

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
HALL OF JUSTICE
TENTATIVE RULINGS - January 22, 2009**

EVENT DATE: 04/22/2009 EVENT TIME: 10:00:00 AM DEPT.: C-71

JUDICIAL OFFICER: Ronald S. Prager

CASE NO.: GIC880444

CASE TITLE: SAN DIEGO NAVY BROADWAY COMPLEX COALITION VS CITY OF SAN DIEGO

CASE CATEGORY: Civil - Unlimited

CASE TYPE: Toxic Tort/Environmental

EVENT TYPE: Hearing on Petition

CAUSAL DOCUMENT/DATE FILED: Amended Petition, 04/02/2008

The Court rules on petitioner San Diego Navy Broadway Complex's ("Petitioner") petition for writ of mandate as follows:

If affirmed, the Court's tentative ruling will serve as the Court's Statement of Decision pursuant to California Rules of Court, rule 3.1590.

Petitioner is a public benefit corporation. Petitioner is represented by Cory J. Briggs and Mekaela M. Gladden of Briggs Law Corporation and Marco A. Gonzalez of Coast Law Group LLP.

Respondent is the City of San Diego ("Respondent"). Respondent is represented by Malinda R. Dickenson of the Office of the City Attorney. The Real Party in Interest is Manchester Pacific Gateway LLC ("RPI"). The RPI is represented by Steven M. Strauss, Summer J. Wynn, and Sarah R. Boot of Cooley Godward Kronish LLP.

As a preliminary matter, Respondent and RPI's requests for judicial notice are granted.

Petitioner challenges Respondent's decisions on January 9, 2007 (Administrative Record ("AR") 195:010546-704, 10:000355:59, 11:000361-65) and February 26, 2008 (AR 208:018109-210) to uphold the DSD's and CCDC's environmental determinations under section 21166.

The subject property is approximately 16 acres of land near the waterfront in Downtown San Diego, bordered by Broadway on the north, Harbor Drive on the west and south, and Pacific Highway on the east. (AR 2:000024-25.)

In 1990, the Navy decided to redevelop the Navy Broadway Complex and adopted an environmental impact statement ("1990 EIS") to substantiate its decision. In 1992, the Navy and Respondent entered into a Memorandum of Understanding, which specified that the Navy and Respondent would enter into an agreement for the future redevelopment of the NBC site ("Development Agreement"). (AR 2:000026, 13:000402.) The Development Agreement between the Navy and Respondent contemplated that the developer of the Project would be entitled to build up to 1,650,000 square feet of office space, 1,220,000

square feet of hotel space, 25,000 square feet of retail facilities, and 55,000 square feet of museum or other public-attraction space in addition to the high-rise office for the Navy's new headquarters. (AR 2:000068-29, 2:000032, and 2:000069.) At the same time, Respondent certified an environmental impact statement. ("Final EIR/EIS") and a Mitigation and Monitoring Program ("MMP"). (AR 17:001365-72.) On March 31, 2006, the Navy selected the RPI to be its lessee and the developer of the NBC. (AR 12:000367.) On November 22, 2006, the RPI and the United States of America, acting by and through the Navy, entered into the Real Estate Ground Lease for Broadway Complex, Lease No. N6247307RP07P24 ("Ground Lease"). (AR 7:000140-41.) The Ground Lease expressly required the RPI to develop the NBC site in accordance with the Development Agreement and Guidelines. (AR 7:000165.)

In May 2006, the RPI submitted its master plan and "basic concept/schematic drawings" for step one consistency review to the CCDC ("First Submittal"). (AR 26:007475, 355:022541.) Before the CCDC completed its step one consistency determination for the First Submittal, Respondent completed a formal analysis and determination under Public Resources Code section 21166 ("section 21166"). (AR 273:009972, 209:18212-16.) Respondent's Department of Development Services ("DSD") performed the analysis. (AR 209:018212.) The DSD determined that the Project was substantially the same as the Project analyzed and mitigated by the Final EIR/EIS and MMP. (AR 209:018212.) It concluded that none of the conditions under section 21166 were met and so supplemental or subsequent review of the Project was not required. (AR 209:018214-216.) On October 25, 2006, the CCDC issued its consistency determination for the First Submittal. (AR 342:021335-76.) It also considered and adopted the DSD's CEQA consistency analysis. (AR 344:021665-66, 021675.) Thus, it agreed with the DSD's determination that subsequent or supplemental review was not required under section 21166. (AR 344:021676-77.) Two appeals were filed challenging the DEQA consistency analysis. (AR 183:010027-90, 184:010092-111.) On January 9, 2007, the City Council voted to deny both appeals and uphold the DSD's and CCDC's environmental determinations under section 21166. (AR 195:010546-704, 10:000355:59, 11:000361-65.) As a result, Petitioner filed this action on February 20, 2007.

Standard of Review. Petitioner's challenges under CEQA and the SHMA are adjudicated under Code of Civil Procedure section 1094.5. Courts must determine whether the challenged acts and decisions are supported by substantial evidence in light of the entire record. (Pub. Resources Code §21168.) Under section 1094.5, the central issue is whether the responding parties acted without or beyond their jurisdiction, failed to provide a fair trial, or prejudicially abused their discretion. (Code Civ. Proc. §1094.5(b).) An abuse of discretion exists when the responding parties have not proceeded in the manner required by law, their order or decision is not supported by the findings, or the findings are not supported by the evidence. (*Ibid.*)

Subsequent/Supplemental Review. "[A]fter a project has been subjected to environmental review, the statutory presumption flips in favor of the developer and against further review." (*Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 1049 (hereafter "*Moss*").) "[T]he interests of finality are favored over the policy of favoring public comment." (*Mani Bros. Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1399.)

Generally, the lead agency's role in evaluating a proposal's environmental impacts is complete upon approval of the proposal even if additional information appears after the approval. (Cal. Code of Regs, tit. 14 ("CEQA Guidelines"), §15162(c).) Even so, the lead agency must subject the proposal to further environmental review if it is called on later to take another discretionary action on the proposal and one

of the criteria for updating the previously certified EIR is satisfied. (*Ibid.*)

Section 21166 prohibits agencies from requiring a subsequent or supplemental EIR unless one or more of the following events occur: (1) substantial changes are proposed in the project which will require major revisions of the previous EIR, (2) substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the previous EIR, or (3) new information, which was not known and could not have been known at the time the previous EIR was certified as complete, becomes available. Under the statute's first two prongs, an agency is prohibited from requiring subsequent review unless there is substantial "evidence of such 'substantial changes' in the project or surrounding circumstances that 'major revisions' of the prior EIR are required." (Pub. Resources Code §21166(a), (b).) Under the third prong, an agency is prohibited from requiring subsequent review unless "[1] 'new' information of substantial importance becomes available, [2] the 'new information' was not known and **could not have been known** at the time the EIR was certified; and [3] the 'new information' shows either that the project will have one or more significant effects not previously discussed in the EIR or that significant effects previously examined will be substantially more severe than shown in the EIR." (*A Local & Regional Monitor v. City of Los Angeles* (1993) 12 Cal.App.4th 1773, 1800 (hereafter "*ALARM*") (emphasis in original); CEQA Guidelines §15162.) If any of the conditions are not satisfied, "the agency is **prohibited** from requiring a subsequent EIR." (*Ibid.* (emphasis in original); *See also Moss, supra*, 162 Cal.App.4th at pp. 1061-1062.) A court reviewing an agency decision under section 21166 is held to the "substantial evidence" standard of review. (*See e.g., Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689, 702-704; CEQA Guidelines §15384.)

The Court has reviewed the record in light of the parties' briefs and the applicable law and concludes the petition for writ of mandate should be denied for the reasons stated below.

Petitioner's moving papers set forth the following issues to be considered by the Court: (1) Did Respondent prejudicially abuse its discretion under CEQA by approving the recent proposal for implementing redevelopment of the NBC without first performing an up-to-date environmental review? and (2) Did Respondent prejudicially abuse its discretion under the Seismic Hazards Mapping Act ("SHMA") by not requiring a geotechnical report? In addition to these issues, the Respondent and RPI presented procedural issues for the Court to address.

Procedural Issues. Respondent and RPI contend that Petitioner failed to exhaust administrative remedies, failed to file a statement of issues, and failed to fairly portray the evidence in the administrative record.

As to the issue of exhaustion of administrative remedies, Petitioner presented evidence that it communicated to the City Council its desire for that body to consider the issues of water supply, groundwater contamination, particulate matter, greenhouse gas, and climate change though the PowerPoint presentation it presented at the public hearing. (PET AR 196:10707-24.) This is sufficient evidence that it did exhaust its administrative remedies.

As to the issue of whether Petitioner failed to file a statement of issues, Petitioner presented evidence that the Court relieved Petitioner of the necessity of filing a Statement of Issues pursuant to Public Resources Code section 21167.8 due to Respondent's failure to provide the AR in a timely manner. (Briggs Dec., ¶¶1-3, 5.) Respondent and RPI did not refute this fact.

As to the issue of whether Petitioner failed to fairly portray the evidence in the administrative record, the court notes that in *Citizens for a Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91, 112-113, the court stated that "[i]t is [petitioner's] burden to demonstrate that there is not sufficient evidence in the record to justify the City's action. [Citation] To do so, an [petitioner] must set forth in its brief all the material evidence on the point, not merely its own evidence. [Citation] A failure to do so is deemed a concession that the evidence supports the findings." Petitioner's Reply admits that it did not comply with this requirement and, in fact, believes that it was not required to do so. (Reply, p. 5.) However, Petitioner failed to show why the burden should differ at the trial versus appellate level. Therefore, the petition is denied on this procedural ground.

Substantive Issues. Petitioner contends that Respondent abused its discretion with respect to the following issues.

Consistency Determination. Petitioner contends that the CCDC's consistency determinations on the Master Plan and Superseding Master Plan for redevelopment of the Project were discretionary actions. On the other hand, Respondent and RPI presented evidence to show that nothing more than ministerial decisions were involved. More specifically, the Development Agreement stated that review of the plans would be ministerial. (AR 2:000025.) Furthermore, the CCDC used a standard crafted by Respondent and the Navy. (AR 2:000025-26.) Finally, aesthetic issues are the subject of local ordinances, not CEQA. (*Bowman, supra*, 122 Cal.App.4th at p. 593.) Thus, there is substantial evidence in the record to support Respondent's actions on this issue.

Seismic Impacts. Petitioner contends that substantial changes in circumstances and new information have arisen since the Final EIR/EIS. On the other hand, Respondent and RPI presented evidence that whether or not an active fault was located under the Project was considered in the Final EIR/EIS. (AR 15:000973-74, 16:001159.) Mitigation measures were imposed to reduce the risks associated with seismic hazards to less than significant. (AR 202:017830-31, 15:000936, 198:017583, 355:0222522.) Respondent and RPI also pointed out that the GEOCON Report concluded that tests were unable to locate an active fault. (AR 151:009660, 33:007792-93.) Thus, there is substantial evidence in the record to support Respondent's actions on this issue.

Water Supply Impacts. Petitioner contends that substantial changes in circumstances and new information have arisen since the Final EIR/EIS. On the other hand, Respondent and RPI presented evidence that the Final EIR/EIS considered water-supply issues. (AR 13:000597-99, 15:000824.) The Final EIR/EIS also contained mitigation measures and responses to comments on this issue. (AR 15:000918-19, 15:000938, 15:000957.) Notably, the DSD and CCDC incorporated information regarding water supply in their determinations and studies. (AR 20:003327-31, 22:006222-26; See also AR 23:00666-68, 24:007174-80.) Most importantly, Respondent and RPI correctly pointed out that Water Code section 10910 applies to initial determinations. The initial determination of whether to prepare an EIR, negative declaration, or mitigated negative declaration in this case was made in the 1990s. Thus, there is substantial evidence in the record to support Respondent's actions on this issue.

Groundwater Impacts. Petitioner contends that substantial changes in circumstances and new information have arisen since the Final EIR/EIS. On the other hand, Respondent and RPI presented evidence that the Final EIR/EIS analyzed potential impacts from groundwater contamination from construction. (AR 15:000983-85, 16:001168-70, 17:001353-54.) It also states that treatment of contaminated water and compliance with the RWQCB's and NPDES standards will be required for construction dewatering. (AR 15:000983-85, 16:001168-70.) The MMP also includes mitigation

requiring the RPI to obtain a discharge permit from the RWQCB. (AR 17:001353-54, 22:006153-54.) Since the Final EIR/EIS, the NEAVP-EIR has analyzed potential impacts from contaminated groundwater on the Project site (AR 19:002384-86) and concluded that mitigation, including compliance with RWQCB, NPDES, and City discharge standards, will mitigate construction dewatering impacts below a level of significance. (AR 19:002387-88; See also CCDC's 2007 Initial Study, 23:006646049, 2006 Navy EA, 22:006261-73.) The Ground Lease also requires the RPI to comply with applicable federal, state, and City regulations regarding water quality. (AR 7:000172.) Finally, Respondent's Storm Water Management and Discharge Ordinance prohibits and regulates the discharge of "Non-Storm Water Discharges" into the storm water conveyance system. (SDMC §§43.0301, 43:0304, 43.0305.) Thus, there is substantial evidence in the record to support Respondent's actions on this issue.

Particulate Matter Impacts. Petitioner contends that substantial changes in circumstances and new information have arisen since the Final EIR/EIS. On the other hand, Respondent and RPI presented evidence that the Final EIR/EIS did analyze the potential effects of diesel particulate matter. (AR 13:000640-42, 15:000824.) It concluded that the impacts from "exhaust emissions from construction equipment" would be temporary and insignificant. (AR 13:000640-42.) In addition, the NEAVP-EIR concluded that "emissions from equipment exhaust are adverse but less than significant" while the 2006 Navy EA concluded that there would be no significant adverse impact from diesel particulates. (AR 22:006288 and 20:003392-99.) Thus, there is substantial evidence in the record to support Respondent's actions on this issue.

Greenhouse Gas and Climate Change Impacts. Petitioner contends that substantial changes in circumstances and new information have arisen since the Final EIR/EIS. However, Respondent and RPI correctly note that CEQA does not require review of GHG emissions. At this time, the Office of Planning and Research is still in the process of adopting CEQA Guidelines concerning GHG emissions. (Pub. Resources Code §21083.05.) Public agencies are not required to consider or proposed draft regulations when evaluating a project. (*Chaparral Greens, supra*, 50 Cal.App.4th at p. 1145.)

Cumulative Impacts. Petitioner contends that substantial changes in circumstances and new information have arisen since the Final EIR/EIS. On the other hand, Respondent and RPI presented evidence that the Final EIR/EIS contained a cumulative impact analysis. (AR 13:000709-12, 15:000824.) In addition, the CCDC's 2007 Initial Study and the 2006 Navy EZ considered the Project's cumulative impacts. (AR 22:006323-41, 23:006613-23.) The NEAVP-EIR also included the Project in its cumulative impact analysis. (AR:002818-38.) Finally, several other environmental documents certified by Respondent assumed full build out of the Project in their cumulative impact analyses. (AR 18:001841-64, 18:001900, 19:002829, 20:003179, 20:003441-54, 22:006336-41, 24:006893-94, 24:007273-77.) Thus, there is substantial evidence in the record to support Respondent's actions on this issue.

Terrorism Impacts. Petitioner contends that substantial changes in circumstances and new information have arisen since the Final EIR/EIS. On the other hand, Respondent and RPI correctly note that CEQA does not require an analysis of terrorism. *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm.* (9th Cir. 2006) 449 F.3d 1016 is factually and legally distinguishable from this case.

Seismic Hazards Mapping Act ("SHMA"). SHMA does not apply since the Project is not located within a seismic hazard zone. (AR 355:022551; See also SRJN, Exhs. C and D.) In fact, "[n]o seismic hazard maps have been completed by the State for the County of San Diego." (AR 161:009747.)

Therefore, the Court denies Petitioner's writ of mandate. Respondent is directed to prepare the

Judgment in accordance with this ruling.

IT IS SO ORDERED.