FILED
JUL 28 2014
STEPHEN H. NASH CLERK OF THE COURT
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF CONTRA COSTA
By _____ Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

SOS-DANVILLE GROUP, Petitioner and Plaintiff, v. TOWN OF DANVILLE, et al., Respondents and Defendants.	CASE NO. N13-1151 ORDER RE: PETITION FOR WRIT OF MANDATE (CEQA)

The parties' requests for judicial notice are granted. The objection to the Crompton declaration is overruled.

Petition for writ mandate granted in part in part and denied in part.

First Cause of Action (CEQA violations): Petition granted in part and denied in part.

Standard of review: Prejudicial abuse of discretion is established "if the agency has not proceeded in manner required by law or if the determination or decision is not supported by substantial evidence." Pub. Res. Code §21168.5. "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 be reached," and "shall include facts, reasonable assumption predicated on facts, and expert opinion supported by facts." 14 Cal. Code Regs. ("CEQA Guidelines") §15384, subdivs. (a), (b). The Court reviews all of the evidence on which the agency relied, not just evidence favorable to the party challenging the decision or the environmental impact report ("EIR"). *Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 415. Also, the Court "does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document." *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392 (internal quot. marks and cit. om.). In this regard, the agency may defer to the conclusions of the experts who prepared the EIR, even though other experts may disagree. CEQA Guidelines §15151. When experts disagree about data or methodology, "the EIR should summarize the main points of disagreement" (*id.*), but the agency may choose between the expert opinions (*Browning-Ferris Industries v. City Council of the City of San Jose* (1986) 181 Cal.App.3d 852, 863). An expert opinion is not "substantial evidence" unless it is based on facts. Pub. Res. Code §21082.2.

Impacts on traffic – Diablo Road: Petition denied. The Court finds that the Town reasonably relied on the analysis prepared by its expert, Hexagon Transportation Consultants, that the final EIR ("FEIR") adequately explains why the focus for Diablo Road was on "signalized" intersections, and that the FEIR adequately responds to the letter from Terri Supak. See, e.g., Hexagon's May 14, 2013 memorandum to Town planner David Crompton, explaining why "arterial" "levels of service" were not

examined (11 AR 5382); FEIR Response No. 71G, re. the focus on intersections (10 AR 4461); and FEIR Response No. 82, responding to each of the four specific suggestions made by Supak, and also referring to the FEIR Master Response discussion of traffic analysis methodology and findings (10 AR 4488).

Impacts on traffic – cumulative impacts: Petition denied. The Court finds that the Town reasonably relied on Hexagon's analysis, and that the FEIR adequately explains why the regional traffic model ("CCTA") was used. See, e.g., Hexagon president Gary Black's statement at the April 23, 2013 public hearing on the FEIR, that the CCTA model is the "best tool" for projecting traffic increases in Contra Costa County (10 AR 4818); Hexagon's May 14, 2013 memorandum to Town planner David Crompton, explaining why the CCTA model was used (10 AR 5381); FEIR Master Response re. traffic comments, stating that the CCTA "uses information on current and future population and employment, transit ridership, expected roadway improvements, and observed travel behavior to forecast traffic on the regional transportation system," and that using the CCTA model was "[c]onsistent with standard traffic engineering practice" (9 AR 4226); and the staff report for the June 13, 2013 Town Council consideration of the FEIR, explaining that using the 2% growth rate "results in a higher and therefore more conservative expression of traffic impacts" (12 AR 5924).

Impacts on traffic – threshold of significance: Petition denied. The Court finds that use of the .05 threshold was supported by substantial evidence, and that the EIR adequately explains why this threshold was used. See, e.g., Town consultant Tai Williams' statement at the June 23, 2013 public hearing on the FEIR, that "we adopt thresholds of significance on a project-specific basis,...based on surveying of local communities

and what people do around us. I believe...we looked at similar EIRs prepared in the area...and we determine[d]...what is reasonable for this particular project." (10 AR 4895-4896); the staff report for the Town Council's consideration of the FEIR, explaining that the Town "uses project-specific thresholds...to reflect the unique characteristics of each project's setting," and explaining why the .05 threshold was used here (12 AR 5921-5922); Hexagon's May 14, 2013 memorandum to Town planner David Crompton (10 AR 5382); and the draft EIR's explanation that the .05 threshold was based on the expertise of the Town staff and its consultants (4 AR 1534).

Impacts on traffic – bicycle safety: Petition granted. The Court finds that the EIR fails to properly address impacts on bicycle safety. Section IV of the FEIR's Master Responses re. traffic is entitled "Bicycle Safety on Diablo Road" (9 AR 4229). The response appears to be based on the assumption that because the existing conditions are dangerous for bicycles, any added danger would not be a significant impact; but it does not provide any statistics about actual or projected numbers, or severity, of accidents. Nor does the response mention the possibility of any mitigation measure, other than a vague reference to the "limit[ed] feasibility" of widening the road to create a bicycle lane. It should have explained the extent to which that feasibility is limited, not just *why* it is limited. The response also should have addressed at least some of the mitigation possibilities raised in the comments. See, e.g., Valley Spokemen Bicycle Club Board member Bill Well's suggestions for a "Share the Road" sign "at the beginning of the curve section" (12 AR 5665), and for "straightening out some of the alignment" on the curves to create more "sight distance" (12 AR 5666); petitioner's spokeswoman Maryann Cella's June 16, 2013 email to Town representatives,

recommending that "the developer...build bike lanes along Diablo Road from Green Valley Road to Mt. Diablo Scenic Blvd." (12 AR 5754); and Alameda County Transportation Commission Bicycle Pedestrian Advisory Committee member Midori Tabata's email to Town planner David Crompton, suggesting "setting the speed limit to 25 and enforcing it" (13 AR 6138).

Impacts on California red-legged frog ("CRLF"): Petition denied. The Court finds that the Town reasonably relied on its expert's analysis, and that the chosen mitigation measures and responses to comments on projected increased predation were supported by substantial evidence. See, e.g., FEIR explanation of conclusions regarding the suitability of habitat along East Branch Green Valley Creek (13 AR 4560); FEIR Response No. 71 E (10 AR 4459); and FEIR Response No. 105U (10 AR 4563). These responses demonstrate a "good faith, reasoned analysis." CEQA Guidelines §15088(c). The Town may defer to the conclusions of its experts, even though other experts may disagree. CEQA Guidelines §15151.

Impacts on emergency access and emergency evacuation: Petition denied. The Court finds that the EIR adequately explains what facts were considered, and also that its contact in the San Ramon Valley Fire Protection District was familiar with those facts. See, e.g., FEIR Master Response (9 AR 4064-4065); the FEIR's "fire" discussion (10 AR 4626-4629); and FEIR Response No. 71H (10 AR 4461).

Consideration of alternatives: Petition denied. "An EIR need not consider every conceivable alternative to a project." CEQA Guidelines §15126.6(a). When this portion of an EIR is challenged, the question is whether the range of considered

alternatives was reasonable. *Id.*; *Laurel Heights*, *supra*, 47 Cal.3d at 406. Here, the EIR considers five alternatives (4 AR 1597-1617). Petitioner does not contend that these alternatives were unreasonable; instead, it contends that only petitioner's favored alternative "truly address[es] the criteria set forth in the Magee Ranch SCA discussion in the 2010 GP" (reply brief 26:8-13). However, the Town was not required to consider petitioner's favored alternative.

Responses to comments: Petition granted as to comments about bicycle safety impacts, and otherwise denied. Petitioner contends that the FEIR does not adequately respond to comments about bicycle safety impacts, emergency access and emergency evacuation impacts, cumulative traffic impacts, or use of the .05 threshold of significance. All of these specific issues are addressed above.

Second Cause of Action (planning and zoning law violations): Petition granted in part and denied in part.

Standard of review: An agency's determination of consistency with the general plan ("GP") is generally accorded deference and should be upheld, unless "it is based on evidence from which no reasonable person could have reached the same conclusion." *A Local and Regional Monitor v. City of Los Angeles* (1993) 16 Cal.App.4th 630, 648. The Court must "decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms with those policies...." *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704,

719-720. At the same time, the agency's interpretations must be reasonable, and must follow statements in the GP that are fundamental, clear, and mandatory. *Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Bd. of Sup'rs* (1998) 62 Cal.App.4th 1332, 1341-1342.

The meaning of "underlying zoning density": The parties agree that Williamson Act land is zoned A-4 while under contract. The Court finds that upon expiration of a Williamson Act contract for agricultural land, the GP language adopted by the Town to define the "underlying zoning density" of such land is "one unit per 20 acres or one unit per five acres." (Town Exh. 1, p.52; Town RJN Exh. 3) See the explanation in the FEIR (9 AR 4222). The Court finds that the word "underlying" can be reasonably interpreted to mean "previous."

The rezoning of agricultural land to P-1:

It is undisputed that the GP's agricultural land use designation does not identify P-1 as a consistent zoning classification; only A-4 and A-2 are consistent. It also is undisputed that the entire project area was rezoned to P-1, without first a GP amendment to redesignate the agricultural parcels as some other category for which P-1 is consistent zoning.

However, the land use designations in the GP "are a set of official definitions for the land use types and intensities found in Danville. *Each land use designation addresses the specific uses permitted*, the intensity of the use, and other policy considerations" (Town Exh. 1, p.4) (emphasis added). The agricultural land use description in the GP clearly contemplates GP amendments if "other uses" are desired, especially after expiration of Williamson Act contracts. (Town Exh. 1, p.52) The GP also notes that state law requires the zoning ordinance to be consistent with the GP, and that zoning

districts "must correspond with land use map designations" (*id.* at p.6). Further, the language for the Magee Ranch "Special Concern Area" ("SCA") is ambiguous: The SCA does state that "despite the A-2 . . . zoning on much of the site," the GP "encourages" development proposals that include transferring densities and clustering, and "discourages" 5-acre "ranchette" sites (Town Exh. 1, p.58). But it is unclear whether such transferring and clustering should (or could) occur on the agricultural-designated portion of the site (~198.7 ac.), even if that portion is zoned A-2. After all, the rural-residential-designated portion (~200.7 ac.) is also zoned A-2 -- and that land use designation specifically allows P-1 zoning (Town Exh. 1, p.43). So the language of the SCA can be interpreted reasonably to mean that the non-agricultural portions of the site should be cluster-developed, leaving the agricultural portion as open space.

The Town, in effect, changed the GP's designation and description of agricultural land to add P-1 as a consistent zoning category. And it did so without complying with Measure S -- either by putting the issue to a popular vote, or by the Council voting (at least 4/5) to make the change, with a simultaneous finding that the change was necessary, either to avoid an unconstitutional taking of property rights or to comply with state or federal law, and that the proposed change was the minimum change necessary to comply with such laws (7 AR 3233-3234). It appears that the Town interpreted the GP in such a way to essentially circumvent the mandate of Measure S.

But even if Measure S did not exist, or (as the Town contends) did not apply here, and using just the language of the GP itself, the agricultural land designation still could not be changed without amending the GP, and then after completing a comprehensive planning study. (Town Exh. 1, pp. 4, 52)

Therefore, if the Town wanted to rezone the agricultural land to P-1 (whether starting

from A-4 or A-2), it should have first redesignated that land to some other land use category which expressly allows P-1 zoning. The Court finds that the rezoning was improper without first a GP amendment to change the agricultural land use designation.

Dated: July 28, 2014

STEVEN K. AUSTIN

Steven K. Austin

Judge of the Superior Court