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AUG 07 2008

**SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF RIVERSIDE**

<b>TITLE:</b> Center for Biological Diversity v. City of Desert Hot Springs, et al et al	<b>DATE &amp; DEPT.</b> August 6, 2008 2G	<b>NUMBER</b> RIC464585
<b>COUNSEL</b> None	<b>REPORTER</b> None	<div style="border: 2px solid black; padding: 5px; text-align: center;"> <b>DOCKET</b>  <b>08-GHGOII-1</b> </div>
<b>PROCEEDING</b> Ruling on Petition for Writ of Mandate		
		<b>RECD.</b> NOV 07 2008

Petitioners Center for Biological Diversity and Sierra Club (“petitioners”) seek a writ of mandate invalidating the environmental impact report for the Palmwood Project planned for construction in respondent City of Desert Hot Springs and directing the respondent to prepare a new EIR. The Palmwood specific plan covers 1,766 acres of residential and commercial development. In addition, the development includes a 160-acre Outparcels area, which the EIR treats as a separate project. The project proposes nearly 2,700 homes, one million square feet of commercial space, a 400-unit hotel, commercial amphitheatre, and golf courses comprising 45 holes. Petitioners contend that the EIR is insufficient for five reasons: 1) the EIR failed to adequately evaluate the cumulative impacts of the project, 2) the description of the existing environment and impacts on wildlife corridors and adjacent preserves is inadequate, 3) the analysis of the water supply and impacts is inadequate, 4) the EIR failed to analyze the project’s impact on global warming, and 5) respondent failed to recirculate the EIR after receiving new information about impacts on endangered species. The Court heard argument on the petition for writ of mandate on May 9, 2008 and took the matter under submission.

The Court finds that the EIR is inadequate in two respects: there is not substantial evidence to support respondent’s determination of the geographic scope in the cumulative impacts analysis and respondent failed to make a meaningful attempt to determine the project’s effect upon global warming before determining that any such analysis would be speculative. Therefore, the petition is GRANTED.

The Cumulative Impact Analysis was Insufficient. The CEQA guidelines provide that cumulative impacts may be analyzed either under the “list method” or the “summary of projections method.” Respondent used the former, which requires that the agency: (1) identify past, present, and probable future projects producing related or cumulative impacts, including, if necessary those projects outside the control of the agency; (2) a definition of the geographic scope of the area affected by the cumulative effect and a reasonable explanation for the geographic limitation used, (3) a summary of the expected environmental effects to be produced by those projects, and (4) a reasonable analysis of the cumulative impacts of the relevant projects, including reasonable, feasible options for mitigating or avoiding the project’s contribution to any significant cumulative effects. CEQA Guidelines, §15130(b).

Respondent described the geographic scope of the area affected as “the area of Desert Hot Springs and Riverside County north of Pierson Boulevard and west of Indian Avenue,” a mostly undeveloped area northwest of the City and south of the project. “This area was selected because of the high growth potential.” (87 AR 22329-22320.) Petitioners argue that this definition of the geographic scope of the area affected is arbitrary because it applies equally as well to the City and Coachella Valley as a whole. (87 AR 22337.) Respondent argues that the EIR actually analyzed each potential impact based upon the area actually affected. For example, in analyzing the cumulative impacts on air quality, the EIR looked at cumulative air quality conditions in the Coachella Valley and throughout the Salton Sea Air Basin. (86 AR 22239, 22243-22244, 22246, 22332.) Respondent’s argument is unpersuasive, however, because, as is shown by its citations to Vol. 86 of the administrative record, it is based upon the analysis in the direct impacts section

of the EIR, That respondent relies upon the direct impacts section of the EIR and that it argues that individual impacts were analyzed based upon their cumulative effect in an area much broader than that defined as the geographic scope of the area affected demonstrates that the definition of the geographic scope of the area affected is arbitrary.

Respondent Failed to Make a Meaningful Attempt to Analyze the Effects of Global Warming. Petitioners argue that respondent did no analysis of the project's effect upon greenhouse gases or global warming. The Legislature and governor have recognized the importance of combating global warming. AB 32, adopted in 2006, which limits greenhouse gas emissions, and SB 97, adopted in 2007, which directs the Office of Planning and Research to prepare guidelines for mitigating greenhouse gas emissions (specifically mentioning CEQA analysis), support petitioners' contention that respondent's failure to make a meaningful attempt to analyze the effect of the project on global warming failed to meet CEQA's requirements.

Respondent contends that such an analysis is not required because it would be entirely speculative. It argues that neither the Air Resources Board, the Environmental Protection Agency nor any other regulatory agency has provided guidance or a framework or developed the necessary analytic tools or methodology for conducting such an analysis. (87 AR 22537.) Respondent may well be correct about the absence of regulatory guidance (although petitioners argue that they provided a methodology used by the EPA and respondent ignored it—AR 87:22435) and that if respondent had made a meaningful attempt to analyze the project's effects upon greenhouse gases or global warming that it would have concluded that such an analysis was entirely speculative. But respondent failed to make such a meaningful attempt and therefore did not proceed as required by law. Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners (2001) 91 Cal. App. 4<sup>th</sup> 1344, 1370-71 ("If, *after thorough investigation*, a lead agency finds that a particular impact is too speculative for evaluation, the agency should note its conclusion and terminate discussion of the impact." (CEQA Guidelines, § 15145, italics added by the Berkeley Jets court.)

Further--and contrary to respondent's assertion that such an analysis would be speculative--respondent concluded that the large project would have a "beneficial impact on CO2 emissions." (87 AR 22538.) This conclusion seems to be based in large measure on the unsupported assumption that the houses currently occupied by those who move into the project would remain unoccupied thereafter. If those homes remained unoccupied, then energy use would decline, traffic would shift to freeways and highways that are relatively uncongested, etc. But if, as is far more likely, those homes are sold and occupied, then the project would add to the burning of fossil fuels and add to the traffic on the highways. Further, this assumption does not address the increased activity, and accompanying consumption of fossil fuels, from the commercial space, the hotel, amphitheatre and golf courses. Thus, even if it could be said that respondent attempted to perform an analysis of the project's effects upon global warming or greenhouse gases, the conclusion that the project would have a beneficial impact on CO2 emissions is not supported by substantial evidence.

Nor is respondent's argument that the cumulative impact analysis required by CEQA is so constrained that it would not require analysis of the cumulative impact of global warming. California has recognized that increased greenhouse gases will have an impact on the state. The Ninth Circuit, applying the analogous federal law, found that the cumulative impact of greenhouse gases is "precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct." Center for Biological Diversity v. National Highway Traffic Safety Administration (9<sup>th</sup> Cir. 2007) 508 F. 3d 508, 550.

The EIR Adequately Evaluated the Project's Effects on Wildlife Corridors. Petitioners argue that the EIR fails to adequately describe the existing environment and evaluate impacts on wildlife corridors and adjacent wildlife preserves. This argument is based upon what P claims is voluminous evidence which shows that the subject property includes wildlife corridors which provide access to other areas, including adjacent wildlife preserves. This argument is unpersuasive because the biological survey conducted in connection with the EIR concluded: (1) there were no wildlife corridors and (2) there would be no significant impact to special status species beyond the boundaries of the project site. (88 AR 22736, 22771, 22806.) These conclusions are based upon field surveys by four biologists conducted on 39 days and 5 nights in 2004 and 2005 that included trapping and tracking of animals. The Court's role in reviewing a challenged EIR is not to determine whether the EIR's ultimate conclusions are correct but only whether

they are supported by substantial evidence in the record as a whole. Laurel Heights Improvement Assn. v. Regents of University of California (1988) 47 Cal.3d 376, 407. The biological field surveys and report constitute substantial evidence supporting respondent's conclusions.

The EIR's Water Supply Analysis was Adequate. Petitioners argue that the water needs are underestimated by 439 homes and approximately 40 acres of golf course. There is no dispute that the project changed slightly from the time that the Water Supply Assessment (WSA) was prepared. However the changes are not significant. At the time the WSA was prepared, 2,255 residential units were planned and 500 acres of golf course. As approved, the project specific plan provides for 1,853 residential units and approximately 540 acres of golf course. P claims that the number of residential units should include those in the Outparcels Project (which at this point is not actually planned to be developed) for a total of 2,694. However, inclusion of the Outparcels Project water needs in the WSA for the Palmwood specific plan is not required. Neither Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412 nor Stanislaus Natural Heritage Project v. County of Stanislaus (1996) 48 Cal.App.4th 182, cited by Petitioners, compels such conclusion. Both addressed projects that were planned to be fully built out. There are no plans to build out the Outparcels Project. It was simply zoned in conjunction with being annexed. Respondent annexed the property because if it had not, the Outparcels Project would have been an unincorporated island within the City of Desert Hot Springs after the annexation of the Palmwood property.

Substantial evidence supports respondent's finding regarding water supply. Petitioners argue that much of the water used to supply the project is paper water and that the EIR fails to adequately describe the source of water for the project. The central issue is whether water supplies are likely to prove available. Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, supra, 40 Cal.4th at 432 (future water supplies identified and analyzed must bear a likelihood of actually proving available; speculative sources and unrealistic allocations, so called "paper water" are insufficient bases for decision making under CEQA.) This argument fails because the WSA indicates that the water for the project will be supplied by the Mission Springs Water District from the local aquifer and that the local aquifer contains water sufficient to supply the project. (91 AR 23561-23562.) Petitioners' argument regarding paper water based upon water agreements with the state have no merit.

Recirculation of the EIR was not Required. Substantial evidence supported respondent's conclusion that recirculation of the EIR was not required after information concerning the triple-ribbed milkvetch was provided to respondent. Respondent had conducted an extensive study, with four biologists walking the property for 39 days and 5 nights at the most favorable time of the year looking for the milkvetch and other plants and animals. They concluded the milkvetch was not present. (88 AR 22727-22728, 22762-22763, 22796-22796 and 61 AR 15688-15690). The evidence relied upon by petitioners indicated that the milkvetch was located on the property years before the more extensive study relied upon by respondent. Thus, substantial evidence supported respondent's decision not to recirculate the EIR.

Petitioners to prepare a proposed writ of mandate in the manner described by Rule 3.1312 of the California Rules of Court.

Clerk to give notice.

Harold W. Hopp, Judge  
P. Vasquez, Clerk

SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE

www.riverside.courts.ca.gov

- [ ] 4100 Main Street, Riverside, CA 92501
- [ ] 4050 Main Street, Riverside, CA 92501
- [ ] 4175 Main Street, Riverside, CA 92501
- [ ] 880 N. State Street, Hemet, CA 92543
- [ ] 41002 County Center Dr. #100 Temecula, CA 92591
- [ ] 135 N. Alessandro Rd. Banning, CA 92220
- [ ] 505 S. Buena Vista Ave., Corona, CA 91720
- [ ] 13800 Heacock #D201, Moreno Valley, CA 92553

X 46-200 Oasis Street Indio, CA 92201  
CLERKS CERTIFICATE OF MAILING

PLAINTIFF: CENTER FOR BIOLOGICAL DIVERSITY

VS.

DEFENDANT: CITY OF DESERT HOT SPRINGS

Case No. RIC464585

TO:

I, clerk of the above entitled court, do hereby certify I am not a party to the within action or proceeding; that on the date below indicated, I served a copy of the attached 05/09/08 by depositing said copy enclosed in a sealed envelope with postage thereon fully prepaid in the mail at Riverside, California addressed as above.

*[Signature]*  
CLERK OF THE COURT

Dated: 08/06/08

By:

*[Signature]*  
PATSI VASQUEZ

Notice 'CCM' has been printed for the following Attorneys/Firms  
or Parties for Case Number RIC464585 on 8/06/08:

CENTER FOR BIOLOGICAL DIVERSITY  
5656 S. DORCHESTER AVE NO. 3  
CHICAGO, IL 60637

CENTER FOR BIOLOGICAL DIVERSITY  
PMB447, 8033 SUNSET BLVD.  
LOS ANGELES, CA 90046

MUNGER, TOLLES, & OLSON  
355 SOUTH GRAND AVE  
35TH FLOOR  
LOS ANGELES, CA 90071-1560

MEYERS, NAVE, RIBACK, SILVER & WIL  
333 SOUTH GRAND AVENUE  
SUITE 1670  
LOS ANGELES, CA 90071

BINGHAM MCCUTCHEN LLP  
1333 N. CALIFORNIA BLVD.  
SUITE 210, P.O. BOX V  
WALNUT CREEK, CA 94596

ROEMER, HARNIK & NETHERY, LLP  
45-025 MANITOU DR  
INDIAN WELLS, CA 92210

SLOVAK BARON & EMPEY LLP  
1800 E TAHQUITZ CANYON WAY  
PALM SPRINGS, CA 92262