SUPERIOR COURT FOR THE STATE OF CALIFORNIA,

COUNTY OF NAPA

AMERICAN CANYON COMMUNITY UNITED FOR RESPONSIBLE GROWTH,

Petitioner,

vs.

CITY OF AMERICAN CANYON, BY AND THROUGH THE CITY COUNCIL, et al.,

Defendants,

LAKE STREET VENTURES, LLC, et al.,

Real Parties-In-Interest.

Case No.: 26-27462

Order Discharging the Writ of Mandate

CITIZENS AGAINST POOR PLANNING, et al.,

Petitioners,

vs.

CITY OF AMERICAN CANYON, BY AND THROUGH THE CITY COUNCIL, et al.,

Defendants,

LAKE STREET VENTURES, LLC, et al.,

Real Parties-In-Interest.

Case No.: 26-27534

Order Discharging the Writ of Mandate

INTRODUCTION

In these consolidated actions, Petitioners American Canyon Community United for Responsible Growth (Am Can) and Citizens Against Poor Planning and Stacy Su (CAPP) (Collectively the Citizen Groups) petitioned this court for a writ of mandate to direct the City of American Canyon by and through the City Council (the City), to set aside and void all of its approvals, resolutions and permits relating to the Napa Junction Project Phase II (the Project). The Court had denied the petitions, but the Citizen Groups appealed that decision, which was ultimately reversed by the Court of Appeal in *American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 Cal.App.4th 1062. The Court of Appeal remanded the matters back to this court with instructions "to issue a writ of mandate requiring the City to comply with Public Resources Code section 21166 and its own zoning code, consistent with the views expressed in the opinion."[1] (*Id.* at p. 1085.) This court did issue the writ of mandate as instructed by the Court of Appeal and ordered the City to file a return to the writ to show compliance therewith.

On April 26, 2007, the City filed a return to the writ of mandate indicating that on April 24, 2007, after a duly noticed public hearing at which documentary evidence and public testimony were received, the City re-approved the Project after approving and certifying an addendum (the Addendum) to the previously certified mitigated negative declaration (MND), as well as approval of the various land use permits at issue.

The CAPP petitioners object to the return on the basis that the Addendum is legally inadequate to support the decision to re-approve the Project. Their challenge to the return came on for hearing before the court on May 14, 2007.

Having read and considered all the papers filed and heard oral argument, the court took the matter under submission and now rules as follows:

The CAPP petitioners object to the adequacy of the Addendum on three bases: (1) it fails to adequately analyze cumulative impacts within the regional market area; (2) the traffic analysis does not include a newly identified tenant in the Project, specifically a Chevron gas station with 12 fueling stations; and (3) it fails to analyze the Project's impact on climate change. The court will address each of these challenges below.

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[1] All further statutory references are to the Public Resources Code unless otherwise specified.

STANDARD OF REVIEW

In reviewing the City's return to the writ, the issue before the court is whether it was appropriate under CEQA for the City to have re-approved the Project without requiring the preparation of an EIR or subsequent negative declaration addressing the proposed changes' potential impacts that were not previously addressed in the MND. The statutory guidance on this issue is found in section 21166, under which an agency is prohibited from requiring a subsequent EIR (or negative declaration[2]) unless one or more of the following events occur:

> "(a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report [or negative declaration].
> (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report [or negative declaration].
> (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available." (*bracketed material added.)*

As applied to this case, the triggering events set forth in Section 21166 can be paraphrased as a change in the Project or circumstances surrounding the Project, or new information that was not known and could not have been known, which requires preparation of an EIR or modification of the negative declaration because the change or new information reveals an additional impact, direct or indirect, that will result in a potentially substantial adverse change in the physical environment.

By re-approving the Project without requiring additional environmental review, the City implicitly determined that the changes in the Project would not result in significant impacts not previously addressed in the MND. It is this determination that must be supported by substantial evidence in order for the writ to be properly discharged at this time.

In general, substantial evidence has been defined as "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." (*Hosford v. State Personnel Bd.* (1977) 74 Cal.App.3d 302, 307.) The CEQA Guidelines define substantial evidence as "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 also be reached....Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence....Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts. (14 Cal. Code Regs. § 15384.)

When faced with this type of review under CEQA, the court is to resolve all reasonable doubts and conflicts in the evidence in favor of the administrative decision. (*Laurel Heights Improvement Assn. v. Regents of University of California, supra,* 6 Cal.4th at p. 1135.) Moreover, courts must indulge all reasonable inferences from the evidence that would support the agency's determinations. (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal. App. 4th 99, 117.)

WAIVER OF OBJECTIONS

Before addressing the CAPP Petitioners' objections, the court first addresses the argument made by Real Parties In Interest, Wal-Mart Stores, Inc. and Lake Street Ventures, LLC ("Real Parties") that petitioners have waived their objections by failing to comply with their burden of presenting in their brief the evidence supporting the City's determination. (See *Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91.) The court in *Megaplex* held that the citizen group challenging a finding that none of the section 21166 events had occurred bore the burden of demonstrating to the court that there is insufficient evidence in the record to justify the City's action. (*Id.* at p. 113.) To do so, the court held, "they must set forth in their brief all the material evidence on the point." (*Id.* at pp. 113-114.) "A failure to do so is deemed a concession that the evidence supports the findings. [Citation.] The reason for this is that 'if the appellants fail to present us with all the relevant evidence, then the appellants *cannot* carry their burden of showing the evidence was insufficient to support the agency's decision because support for that decision may lie in the evidence the appellants ignore.' [Citation.] This failure to present all relevant evidence on the point 'is fatal.'" [Citation.] 'A reviewing court will

[2] As confirmed by the Court of Appeal, section 21166 also applies when the initial environmental document was a negative declaration, rather than an EIR. (See *American Canyon Community United for Responsible Growth v. City of American Canyon, supra,* 145 Cal.App.4th at pp. 1071-1072.)

not independently review the record to make up for appellant's failure to carry his burden.'" [Citation.] (*Id.* at p. 114.)

In response to this argument by Real Parties, the CAPP petitioners argued at the May 14 2007 hearing in this case that the *Megaplex* case is procedurally distinguishable since it was up on appeal after an initial petition for writ of mandate and that the procedural requirement of setting forth the evidence in support of the City's decision does not apply here where it is the City's burden to show compliance with the writ of mandate.

The parties have not cited, nor has the court found any authority specifically addressing the respective burdens of proof on return from a writ of mandate. The CEQA Guidelines require the court to "retain jurisdiction over the public agency's proceedings by way of a return to the peremptory writ until the court has determined that the public agency has complied with this division." (§ 21168.9.) Because the trial court has to determine whether there is compliance, it is arguable that it is the trial court's burden to review the entire record, rather than the petitioner's burden to set forth supportive evidence.

Regardless of the applicable burdens of proof, to the extent there is a procedural deficiency in the petitioners' challenge to the return, the court opts to overlook it and continues on to address the substantive issues raised by their objections.

THE OBJECTIONS

1. Insufficient Analysis of Cumulative Impacts.

One of the reasons the Court of Appeal reversed the denial of the writ of mandate was that the City had failed to adequately consider urban decay impacts in areas outside the city limits. The Addendum relied on by the City this time around rectifies that problem. The CAPP Petitioners argue that the Addendum is nevertheless deficient in its analysis of the market region cumulative impacts. More specifically, they allege that "the combined effects of the planned White Slough Supercenter in Vallejo [which includes another Wal-Mart Supercenter approximately 4 miles from the Project], the American Canyon Supercenter, and the looming closure of the current Vallejo Wal-Mart Discount Store are not analyzed in the Addendum. The court disagrees.

Contrary to petitioners' argument, the Addendum does address the cumulative potential for urban decay within the defined market region. Appendix E to the Addendum provides a rather extensive analysis of the potential for store closures resulting not just from the subject

Project, but also reasonably foreseeable future projects, including the proposed Vallejo Wal-Mart Supercenter. The urban decay discussion is based on physical observation and detailed market data analysis. The discussion addresses the planned closure of the current Vallejo Wal-Mart, which the evidence reflects is already in contract to be re-leased to the Home Depot. The discussion concludes that because of anticipated growth in the community and because numerous retail categories are currently underserved in the market region, any stores closing as a result of Project and other planned projects will most likely be re-tenanted within short periods of time, thus minimizing any potential for urban decay. This analysis was also positively peer reviewed by Dr. Grandier from Stanford University.

The court further disagrees with petitioners that the market area described in the Addendum is "inadequate and entirely subjective." The City was required to consider the cumulative environmental impacts of other past, present and reasonably foreseeable retail projects in the market area served by the proposed supercenter. (See *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1218.) Page 7 of CBRE's urban decay analysis in Appendix E explains that the experts determined the Supercenter's market area by mapping the locations of all existing and planned Wal-Mart stores to determine from which communities people would frequent the American Canyon store. The market area they determined included not only the City of American Canyon, but also the surrounding cities of Vallejo and Benicia. Presumably, a person from a community with an existing Wal-Mart, such as Napa or Fairfield, is not likely to drive to the American Canyon Wal-Mart. Nothing about the market area determination appears to the court to be inadequate or inappropriately subjective.

Based on the foregoing, the court finds that the urban decay analyses set forth in the Addendum and Appendix E constitute relevant evidence that a reasonable mind could accept as adequate to support the conclusion that the changes in the Project will not result in significant urban decay impacts requiring supplemental environmental review. (See *Hosford v. State Personnel Bd., supra,* 74 Cal.App.3d at p. 307.)

2. Inadequate Traffic Analysis.

Another reason the Court of Appeal reversed the denial of the writ of mandate was that the previous traffic analysis relied on by the City was based on inaccurate identification of the size and type of retail proposed in the Project. The court finds that the current traffic analysis is

based on an accurate identification of the size and type of all commercial development proposed. And the CAPP petitioners do not contest the issue.

What the CAPP petitioners do argue, however, is that the traffic analysis in the Addendum is deficient because, although it acknowledges the proposed Chevron Gas Station with 12 fueling stations, it does not analyze the station's traffic generating contribution. Again, the court disagrees.

Although the written analysis does not separately discuss the impact of the Chevron Gas Station alone, the station's traffic contribution is clearly included in the overall calculations, which are then discussed in terms of the total additional traffic contribution. And the City's decision was not based on just one traffic study. The Addendum includes a traffic study by DKS, an independent traffic study by KHA, DKS' peer review of KHA's traffic study, and Omni-Means' peer review of both DKS' traffic study and KHA's traffic study. It is clarified throughout the reports that the studies focus on the difference in traffic generated from the original project and the revised project, which replaces the originally proposed 196,000 square feet of shopping center with 173,015 of Wal-Mart Supercenter plus 13,781 square feet of outdoor garden center (and 7,625 square feet of outdoor seasonal sales area), 39,225 square feet of shopping center, 3 service bay oil change shop and 12 fueling position gas station. All three expert entities concluded that the changes to the Project would not result in significant impacts that were not adequately addressed in the MND.

The court finds that these traffic studies and the peer reviews thereof constitute relevant evidence that a reasonable mind could accept as adequate to support the conclusion that the changes in the Project will not result in significant traffic impacts requiring supplemental environmental review. (See *Hosford v. State Personnel Bd., supra,* 74 Cal.App.3d at p. 307.)

3. Lack of Analysis of Impacts on Climate Change.

Finally, petitioners argue that the Addendum is inadequate because it does not include an analysis of the Project's greenhouse gas emissions and global warming impacts. The court, again, disagrees.

In reversing the denial of the writ, the Court of Appeal did not indicate that the City had erred in failing to specifically address climate change impacts. And petitioners have failed to provide any authority currently requiring the City to have undertaken such an analysis at this stage of the proceedings. Nor has the court found any such authority.

Under the writ of mandate, the City was required to comply with section 21166. Under section 21166, the City was prohibited from requiring an EIR or subsequent negative declaration unless one of the three events listed in the statute has occurred. Petitioners seem to be suggesting that the new legislation AB 32 should have triggered further review pursuant to section 21166. However, as explained in petitioners' brief, AB 32 simply "charges the California Air Resources Board to develop regulations on how the state would address climate change impacts." While it is possible that the promulgation of new climate change regulations may trigger further environmental review of projects undergoing section 21166 scrutiny in the future, the court fails to see how a mere legislative mandate for the creation of regulations could have triggered review under section 21166 in the City's re-approval of this Project.

If petitioners are attempting to classify AB 32 as "new information" that could not have been known, the court does not agree that it is the type of new information contemplated by section 21166. CEQA Guideline 15162, which augments section 21166, clarifies that the "new information" must show something about the particular project's effects, i.e., that the project will have one or more significant effects not discussed in the previous negative declaration. New legislation requiring creation of state regulations certainly does not pertain to this particular Project or its effects. Thus, the court concludes that AB 32 is not the kind of "new information" contemplated by section 21166.

For these reasons, the court finds that the CAPP petitioners' objection regarding climate change are not well taken.

CONCLUSION

The CAPP petitioners' objections notwithstanding, it appears to the court that the City has adequately complied with the writ of mandate and that its decision to re-approve the Project was not an abuse of discretion or contrary to law. Thus, the court hereby discharges the writ of mandate and dissolves the March 20, 2007 order reconfirming the stay.

Dated: 5/21/07

Raymond A. Guadagni, Judge

CERTIFICATE OF MAILING

Napa Courts

Civil, Probate, Criminal, Appeals, Small Claims

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Brett S. Jolley
Herum, Crabtree & Brown
2291 West March Lane, Suite B100
Stockton, CA 95207

Kypros G. Hostetter
Law Offices of William D. Ross
520 South Grand Avenue, Suite 300
Los Angeles, CA 90071-2610

Timothy M. Taylor
Somach, Simmons & Dunn
813 Sixth Street, Third Floor
Sacramento, CA 95814

Arthur Friedman
Sheppard, Mullin, Richter & Hampton, LLP
Four Embarcadero Center, 17th Floor
San Francisco, CA 94111

William D. Ross
Law Offices of William D. Ross
520 South Grand Avenue Suite 300
Los Angeles, CA 90071-2610

I hereby certify that I am not a party to this cause and that copies of the attached **ORDER DISCHARGING THE WRIT OF MANDATE** mailed (first class postage pre-paid) to the above parties at Napa, California on this date and that this certificate is executed at Napa, California this date.

5/22/07
DATE

M. Fields
Deputy Court Executive Officer