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Project Approval Violated City's General Plan Because City Failed To Design Mitigation Impacts In Coordination With United States Fish And Wildlife Service

In *California Native Plant Society v. City of Rancho Cordova*, (--- Cal. Rptr.3d ---, Cal.App. 3 Dist., March 24, 2009), a California Court of Appeal considered (1) whether a plaintiff exhausted its administrative remedies as to any of the alleged violations committed by the City of Rancho Cordova ("City") under the California Environmental Quality Act (CEQA) when the city prepared an environmental impact report ("EIR") and approved a development project; and (2) whether the City violated the Planning and Zoning Law because it failed to design mitigation measures for the impacts of a project on special-status species in coordination with the United States Fish and Wildlife Service (USFWS).

The Court of Appeal held that the plaintiff failed to state a claim under CEQA because it failed to exhaust its administrative remedies as to the City's alleged violations of CEQA. The court further held that the City did violate the Planning and Zoning Law because it failed to coordinate with the USFWS when it designed mitigation measures for certain environmental impacts created by the project.

Facts

The Preserve at Sunridge ("Project") is a commercial and residential development which lies within the City. The Project "is located within the Laguna Formation Geological Formation in the Southeastern Sacramento Valley Vernal Pool Region." Vernal pools are shallow depressions that are seasonally inundated with water for various periods of time. The vernal pools at issue support a variety of species including vernal pool fairy shrimp ("fairy shrimp"), which are listed as threatened under the federal Endangered Species Act ("Act"), and vernal pool tadpole shrimp ("tadpole shrimp"), which are listed as endangered under that Act. The USFWS, United States Environmental Protection Agency ("EPA"), and the United States Army Corps of

Note:

California Native Plant Society was cited in *Oakland Heritage Alliance v. City of Oakland and Oakland Harbor Partners et al.* Please see our Legal Alert entitled, "City's Revised Environmental Impact Report On Seismic Impacts Met CEQA Requirements", July 5, 2011.

Engineers ("COE"), met and identified "preserve areas within the Sunrise Douglas Community Area," a master planned community where the Project is located.

In 2004, the City issued a notice of its intent to prepare an EIR for the Project. USFWS submitted a comment letter which stated that the Project's design was not consistent with the conceptual-level strategy document and map prepared by the federal agencies and would result in significant loss of shrimp and their habitats. When the City released its draft EIR, it noted that the Project would result in the direct loss of 14.1 acres of fairy shrimp habitat and 15.65 acres of tadpole shrimp habitat. The City deemed this loss significant. To reduce the impact to less than significant "the applicant would be required to 'complete and implement a habitat mitigation and monitoring plan that will compensate for the loss of acreage, function and value of the impacted resources.'" The applicant would be required "to preserve two acres of existing habitat or create one acre of new habitat for each acre of habitat impacted by the [P]roject" for both direct and indirect adverse effects of the Project.

USFWS submitted a comment letter to the City stating that it could not discern any changes to the proposal that would reduce the impact to the shrimp. The California Native Plant Society ("Society") also submitted a comment letter stating that the proposed mitigation and monitoring plan developed for the EIR would

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itself have environmental impacts that were not addressed in the draft EIR. In response to Society's comments, the City required the applicant to submit a wetland avoidance/mitigation plan.

The City adopted a resolution certifying the EIR for the Project. The City expressly made the finding that the Project was consistent with its general plan. The City also adopted a resolution to approve a tentative subdivision map, an ordinance relating to the zoning of the area where the Project is located, and an ordinance approving a development agreement relating to the Project.

Society filed a petition for writ of mandate alleging violations of CEQA and the Planning and Zoning Law. The trial court granted judgment in favor of Society finding that the City's approval of the project violated CEQA and the Planning and Zoning law.

Decision

The Court of Appeal held that the trial court erred in finding that the City violated CEQA when it prepared the EIR and approved the project. However, the Court of Appeal held that the trial court did not err in finding that the City's approval of the Project violated the Planning and Zoning Law because, although the City's general plan required it to design mitigation for impacts in coordination with the USFWS, the City failed to do so.

Society asserted that the EIR violated CEQA because it failed to describe where the off-site vernal pool and wetland creation would occur and how the creation would affect the off-site environments. The City argued that Society failed to exhaust its administrative remedies because Society failed to raise any of these arguments in the administrative proceedings. The Court of Appeal agreed, holding that Society's comments regarding off-site mitigation "did not fairly apprise the City that the draft EIR was inadequate in its description of the Project and its environmental background, that environmental review of the Project was being improperly 'piecemealed,' or that the EIR would need to be recirculated."

Society also argued that City unlawfully deferred development and adoption of mitigation measures until after the Project approval because it failed to describe where the off-site mitigation might occur and failed to disclose or analyze the impacts of the off-site mitigation. California case law and the California Code of Regulations provide that the formulation of mitigation measures is not to be deferred until some date in the future. However, an "agency does not have to commit to any particular mitigation measure in the EIR, as long as it commits to mitigating the significant impacts of the project. . . . [T]he details of exactly how mitigation will be achieved under the identified measures can be deferred pending completion of a future study."

The court concluded that the City satisfied these requirements because the City did not defer either the determination of whether the Project would impact vernal pool and seasonal wetland habitat or the identification of measures that would mitigate the impact. The City determined that Project would result in habitat loss and then identified preservation or creation of off-site habitat as the specific measure to mitigate the habitat loss. Although the City did not identify any proposed mitigation sites, there is nothing to indicate that it was required to do so under the relevant case law.

Society also argued that evidence does not support the City's findings that the potentially significant adverse effects of the Project would be reduced to "less than significant" levels. Society claimed its argument was supported by the fact that federal agencies reviewed and commented on the proposed mitigation measures and opined that the measures would result in significant impacts to, and the loss of, shrimp species. The court found that merely pointing out that other agencies disagreed with the City does not necessarily show that there was insufficient evidence to support the City's findings. The burden was on Society to affirmatively show that there was no substantial evidence to support the City's findings. The court found that Society failed to meet this burden because "[p]ointing to evidence of a disagreement with other agencies is not enough to carry the burden of showing a lack

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of substantial evidence to support the City's findings."

Society also argued that, because the California Supreme Court had invalidated the EIR for the Sunrise Douglas Community Plan due to the fact that it failed to identify long-term water supply impacts and the impacts to the Cosumnes River, the Project EIR also had to be invalidated because it incorporated portions of the Sunrise Douglas Community Plan EIR relating to these two areas. The court found that Society's argument was deficient for several reasons. For example, the portion of the holding in the Supreme Court decision that Society was referring to did not contain any holding or ruling by the Supreme Court; rather, it was a summary of an earlier court decision. Perhaps more importantly, Society failed to raise this issue during the administrative proceedings. The court stated, "An objector cannot simply sit back and wait for the earlier EIR to be invalidated, then belatedly assert after the administrative proceeding is complete (as happened here) that the current EIR is defective because it relied on the earlier EIR that has now been invalidated." Nothing prevented Society from presenting its argument to City regarding the Sunrise Douglas EIR during the proceedings on the EIR for the Project.

The court concluded that Society failed to establish that it had exhausted its administrative remedies as to any of the alleged violations of CEQA. Accordingly, the court held that the trial court erred when it found City violated CEQA.

The court concluded that the trial court did not err when it found that City violated the Planning and Zoning Law. The City's general plan provides that it will, in accordance with federal and state law, protect rare, threatened and endangered species and their habitats. The City must review projects to make sure they comply with this policy. When a project involves preservation of habitats that support special-status plants and animals, "City shall require that these preserved habitats have interconnections with other habitat areas in order to maintain the viability of the preserved habitat to support the special-status species identified." The City must consult with the

California Department of Fish and Game ("CDFG") and USFWS to determine the design and size of the interconnections. Prior to approving a project, the City must require a biological resources evaluation for areas that may contain listed plant or wildlife species.

To implement this policy, in areas where special-status species are located or are likely to be found, the City "shall require mitigation of impacts to those species that ensure that the project does not contribute to the decline of the affected species populations in the region." Such mitigation must be designed by the City in coordination with CDFG and USFWS.

Society asserted the Project was inconsistent with the City's general plan because (1) City did not coordinate with USFWS in designing mitigation for the Project's impacts on special-status species; (2) the "City's mitigation measures were inadequate to ensure the Project would not impact the viability of regional populations of special-status species;" and (3) the City's approval of the Project was inconsistent with the general plan's requirement of interconnection of habitat reserves. The court found Society was correct in its assertion that the City's approval of the Project was inconsistent with its general plan because it did not coordinate with USFWS, but that Society failed to sufficiently support its propositions of error as to the two other alleged violations of the general plan.

The court rejected the City's contention that the coordination requirement was satisfied because it consulted with USFWS and USFWS made its views known during the EIR process. The City claimed that "coordinate" means "to negotiate with others in order to work together effectively" and it satisfied this requirement by trying to work with USFWS when it solicited, considered, and replied to USFWS's comments." The court found that the City could not coordinate with USFWS by simply soliciting and considering its comments. The term coordination "implies some measure of cooperation that is not achieved merely by asking for and considering input or trying to work together."

USFWS will have a role in issuing permits for

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the Project in the future. The court found that “coordination” between USFWS and the City “in designing mitigation for the impacts of the Project on special-status species” like the shrimp at issue here “serves the laudable purpose of minimizing the chance the City will approve the Project, only to have later permits for the Project denied because of [USFWS’s] disapproval of the mitigation measures” imposed by the City. Per the City’s general plan, the City was required to coordinate with USFWS. Since it did not do this, the court found that the City violated the Planning and Zoning Law because the Project was inconsistent with its general plan.

Questions

If you have any questions concerning the content of this Legal Alert, please contact the following from our office, or the attorney with whom you normally consult.

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