SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 01/26/2021 TIME: 02:09:00 PM DEPT: C-71

JUDICIAL OFFICER PRESIDING: Gregory W Pollack
CLERK: Terry Abas
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2018-00057624-CU-TT-CTL** CASE INIT.DATE: 11/06/2018
CASE TITLE: **Citizens for a Friendly Airport vs County of San Diego [E-FILE]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Toxic Tort/Environmental

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EVENT TYPE: Ex Parte

APPEARANCES

There are no appearances by any party.

The Court, having taken the above-entitled matter under submission on 1/25/21 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

The Court rules on plaintiff/petitioner Citizens for a Friendly Airport's (Petitioner) complaint/petition for writ of mandate (Petition) as follows:

Petitioner is represented by Cory J. Briggs.

Defendant/Respondent County of San Diego and Bd. of Supervisors of the County of San Diego (collectively County) are represented by Joshua M. Heinlein.

As a preliminary matter, the County's request for judicial notice is granted and the documents Petitioner provided in its Notice of Lodgment of Omitted Administrative Record Items will be added to the administrative record.

Petitioner challenges the County's approval, on October 10, 2018, of the McClellan-Palomar Airport Master Plan Update (Project) and certification of the Project's Final Program Environmental Impact Report (PEIR). (Administrative Record (AR), 41:7548-50).

The Court has reviewed the record in light of the parties' briefs, oral arguments and the applicable law and concludes the Petition should be granted in part and denied in part for the reasons stated below.

Standard of Review. Petitioner's CEQA claims are reviewed for whether there was a prejudicial abuse of discretion. An abuse of discretion is shown if the agency did not proceed as required by law, or if its decision is not supported by substantial evidence. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412, 426.) Under this standard, reviewing courts determine de novo the legal question whether the agency has complied with the procedures mandated by statute, but they afford deference to the agency's substantive factual conclusions. (*Ebbetts Pass Forest Watch v. Cal. Dept. of Forestry & Fire Protection* (2008) 43 Cal. 4th 936, 944.) A reviewing court may '"not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable,' for, or on factual questions, our task 'is not to weigh conflicting evidence and determine who has the better argument.'" (*Ibid.*)

The first issue is whether the County was required to obtain a conditional use permit amendment.

One, the Complaint adequately alerted the County of its alleged violation of CUP-172. To the extent that the County argued that the Petition failed to plead a violation of CUP-172 on the ground of uncertainty, the Court agrees with Petitioner that this issue should have been raised via a demurrer or answer. (Code Civ. Proc., §430.10(f).) Furthermore, this argument is clearly encompassed within the fourth cause of action for violation of the Planning and Zoning Law. Finally, both the administrative record (AR 20:4561, 4575, 4720, 4853, 4865, 4922-4923) and Petitioner's brief re: motion to consolidate filed on July 28, 2020 contain references to CUP-172 (AR 20:4561, 4575, 4720, 4853, 4865, 4922-4923.) Thus, the County has long been apprised of the claims being asserted by Petitioner with respect to CUP-172.

Two, the County waived its immunities. It obtained CUP-172 as a condition of the City of Carlsbad's annexation of the airport and rezoning of the land for airport use. (Petitioner's Notice of Lodgment of Omitted Administrative Record Items (LOARI), Exhs. 4, 5.) Notably, the Local Agency Formation Commission stated the following: "In order to comply with the requirements of the Carlsbad Zoning Ordinance, an appropriate zoning designation must be placed upon the airport, and a Conditional Use Permit *must* be obtained by the County. The City of Carlsbad and the County are in agreement with this procedure." (Emphasis added) (LOARI, Exh. 5, p. 19.) Thus, the evidence in the administrative record indicates that the County voluntarily and intentionally relinquished its immunities with respect to the airport.

Three, Petitioner has standing to maintain the CUP-172 claim pursuant to the public interest exception set forth in *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 913-914.)

Four, the Project required an amendment to CUP-172. The Project changes the designation of the airport. Planning Commission Resolution No. 1699 stated that "[t]he existing designation of the airport as a General Aviation Basic Transport Airport shall not change unless an amendment to this CUP is approved by the Planning Commission." (AR 43:7572.) Here, the County changed the designation of the airport from B-II to D-III. (AR 41:7549.) Notably, the County did not address this issue in its opposition and generally argues that it was not required to obtain an amendment. (*See* Oppo., p. 12.) At oral argument, the County argued that the proposed D-III designation was encompassed within the General Aviation Basic Transport Standard, which was operative at the time CUP-172 was approved. (AR 7:842, 36:6934.) However, it provided no evidence in the administrative record to support this statement. Furthermore, the administrative record stated that "[t]he airport currently meets all B-II design criteria...." (AR 36:6794.) If, as the County argued, the D-III designation was encompassed within the prior standard, why did the PEIR explicitly state that the Airport fell within the B-II design criteria? Notably, the Palomar Airport Advisory Committee failed to approve the Project with the D-III designation. (AR

40:7546.) Finally, the administrative record contained evidence showing that the change from B-II to D-III would allow larger aircraft to takeoff with more fuel. (AR 36:6789; see also AR 20:4602.) This evidences an intent to use the Airport in a way that was not previously authorized.

However, the Court does agree with the County's interpretation of the term "expansion" and that no amendment was required on the basis of the proposed changes set forth in the Project.

The second issue is whether the County adequately analyzed the Project's noise impacts.

One, the PEIR adequately analyzed the noise impacts of non-commercial aircraft. In response to comment L3-70, the County states that "non-commercial aviation activity was analyzed, and potential noise impacts were disclosed in the PEIR and technical studies. The PEIR's Noise Impact Analysis (Appendix D) Table 5 describes the anticipated increase in operations for all aircraft types, including non-commercial. Figure C1 from the Noise Impact Analysis (Appendix D) presents a comparison of existing conditions (2016) to future conditions (2036) including full implementation of the Proposed Project, including forecasted commercial and non-commercial aircraft operations." (AR 20:4614; *see also* AR 20:4615.)

Two, the PEIR's study area and methodology were inadequate. Public Resources Code section 21001 subd. (g) declared that it is the state's policy to '[r]equire governmental agencies at all levels to consider qualitative factors as well as economic and technical factors...." In *Berkeley Keep Jets Over the Bay Committee v. Bd. Of Port Com'rs* (2001) 91 Cal.App.4th 1344, 1377-1383 (hereafter *Berkeley*), the court criticized an agency's sole reliance on the CNEL methodology for CEQA purposes. It also stated that "the fact that residential uses are considered compatible with a noise level of 65 decibels for purposes of land use planning is not determinative in setting a threshold of significance under CEQA. (*Id.,* at p. 1381.) Furthermore, the court in *Berkeley* cited to *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 881-882, for the proposition that "citizens' personal observations about the significance of noise impacts on their community constituted substantial evidence that the impact may be significant and should be assessed in an EIR, even though the noise levels did not exceed general planning standards." Here, the administrative record indicates that CNEL levels in the City of Vista were not identified as part of the analysis despite the fact that Vista residents and other out of contour communities reported significant noise impacts during the public comment period. (AR 9:1449, 20:4644-4655.) CEQA requires an agency to assess the impacts in the areas affected by the proposed project. (CEQA Guidelines, §15360; Pub. Res. Code §20160.5; *see also Citizens of Goleta Valley v. Bd. of Supervisors of Santa Barbara Cty.* (1990) 52 Cal.3d 553, 575.) Here, the County admitted that "CNEL levels in the City of Vista are not identified as part of the analytic...." (AR 20:4651.)

Three, the threshold of significance for the noise impacts analysis was appropriate.

As a preliminary matter, the Court notes that the administrative record contained evidence that this issue was raised at the administrative level. (AR 20:4644, 4757, 5061.)

CEQA Guidelines section 15064.7 subd. (c) states that the determination of the appropriate threshold is made by the lead agency. Notably, Petitioner's Exhibit at page 33 states that "a commonly used baseline criterion is a CNEL of 65dB." Furthermore, the administrative contains the County's basis for why it believed it was appropriate to use this threshold. (AR 7:678-682, 12:3371-3376, 20:4636, 5216-5217.)

Four, the County's responses to Comments were adequate. Petitioner's argument as to this issue is based on the County's alleged failure to assess the effects of non-commercial aircraft operations. This

argument fails since this Court has determined that the County did assess its effects in the PEIR for the reasons stated above.

The third issue is whether the County adequately analyzed the Project's traffic impacts.

The County presented evidence that the PEIR analyzed traffic conditions for the following scenarios: (1) Existing Conditions: 2016, (2) Existing Conditions Plus Project, (3) Near-Term Conditions (i.e., existing + cumulative): 2020, (4) Near-Term Conditions Plus Project, (5) Long-Term Conditions: 2036, and (6) Long-Term Conditions Plus Project. (AR 7:709.) Citing AR 7:717, it contends that natural growth of non-commercial operations was accounted for in SANDAG's model forecasts and included in the PEIR's cumulative impacts analysis. (*See also* AR 20:4618, 5218-5219, 5250.) Thus, substantial evidence exists to show that the County adequately analyzed the Project's traffic impacts.

The fourth issue is whether the County adequately analyzed the Project's GHG emissions and climate change impacts.

One, the County presented substantial evidence to support its contention that the PEIR analyzed the GHG emissions and climate-change impacts from all potential sources, including non-commercial operations. For example, the total emissions for each plan scenario included GHG emissions from non-commercial aircraft. (AR 7:813-816.) It also demonstrated how emissions from non-commercial aircraft could be calculated based on the information provided in the PEIR. (Oppo., p. 27.)

Two, the PEIR was not required to analyze potential methane emissions from drilling holes into the existing landfill. CEQA Guidelines section 15152 subd. (c) allow the deferral of "detailed, site-specific information." The court in *Citizens for a Sustainable Treasure Island v. City & County of San Francisco* (2014) 227 Cal.App.4th 1036, 1047, noted that a program EIR "does not examine the site-specific impacts of the many individual projects that may be proposed in the future." Here, project-specific engineering design plans do not exist for the portion of the runway extension that would conceptually be built over the existing landfill. (AR 7:567.) In a response to comment, the County stated that "[a]dditional analysis under CEQA will be required for projects at the time that they are designed and proposed. While the County has calculated estimated construction emissions to the extent feasible, additional analysis pursuant to CEQA will be required as project-specific elements are funded, designed, and proposed. (AR 20:5498; *see also* AR 20:5192, 5337.) Finally, the PEIR states that any construction methods will ensure that methane from the inactive landfill will not be emitted. (AR 7:672.)

Three, the County used a proper baseline. Under CEQA Guidelines, the baseline normally consists of "the physical environmental conditions in the vicinity of the project, as they exist at the time...environmental analysis is commenced." (CEQA Guidelines, §15125(a).) However, the California Supreme Court has interpreted this guideline to give lead agencies significant discretion in determining the appropriate existing conditions baseline. (*Neighbors for Smart Rail v. Exposition Metro Line Constr. Auth.* (2013) 57 Cal.4th 439, 453; *see also Communities for a Better Environ. v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 336.) The City's determination of baseline conditions is reviewed for substantial evidence. (*Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 337.)

Here, the PEIR states that the baseline "shall be the environmental conditions as they existed at the time the NOP was published, which was February 2, 2016 for the Proposed Project. (AR 7:570; *see also* AR 7:791.) In a response to comment, the County also explained why a comparison using the same future year, 2036, was also appropriate. (AR 20:5339-5340; *see also* AR 20:4616, 20:5336-5337.) In

Neighbors for Smart Rail v. Exposition Metro Line Construction Authority (2013) 57, Cal.4th 439, 454, the California Supreme Court concluded that "nothing in CEQA law precludes an agency, as well, form considering both types of baseline-existing and future condition-in its primary analysis of the project's significant adverse effects." It also held that "while an agency preparing an EIR does have discretion to omit an analysis of the project's significant impacts on existing environmental conditions and substitute a baseline consisting of environmental conditions projected to exist in the future, the agency must justify its decision by showing an existing conditions analysis would be misleading or without informational value." (*Id.,* at p. 457.) Here, in the above noted response to comment, the County stated that "[c]omparing the Mater Plan Update's full implementation timeframe (i.e., 2036) to existing conditions (i.e., 2016) would [] be misleading and uninformative as conditions would naturally evolve over the 20-year planning period regardless of the Proposed Project. Therefore, for the purposes of the PEIR, emissions associated with the Proposed Project in 2036 were compared to environmental conditions projected to occur in 2036 without the Proposed Project in order to show impacts associated with the project."

The fifth issue is whether the County adequately analyzed the Project's energy impacts

One, Petitioner did not wave its challenge to the PEIR's energy impacts analysis as the Court finds that its citation to the administrative record adequately presented its analysis and baseline arguments in its moving papers.

Two, the County used a proper baseline. The administrative record indicates that the Project's electricity and fuel consumption are compared to existing conditions. (AR 7:874, 878 (fuel); AR 7:871-872 (electricity); *see also* AR 20:5501-5502, 5534.) It also explained its comparisons. (AR 20:4616, 5341.)

Based on the foregoing, the Petition is granted as to the Planning and Zoning Violation and the study area and methodology issue with respect to noise impacts but is denied in all other respects. Thus, the Court finds that (1) an amendment to CUP-172 by the City of Carlsbad is required and that (2) the study area with respect to noise impacts should include all areas where public comments had reported significant noise levels.

The Petitioner is directed to prepare the Judgment in accordance with this ruling.

IT IS SO ORDERED.

Judge Gregory W Pollack