminary injunction, a trial court must evaluate two interrelated factors: (1) the likelihood that the party seeking the injunction will ultimately prevail on the merits of his claim, and (2) the balance of harm presented, *i.e*., the comparative consequences of the issuance and nonissuance of the injunction. *Fleishman v. Superior Court*, 102 Cal.App.4th 350, 355-56 (2002); *IT Corp v. County of* Imperial, 35 Cal. 3d 63, 69-70 (1983); *Robbins v. Superior Court*, 38 Cal. 3d. 199, 206 (1985); *Cohen v. Bd. of Supervisiors*, 40 Cal 3d 277, 286 (1985). Thus, in order to consider whether SDOG is likely to prevail, the court must consider the requirements of CEQA.

3. Overview of the CEQA Process.

A. The Court's Role in CEQA Cases.

In *Mira Mar Mobile Community v. City of Oceanside,* 119 Cal.App.4th 477, 486 (2004) (*Mira Mar Mobile Community*), the court explained that "[i]n a mandate proceeding to review an agency's decision for compliance with CEQA, [courts] review the administrative record de novo [citation], focusing on the adequacy and completeness of the EIR and whether it reflects a good faith effort at full disclosure. [Citation.] [The court's] role is to determine whether the challenged EIR is sufficient as an information document, not whether its ultimate conclusions are correct. [Citation.]" An EIR is presumed adequate. Pub. Res. Code § 21167.3, subd. (a).

Courts review an agency's action under CEQA for a prejudicial abuse of discretion. Pub. Res. Code § 21168.5. "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." *Id.;* see *Mira Mar Mobile Community*, *supra*, 119 Cal.App.4th at 486; *County of San Diego v. Grossmont-Cuyamaca Community* College Dist. ("*Grossmont*"), 141 Cal. App. 4th 86, 96 (2006)(same).

In defining the term "substantial evidence," the CEQA Guidelines state: " 'Substantial evidence' ... means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made ... is to be determined by examining the whole record before the lead agency. Argument, speculation, unsubstantiated opinion[,] narrative [or] evidence which is clearly erroneous or inaccurate ... does not constitute substantial evidence." CEQA Guidelines, § 15384(a). "In applying the substantial evidence standard, [courts] resolve all reasonable doubts in favor of the administrative finding and decision. [Citation.]" *Mira Mar Mobile Community*, *supra*, 119 Cal.App.4th at 486; *Grossmont,* supra, 141 Cal. App. 4th at 96.

Although the lead agency's factual determinations are subject to the foregoing deferential rules of review, questions of interpretation or application of the requirements of CEQA are matters of law. While judges may not substitute their judgment for that of the decision makers, they must ensure strict compliance with the procedures and mandates of the statute. *Grossmont, supra*, 141 Cal. App. 4th at 96.

B. The Three Steps of CEQA.

CEQA establishes "a three-tiered process to ensure that public agencies inform their decisions with environmental considerations." *Banker's Hill, et al v. City of San Diego*, 139 Cal. App. 4th 249, 257 (2006)("*Banker's Hill*"); see also CEQA Guidelines, § 15002(k)(describing three-step process).

i. *First Step in the CEQA Process.*

The first step "is jurisdictional, requiring that an agency conduct a preliminary review in order to determine whether CEQA applies to a proposed activity." *Banker's Hill, supra,* 139 Cal. App. 4th at 257; see also Guidelines, § 15060. The Guidelines give the agency 30 days to conduct this preliminary review. (Guidelines, § 15060.) As part of the preliminary review, the public agency must determine the application of any statutory exemptions or categorical exemptions that would exempt the proposed project from further review under CEQA. See Guidelines, § 15282 (listing statutory exemptions); Guidelines, §§ 15300–15333 (listing 33 classes of categorical exemptions). The categorical exemptions are contained in the Guidelines and are formulated by the Secretary under authority conferred by CEQA section 21084(a). If, as a result of preliminary review, "the agency finds the project is exempt from CEQA under any of the stated exemptions, no further environmental review is necessary. The agency may prepare and file a notice of exemption, citing the relevant section of the Guidelines and including a brief 'statement of reasons to support the finding.' " *Banker's Hill*, *supra*, 139 Cal.App.4th at 258, citing Guidelines, §§ 15061(d), 15062(a)(3).

ii. *Second Step in the CEQA Process.*

If the project does not fall within an exemption, the agency proceeds to the second step of the process and conducts an initial study to determine if the project *may* have a significant effect on the environment. (Guidelines, § 15063.) If, based on the initial study, the public agency determines that "there is substantial evidence, in light of the whole record ... that the project may have a significant effect on the environment, an environmental impact report [(EIR)] shall be prepared." [CEQA, § 21080(d).] On the other hand, if the initial study demonstrates that the project "would not have a significant effect on the environment," either because "[t]here is no substantial evidence, in light of whole record" to that effect or the revisions to the project would avoid such an effect, the agency makes a "negative declaration," briefly describing the basis for its conclusion. (CEQA, § 21080(c)(1); see Guidelines, § 15063(b)(2); *Banker's Hill*, *supra*, 139 Cal.App.4th at 259.)

The Guidelines and case law further define the standard that an agency uses to determine whether to issue a negative declaration. "[I]f a lead agency is presented with a *fair argument* that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect." (Guidelines, § 15064(f)(1), italics added.) This formulation of the standard for determining whether to issue a negative declaration is often referred to as the "fair argument" standard. See *Laurel Heights Improvement Assn. v. Regents of University of California,* 6 Cal.4th 1112, 1134–1135 (1993).

If the initial study reveals no substantial evidence that the project may have a significant environmental effect, the agency may adopt a negative declaration. Pub. Res. Code § 21080, subd. (c)(2); Guidelines, § 15070, subd. (b); *Grand Terrace, supra,* 160 Cal.App.4th at 1331. "Alternatively, if there is no substantial evidence of any net significant environmental effect in light of revisions in the project that would mitigate any potentially significant effects, the agency may adopt [an MND]. [Citation.] [An MND] is one in which '(1) the proposed conditions "avoid the effects or mitigate the effects to a point where *clearly* no significant effect on the environment would occur, *and* (2) there is *no substantial evidence* in

light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment." (§ 21064.5 . . . .)' [Citations.]" *Grand Terrace, supra,* at 1331-1332. The MND allows the project to go forward subject to the mitigating measures. Pub. Res. Code §§ 21064.5, 21080, subd. (c); see *Grand Terrace*, *supra,* 160 Cal. App. 4th at 1331.

iii. *Third Step in the CEQA Process.*

If no negative declaration is issued, the preparation of an EIR is the third and final step in the CEQA process. *Banker's Hill, supra*, 139 Cal. App. 4th at 259; Guidelines, §§ 15063(b)(1), 15080; CEQA, §§ 21100, 21151.

C. The Environmental Impact Report.

Central to CEQA is the EIR, which has as its purpose informing the public and government officials of the environmental consequences of decisions before they are made. [Citation.] "An EIR must be prepared on any 'project' a local agency intends to approve or carry out which 'may have a significant effect on the environment.' Pub. Res. Code §§ 21100, 21151; Guidelines, § 15002, subd. (f)(1). The term 'project' is broadly defined and includes any activities which have a potential for resulting in a physical change in the environment, directly or ultimately. Pub Res. Code § 21065; Guidelines, §§ 15002, subd. (d), 15378, subd. (a); [Citation].) The definition encompasses a wide spectrum, ranging from the adoption of a general plan, which is by its nature tentative and subject to change, to activities with a more immediate impact, such as the issuance of a conditional use permit for a site-specific development proposal." *CREED v. City of San Diego*, 134 Cal. App. 4th 598, 604 (2005).

4. Application to Facts of this Case.

As noted in part 3 above, "[j]udicial review under CEQA is generally limited to whether the agency has abused its discretion by not proceeding as required by law or by making a determination not supported by substantial evidence. [Citations.]" *CREED, supra*, 134 Cal. App. 4th at 605. The precise standard of review to be used in determining whether an agency has abused its discretion under CEQA varies depending on the type of claim under review. *Id.* The City concedes in its November 23 opposition (2:10-11) that the substantial evidence test applies here.

The court concludes that SDOG has established it is likely to prevail on the merits, because it is likely to establish that the City abused its discretion by moving forward with channel clearing work in 2010 under a permit that was issued under invalid premises. The court concludes it is unlikely the City can establish, with substantial evidence, the validity of its claim that the "emergency" exemption applies at this time.

What has changed since last year? Several things. First, the City can no longer claim, as it did in 2009 in *SDOG I*, that the completion of the Border Fence Project by federal agencies is a "new" event that has had an unforeseen impact on the hydrology of the TRV. The court accepted this argument last year, soon after the 2008 completion of the border fence project, and the channels were cleared over SDOG's objection. A year later, the City cannot legitimately claim that it did not anticipate that normal spring and summer flows in the TRV would cause sedimentation to re-occur; this is the nature of riverbeds, and the City knew (because it argued it last year in *SDOG I*) that the sedimentation build-up was exacerbated by the huge dam-like berm near Smuggler's Gulch which supports the border fence infrastructure. See

also McFadden 11/16 Decl. at paragraph 3 (the subject channels are "prone to rapid accretion of sediment and debris"). As the court held in *SDOG I* on November 16, 2010, it was incumbent upon the City, pursuant to its own Municipal Code and the language of its own 2009 emergency permit, to process a regular permit application for the 2009 work. The court now finds that, consistent with CEQA and the Municipal Code, it was likewise incumbent upon the City to address post winter 2009 channel clearing work in the TRV with regular, non-emergency permit applications and environmental study. Thus, when the City's Kelly Broughton wrote to the City's Tony Heinrichs in her memo dated 9/14/10 (Ex. E to moving papers) that it was her "understanding that the 2009 Emergency CEQA Exemption is still valid" for the proposed 2010 channel clearing project, she was profoundly mistaken. This sort of erroneous conclusion simply does not qualify as "substantial evidence."

Second, the City claimed in the papers used to support the application for an emergency permit that another wet winter is in store for San Diego as the result of the continued presence of an "El Nino" weather pattern. (Ex. B to moving papers, page 2 of 4, 4th full paragraph referencing "the prediction of El Nino storm events"). In fact, the prognostications are for the opposite: "La Nina" conditions, which in San Diego typically give rise to an abnormally dry winter. [Although under *Mangini v. RJ Reynolds* Tobacco Co., 7 Cal. 4th 1057, 1063 (1994), the court does not take judicial notice of the news articles submitted as Exhibits I and J to the moving papers, the court may properly take judicial notice of publications of governmental agencies indicating the non-existence of "El Nino" conditions for the 2010-11 winter. See, for example, NOAA's report at http:www.cpc.ncep.noaa.gov/products/analysis_monitoring/enso_advisory/ensodisc.pdf. It was published November 4, 2010 and states in pertinent part: " La Nina continued during October 2010 as indicated by below-average sea surface temperatures (SSTs) across most of the equatorial Pacific Ocean ... Consistent with nearly all ENSO forecast models (Fig. 6), La Nina is expected to last at least into the Northern Hemisphere spring 2011. A large majority of models also predict La Nina to become a strong episode (defined by a 3-month average Nino – 3.4 index of -1.5 degrees Celsius or colder) by the November-January season before gradually weakening."] As noted above, "evidence which is clearly erroneous or inaccurate ... does not constitute substantial evidence." CEQA Guidelines, § 15384(a). As SDOG argued, the unsubstantiated reference to a continued "El Nino" raises a strong inference that the City's 2010 emergency permit application was a hasty "cut and paste" from the 2009 version, and the City clearly abused its discretion in seeking and granting itself an emergency permit based on the faulty premise that an El Nino-driven wet 2010-2011 winter portends "the likelihood of flooding."

Further, it appears to the court the City is attempting to "institutionalize" an ongoing "emergency," in a fashion completely at odds with the definition of that term in CEQA and the 4th DCA's exposition of its dimensions in the leading case on the emergency exemption [*CalBeach Advocates v. City of Solana* Beach, 103 Cal. App. 4th 529 (2002)]. The City's various permit applications and other documents repeatedly refer to the project in question as "maintenance." (e.g. Exhibit A, page 1; Exhibit D, page 1; Exhibit E, page 2; Exhibit F; Exhibit H, page 1) The definition of "maintain," insofar as relevant here, is "keep in existence or continuance." Random House Dictionary of the English Language, page 807 (1969 Ed.). Thus, the City wishes to keep the channels in the TRV in their effective state on an ongoing basis (not deal with a sudden, unexpected occurrence or prevent one, as was the case in *CalBeach*). This impression is cemented by Exhibit H, in which the City's consultant candidly requests "authorization for five years of as-needed maintenance to occur between August 16, 2010 and February 28, 2015."

Further evidence of the absence of substantial evidence supporting the City's position comes in the form of the inconsistent assertions contained in the City's permit application papers and submissions to the court. For example, in its opposition brief filed November 16, the City claimed at 4:9 that it was left with

no choice but to apply for "one more emergency permit." Yet in its application for an Emergency CDP dated 9/20/10, it proposed removal of 15,000 cubic yards of material in the "upcoming maintenance event *and annually thereafter*." [Ex. B to moving papers, page 5 (*italics* added)] Even the reference to 15,000 cubic yard of sediment is inconsistent, as the Declaration of Kris McFadden filed November 16 said at paragraph 25 that 13,244 cubic yards had already been removed as of the date of the TRO hearing. Either the permit application severely understated the anticipated removal (and thus does not qualify as substantial evidence), or (as SDOG argues in its reply) the City had completed most of the work anticipated and cannot claim significant harm if the preliminary injunction is granted. In this regard, the absence of TRV flooding news from the rain event of November 20-21 is perhaps significant. While the City's November 23 opposition refers to the rain that fell on this weekend, it does not suggest that this rain caused flooding in the TRV (even though the TRO had been granted a few days earlier).

Similarly, the City's opposition papers filed November 16 and 24 claimed 80% of the materials excavated last year had been refilled (McFadden 11/16 Decl. paragraph 21; Nov. 24 brief at 3:26), yet the City's consultant's estimate was substantially lower ("approximately half of the post maintenance depth"). [Exhibit H to moving papers, page 3 of text, under heading "PROJECT PURPOSE"]. It seems clear to the court that whatever "substantial evidence" may mean in a given context, it should not be such a moving target.

While the court does grant the City's RFJN with respect to the *Egger* litigation, it is not persuaded that the presence of a single claim for damages tips the scales of equity significantly in the City's favor. If the City believes Mr. Briggs has an irreconcilable conflict of interest by representing clients with seemingly inconsistent legal theories and/or litigation goals (Cal. Rules Prof. Conduct 3-310), it may make a seasonable motion for disqualification. *See People ex rel. DOC v. Speedee Oil Change Systems*, 20 Cal. 4th 1135, 1144-1145 (1999); *Marriage of Zimmerman*, 16 Cal. App. 4th 556, 562 (1993).

The City argues that the court should give the City credit for processing a PEIR for a master stormwater permit in accordance with the requirements of the "Permitting Agencies." McFadden 11/16/10 Decl. at paragraphs 7-17. Yet the City's papers fail to establish that the PEIR adequately addresses the environmental impacts of annual channel clearing in the TRV, and the record reflects that the PEIR is delayed because it was appealed by environmental groups who believe it is inadequate. [Ex. G to moving papers.] The City's approach would undermine the fundamental purpose of CEQA, which is to insure that environmental impacts are considered, studied and addressed before a project is undertaken (not after). The City's argument that the Coastal Commission may have concluded that there will be no adverse effect on coastal resources (Nov. 24 Oppo. at 4:23) is not persuasive, because 1) the Coastal Commission is not the lead agency charged with CEQA compliance; and 2) "coastal resources" is only one dimension of the environment that needs to be studied.

The Neudecker Declaration confirms the court's view. In paragraph 4, Mr. Neudecker opines that the "fact that the drainage channels would again be filled was not predictable." This defies common sense, both in light of the riverine nature of the subject project depicted in the photos attached to the Liddicoat Declaration and in light of the City's 2008-2009 experience. Mr. Neudecker goes on to note the absence of "hydrological and drainage studies of the Border Fence Project." That is precisely the point: The City cannot simply complain that the federal government didn't do the studies or won't provide copies of any studies it did do. The City must conduct the necessary studies and incorporate them into a comprehensive informational document called an EIR. The fact that the City argues, without evidentiary support, that channel clearing may not have been needed in 2010 under average circumstances (Nov. 24 Oppo. at 5:21-22) drives this point home.

The court further concludes that, reduced to its essence, the City's argument is that an emergency exists because its master permit application was delayed by circumstances not wholly within its control, and it is getting whipsawed by the competing demands of federal regulators and competing (or conspiring) environmental groups. (Nov. 24 Oppo. at 7; Ortlieb and Harris Declarations) There is no categorical exemption under CEQA that applies in this setting, and the court is not authorized to engraft one. Nor does this state of affairs describe or create an "emergency" as that term is used in CEQA and the case law interpreting it. In deciding whether to grant a preliminary injunction, the court is entitled to consider the public interest. *See City of San Diego v. Southern Calif. Tel. Corp*., 42 Cal. 2d 110, 119-120 (1954). Here, the court determines that insisting upon strict compliance with CEQA is in the public interest, and outweighs the modest evidence of a threat to life and property in the wake of the 2009 channel clearing operation disclosed by the evidence considered by the City in seeking and granting the emergency permit. *See Grossmont, supra*, 141 Cal. App. 4th at 96.

The city's inability to complete the PEIR appears to be a resource allocation issue. This is not a situation in which the City has established that it could not "complete the requisite paperwork within the time constraints of CEQA." *Compare Western Municipal Water Dist. v. Superior Court*, 187 Cal. App. 3d 1104, 1111 (1986), *disapproved on other grounds in WSPA v. Superior Court*, 9 Cal. 4th 559, 570 (1995). The City failed to complete a regular permit application after the winter 2009 channel clearing project, and now confuses "could not complete" with "did not complete." While the court is sensitive to the City's dire financial straights and the need to devote resources to a myriad of complex, important matters in a prudent manner, the Legislature chose not to enact "we are out of money" or "we are trying to avoid litigation on the PEIR" exemptions to CEQA. Again, the court is not free to engraft new exemptions under the guise of an "emergency."

5. Decision.

For all the foregoing reasons, the court concludes that the City is unlikely to prevail on the merits in this case, and that the balancing of the equities favors petitioner (inasmuch as the City has had the authority, power and obligation to process a regular permit application every single day since the conclusion of the 2009 channel clearing work, and continues to have the same authority, power and obligation today). Accordingly, the preliminary injunction is granted as prayed.

6. Other Evidentiary Issues.

SDOG's Nov. 30 objections to the City's evidence are ruled upon as follows: McFadden 4: overruled; McFadden 24; sustained; Ortlieb: overruled; Neudecker: overruled; Liddicoat: overruled, as it has been decades since courts required the declaration of the photographer to authenticate photographic evidence. See Imwinklereid, *Evidentiary Foundations* p. 85 (1st Ed. 1980).

SDOG's Nov. 30 supplemental RFJN is denied. As the court held in the summary judgment context in *San Diego Watercrafts, Inc. v. Wells Fargo Bank*, 102 Cal. App. 4th 308, 316 (2002), consideration of evidence offered for the first time in a reply violates the non-moving party's right to know "what issues it was to meet in order to oppose the motion. Where a remedy as drastic as summary judgment is involved, due process requires a party be fully advised of the issues to be addressed and be given adequate notice of what facts it must rebut in order to prevail." Similarly, here, where a significant City project is at stake, the City had the right to expect that SDOG would lay all of its evidentiary cards on the table in its opening papers. It is noteworthy that the same rule applies in federal court. *See Zamani v.*

Carnes, 491 F.3d 990, 997 (9th Cir.2007) ("the district court need not consider arguments raised for the first time in a reply brief.").