1st App. Dist. CIVIL No. A134559

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

CITY OF PETALUMA, ET AL.,
Petitioners and Appellants,

v.

COUNTY OF SONOMA, ET AL.,
Respondents and Appellees

THE DUTRA GROUP, ET AL.,
Real Parties in Interest and Respondents.

APPELLANTS' PETITION FOR REHEARING

Appeal from the Superior Court for Sonoma County,
Case No. SCV 248948
Honorable Rene Auguste Chouteau (Phone no. (707) 521-6725)

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RULES OF COURT

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Pursuant to Ca. Rules of Court § 8.268, Appellants hereby petition the Court of Appeal for rehearing of three issues in this matter.

Pursuant to Cal. Government Code § 68081, Appellants respectfully request rehearing in order to have an opportunity to provide briefing on the Court of Appeal's conclusion that Petitioners' did not administratively exhaust one of their baseline issues. The issue of whether Appellants exhausted administrative remedies with respect to the argument that certain air pollutant emissions from different parcels should not be part of the environmental impact report's ("EIR") baseline was not argued or otherwise encompassed in Appellees County of Sonoma, *et al*.'s brief. Appellants also respectfully ask the Court to reconsider that baseline issue because they believe the Court of Appeal misstated the baseline issue presented by Appellants as well as the range of comments presented on that issue to the administrative agency.

Additionally, Appellants respectfully request that the Court rehear its decision on Appellants' argument that the EIR did not adequately analyze the Project's impacts to workers by referring to Occupational Safety and Health Administration ("OSHA") standards without further analysis.

Lastly, Petitioners request rehearing on their Ralph M. Brown Act claim on the ground that the Court reached an erroneous decision that Petitioners could not enforce Gov. Code § 54954.3 of the Brown Act via a traditional writ of mandate because it was not listed in Section 54960.1(a) of the Act, which provided for a legal presumption that violations of those provisions were null and void.

A. The Court Should Rehear the "Different Parcel" Baseline Issue Because the Issue was not Raised or Briefed by the Parties and Appellants Fully Exhausted the Issue During the Administrative Proceeding.

Appellants request the Court to reconsider its ruling that Appellants failed to exhaust administrative remedies as to their second baseline argument – that pollutants (reactive organic gases ("ROGs") and particulate matter ("PM10")) at the old asphalt site were not occurring at the proposed new location and hence, could not be attributed to the baseline for these pollutants for the new project. The Court ruled that Appellants did not properly raise the issue during the administrative process before the County that the baseline should not include emissions from Dutra's temporary plant since it was sited at a different location, while the proposed plant is proposed to be constructed on a vacant parcel of land. The Court's ruling should be reconsidered. In fact, Appellants clearly and repeatedly raised this issue in written comments to the County during the formal administrative process.

In its ruling, the Court states that Appellants' "comments fail to make the point that certain substances, namely ROGs and PM10, have a particularly localized impact that the EIR should have taken into account in setting its baseline." Opinion, p. 16. Likewise, the Court states that "[n]or is there any indication plaintiffs drew the County's attention to any air quality effects that would be different at the location of the new plant than at the temporary plant less than a mile away." *Id*.

As a threshold issue, the County's opposition brief did not claim in its brief that Appellants failed to exhaust this baseline issue before the agency. Gov. Code § 68081 provides that, "[b]efore the … court of appeal … renders a decision in a proceeding … based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party." Gov. Code § 68081. The County's brief does not contend that Appellants failed to exhaust their baseline arguments before the agency. County Br., p. 29 ("Appellants argue for the first time on appeal that the EIR is inadequate because potentially significant "localized" air impacts were not considered"). Indeed, the County's brief does not address Appellants' baseline argument at all, treating it instead as a claim that the EIR failed to adequately consider PM10 and ROGs emissions from the future Project. *Id*. Nor does the brief cite to any of the case law regarding administrative exhaustion or include a heading identifying administrative exhaustion as an issue. *Id*. As a result, Appellants were not on notice that administrative exhaustion was even an issue and their reply responded in kind by showing where the issue had been raised to the trial court. Appellants' Reply Br., p. 14 n. 6. The Court of Appeal should grant rehearing on this ground and consider briefing on this issue.

Rehearing is also proper because Appellants did in fact exhaust this issue in their written comments filed with the County during the CEQA administrative

process.

Appellants do not believe the Court's ruling accurately describes the baseline issue presented by Plaintiff that zero emissions of prior asphalt plants occurred at the new site. Appellants' issue is that "[t]he County … errs by using a baseline that assumes that air pollution emissions for the closed temporary plant existed at the proposed site of the new asphalt plant." Appellants' Opening Br., p. 33. Likewise, the issue raised by Appellants states that "[n]o PM-10 or ROGs have been or are being released at the vacant project site since the Project's NOP was issued." *Id*. Appellants' and their consultant's comments plainly raised the baseline issue – namely, that because Dutra proposes to build a new plant on a vacant parcel of land, the CEQA baseline should be zero – even though a different asphalt plant existed on a different parcel of property a half-mile or more away. As discussed in Appellants' brief, no case has ever allowed the CEQA baseline to include emissions from a different facility on a different parcel of property.

Appellants presented the "alleged grounds for noncompliance" with CEQA's baseline requirement "to the public agency orally or in writing … during the public comment period … or prior to the close of the public hearing on the project…." Pub. Res. Code §21177(a). For exhaustion purposes under CEQA, identifying the precise legal inadequacy or the precise statute at issue is not required. *See McPherson v. City of Manhattan Beach* (2000) 78 Cal.App.4th 1252, 1264; *Save Our Residential Environment v. City of West Hollywood* (1992) 9 Cal.App.4th 1745, 1750. The public need only "make their objections known in

some fashion, however unsophisticated." *Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1449 (emphasis in original).

A key emphasis of Appellants' baseline objections for PM10 and ROGs during the County's administrative process was that those pollutants that previously were emitted at the old asphalt plants were never being emitted at the new location, *i.e.* the ROGs and PM10's emitted at the old site were local to the site and did not occur at the new site. Because the previous asphalt plant emissions occurred in different locations with "***zero***" emissions at the new location, they could not be included in the baseline conditions for the new site. Appellants' reference to the evidence in the record confirming that PM10 and ROGs had local impacts merely cited evidence further confirming what Appellants had stated many times in their comments to the County – baseline emissions of PM10 and ROGs at the proposed asphalt plant were zero because it was a different parcel distant from the other two previous sites.

Appellants' comments clearly apprised the County of the concern that PM10 and ROGs emissions at the previous asphalt plants were not present at the new asphalt plant and exhausted the baseline issue resulting from this fact. For example, Appellants commented that:

> Since Dutra is constructing an entirely new facility ***on a new parcel of property***, this is a new project, not a modification, and ***the baseline is the condition that exists on the vacant parcel – zero***.

AR012486 (emphasis added). This comment clearly apprises the County that no emissions – zero – from the other plants occurs on the new parcel, *i.e.* those

emissions are local to the sites of the old plants. Appellants' comments continued to drive this point home:

> Dutra proposes to construct its Project on a vacant lot. There is no asphalt plant or any other facility currently operating on the site. Thus, the 'real condition on the ground' is a zero baseline. The EIR misleads the public into thinking the project's emissions will be much lower by subtracting maximum daily emissions from the closed asphalt plant and the temporary asphalt plant – neither of which exist on the site at all.

AR012487. *See also* AR012488 ("There Should Be No Baseline Credit for a Closed Facility on a Different Parcel"); *Id.* ("There Should Be No Baseline Credit for a Temporary Facility on a Different Parcel").

Appellants' comments also applied the flaw of attributing pollutants at the former sites to the new site, rather than a zero baseline, to the two pollutants focused on in Plaintiffs' brief, namely ROGs and PM10. "Dr. Pless demonstrates that when corrected for the erroneous baseline, the Project will have significant impacts from reactive Organic Compound (ROGs), particulate matter under 10 microns (PM-10), and Nitrogen oxides (NOx)." AR012489. *See also* AR012490;[1] AR012516 (comments of Petra Pless).

Dr. Pless also commented that "[t]he EIR evaluates the Project's impacts on air quality as the net increase in emissions from the new facility, ***which will be***

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[1] "Table 1 demonstrates that emissions from the proposed facility when compared to a zero emissions baseline would exceed the BAAQMD's daily thresholds of significance for PM10, ROG, and NOx. The EIR … due to its incorrect use of baseline emissions from the existing temporary facility failed to identify and properly mitigate the project's significant maximum daily PM10 and ROG emissions."

located on a different parcel of land, compared to the emissions from the existing (temporary) facility as the baseline." AR012515 (emphasis added). Dr. Pless pointed out this baseline was erroneous for a number of reasons, including "First, the Applicant is constructing an entirely new facility on a new parcel of property. Therefore, the Project is a new project, not a modification of an existing project, and the baseline is the condition that exists on the vacant parcel, *i.e.* zero emissions." *Id*. This is the same point arguing that none of the pollution from the old sites is occurring at the new site. Those pollutants were local to the previous sites. Indeed, Dr. Pless makes this very point, commenting at the conclusion of her baseline comments that, "[d]ue to the substantial exceedances of BAAQMD's thresholds of significance, the EIR should include ambient air quality modeling for all criteria pollutants to evaluate the severity of impacts ***on local*** and regional ambient air quality." AR012516 (emphasis added). *See also* AR012526 (concentrations of particulate matter and silica would likely be highest on the Project property where Project employees and the drivers of trucks … would be exposed….") (P. Pless); AR012529 ("[a] layer of dust is often present on streets around asphalt facilities…").

By time and again focusing the County on the fact that emissions of PM10 and ROGs at the new site were zero because it was a different parcel from the replaced asphalt plants, Appellants clearly drew the County's attention to "air quality effects that would be different at the location of the new plant than at the temporary plant less than a mile away." Opinion, p. 16. Appellants clearly

indicated that emissions at the new site were zero. This was more than sufficient to meet CEQA's administrative exhaustion requirement. For these reasons, the Court should grant this petition for rehearing on the baseline exhaustion issue, modify its ruling to hold that Appellants did exhaust the baseline issue during the County's administrative proceeding, and proceed to rule on the merits by holding that Respondent's baseline for PM10 and ROGs is an abuse of discretion by attributing emissions of those pollutants on the new Project parcel that were never present on that parcel.

B. The Court Should Reconsider its Ruling That a Mere Reference to OSHA Regulations Adequately Addresses the Significance of a Project's Pollution Emissions on Worker Health.

Petitioners respectfully ask the court to reconsider its holding that the EIR adequately addressed the issue of worker health by relying on the standards promulgated by federal and state Occupational Safety and Health Administrations ("OSHA"). Opinion, pp. 29-30. This argument was not briefed since the Superior Court based its decision on an entirely different rationale that worker health is not part of the "environment" within the meaning of CEQA.[2] The Court of Appeal did not reach the issue on which the Superior Court based its decision. Opinion, p.

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[2] As discussed in Appellants' briefs, CEQA §21083(b)(3) provides that a project has significant impacts if it "will cause substantial adverse effects on human beings, either directly or indirectly." There is no exemption from this definition for workers. See also, *Berkeley Keep Jets etc. v. Bd. of Port Cmrs*. (2001) 91 Cal.App.4th 1344, 1369 (EIR must analyze human health impacts from toxic air pollutants).

30, fn. 11. Since the issue was not briefed by the parties, Petitioners respectfully ask the Court to reconsider this holding. Gov. Code § 68081.

Although the EIR referenced OSHA standards, there is no analysis of whether compliance with these standards will reduce impacts to worker health to below CEQA significance thresholds. For example, will compliance with OSHA standards reduce worker cancer risks to below the 10 per million CEQA significance threshold adopted by the Bay Area Air Quality Management District? (See, AR360). In the recent case of *Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832, the court held that failing to calculate existing air emissions at the project site, and "failing to quantitatively or qualitatively ascertain or estimate the effect of the Project's mitigation measures on those emissions," amounted to misapplication of the threshold-of-significance standard. *Id*. at 842-843. Thus, it is necessary not only to implement mitigation measures, but also to analyze whether implementation of the mitigation measures will reduce a given impact to below adopted significance thresholds. The EIR fails to analyze whether implementation of OSHA standards reduces impacts to worker health to below significance thresholds. *See also*, *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712-718 (agency erred by wrongly assuming that, simply because the smokestack emissions would comply with applicable regulations from state and federal agencies regulating air quality, the overall project would not cause significant effects to air quality); *Citizens for Non-Toxic Pest Control v. Dep't of Food & Agric*. (1986) 187 Cal.App.3d 1575, 1587-1588

(state agency may not rely on registration status of pesticide to avoid CEQA review).

The EIR is therefore legally deficient because it assumed that compliance with OSHA standards would adequately mitigate impacts to worker health without performing any analysis as to whether the OSHA measures would reduce worker health impacts to below CEQA significance thresholds.

C. The Court Should Reconsider Its Ruling That No Remedy is Available to Enforce a Violation of Section 54954.3 of the Brown Act.

Petitioners respectfully ask the court to reconsider its holding that there is no remedy available for the County's violation of the Brown Act when it refused to allow public testimony at the final hearing at which the County approved the Dutra project. If allowed to stand, the holding would allow agencies to blatantly violate the Brown Act by unlawfully prohibiting public comment at public hearings – with no legal recourse.

As our Supreme Court has explained, writs of mandamus are intended to address situations in which there would otherwise be "a right without a remedy." *May v. Board of Directors* (1949) 34 Cal.2d 125, 133 (writ of mandamus appropriate to require County to pay bondholder, despite absence of private right of action in statute). Without a "remedy or means to enforce," … the "obligation falls in the class of a mere social amenity, its enforcement resting solely on the whim and caprice of the obligor." *Id*. It is for precisely such situations that writs of mandamus exist to require governmental compliance with mandatory duties.

In this case, the Court held that no remedy is available to enforce the requirement set forth in Section 54954.3 of the Brown Act, which requires that "every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item." This right implicates that bedrock democratic principle that the public should be allowed to confront and petition their elected officials. The Court pointed out that the Brown Act sets forth a list of provisions, for which violation results in the action being deemed "null and void," and that the list does not include Section 54954.3. The Court reasoned that under the doctrine of "*expressio unius est exclusion alterius*," the presence of the list in the Brown Act indicates the Legislature's intention "to limit the remedy of declaring an agency's action null and void to violations of the enumerated statutory provisions." Opinion, p. 33.

However, even if the Legislature intended to limit the remedy of declaring the underlying action "null and void" to the listed violations, this does not mean that Section 54954.3 establishes a right without a remedy. The very purpose of a writ of mandate is to allow the court to fashion appropriate relief when no specific remedy is specified in law. *May v. Bd., supra*; *Doe v. Albany Unified School Dist*. (2010) 190 Cal.App.4th 668, 682 ("The fact that a particular statute may not create an explicit private right of action does not mean it cannot be the basis of a petition for writ of mandate to compel compliance").

Pursuant to its broad equitable powers of mandamus, the Court may fashion any appropriate relief to remedy the County's violation of the Brown Act. "In its nature mandamus is a proceeding in which equitable principles are applicable." *Dare v. Bd. of Medical Examiners* (1943) 21 Cal.2d 790, 795. "An equity court has broad powers to fashion a remedy." *Oceanside Cmty. Assn. v. Oceanside Land Co*. (1983) 147 Cal.App.3d 166, 177.

Even if the Court is convinced that the Brown Act does not allow the court to automatically declare null and void the underlying action approving the Dutra facility, the matter should still be remanded to the Superior Court with direction to hold that the County did, in fact, violate the Brown Act, and to fashion appropriate equitable relief for that violation of law. Appropriate relief may include requiring the County Board of Supervisors to hold a public hearing on the matter where public comment is allowed, and to allow the Board to decide whether or not to set aside the underlying Dutra permits based on that public comment. Such relief would fall short of a judicial determination declaring the Dutra permits null and void, but would allow the elected decision-makers to make that decision following full public comment as required by the Brown Act. Relief may also include a judicial mandate requiring the County to allow public comment at all future public hearings. Such relief would vindicate the public's rights set forth in the Brown Act without automatically declaring the underlying action null and void. Some form of equitable relief is required, or else the Brown Act's provisions requiring public comment will effectively become a dead letter.

CONCLUSION

For the foregoing reasons, Appellants City of Petaluma, Petaluma River Council, Friends of Shollenberger Park, Moms For Clean Air, Petaluma Tomorrow, Madrone Audubon Society, David Keller, Andrew Packard, Ryan Phelan, Stewart Brand, and Marjorie Helm respectfully request that this Court grant this petition for rehearing and reconsider the Court's ruling on the above three issues.

Respectfully submitted,

Dated: March 14, 2014

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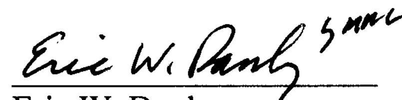

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Certificate of Word Count
(Cal. Rules of Court, Rule 8.204(c)(1))

The text of this brief consists of 3,264 words, as counted by the Microsoft Word 2007 word-processing program used to generate this brief.

Date: March 14, 2014

Respectfully submitted,

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I, Toyer Grear, declare as follows:

I am a resident of the State of California, and employed in Oakland, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 410 12th Street, Suite 250, Oakland, CA 94607. On March 14, 2014, I served a copy of the foregoing document(s) entitled:

APPELLANTS' PETITION FOR REHEARING

☒ **BY ELECTRONIC MAIL AND US FIRST CLASS MAIL (PURSUANT TO CASE MANAGMENT ORDER AND STIPULATION)**. By sending the documents as an electronic mail attachment in PDF format to the e-mail addresses below, and by placing the document(s) listed above in a sealed postage pre-paid envelope, and causing the envelope to be delivered to a US Mail receptacle for collection

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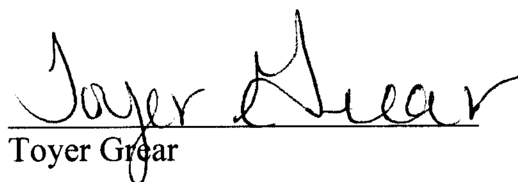
I declare under penalty of perjury (under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed March 14, 2014 at Oakland, California.



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