Westfield, LLC, et al. v. City of Arcadia et al., BS 108923 and Arcadia First! v. City of Arcadia et al., BS 108937

Decision on petitions for writ of mandate: granted in part

Petitioners Westfield, LLC, Santa Anita Shoppingtown, LP, and Santa Anita Fashion Park LP (collectively, "Westfield") seek a writ of mandamus against Respondents City of Arcadia and City Council for the City of Arcadia ("Arcadia" or the "City") and Real Parties-in-Interest Caruso Property Management, Inc. ("Caruso"), Santa Anita Associates Holding Co., LLC, the Santa Anita Companies, Inc., Santa Anita Commercial Enterprises, Inc. and the Los Angeles Turf Club, Inc. (collectively, "Santa Anita"), and the joint venture of Caruso and Santa Anita, Santa Anita Associates, LLC. (Collectively, Caruso, Santa Anita, and Santa Anita Associates, LLC shall be referred to as "Real Parties.") Petitioner Arcadia First! ("Arcadia First") seeks similar relief against the same Respondents in a separate case.

The court has read and considered the moving papers,[1] opposition, and replies, heard the trial, and renders the following decision.

A. Statement of the Case

Petitioner Westfield commenced this proceeding for both traditional and administrative mandamus on May 15, 2007 against Respondent Arcadia and Real Parties.

The Petition alleges in pertinent part as follows. Westfield is the owner and operator of the Westfield Santa Anita Mall (the "Westfield Mall"), a 1.3-million-square-foot regional shopping center in Arcadia. Developer Caruso has proposed a plan to build a 800,000 square foot shopping mall next door to the Westfield Mall in the parking lot of the Santa Anita racetrack known as The Shops at Santa Anita (the "Shops Project" or the "Project"). The Shops Project would involve sixteen buildings, architectural features up to 85 feet, and two parking garages with 5,153 parking spaces. Construction would involve demolition of two components of Santa Anita Racetrack, a historic facility. The environmental impacts of the Shops Project are exacerbated by the fact that the Westfield Mall has itself been approved for a phased 600,000 square foot expansion, on which the first phase of construction is complete.

The Petition contends that Caruso's strategy for the Shops Project has been to tout the economic benefits and downplay the environmental impacts, including denying critical components which will be developed in the near future. As a result, the final environmental impact report ("FEIR") for the Shops Project turned a blind eye to reasonably foreseeable expansion, wrongfully claimed that impacts could be mitigated to insignificant levels, wrongly represented that the Project would not duplicate the Westfield Mall in order to avoid violating the City's General Plan, downplayed feasible alternatives, failed to address all public comments, failed to identify whether Caruso or Santa Anita will be responsible for mitigation monitoring, and wrongly dismissed changes in the law and Project as either not occurring or irrelevant.

The Petition contains claims for violation of the California Environmental Quality Act ("CEQA"), for inconsistency between the Shops Project and the City's General Plan, and for violation of the Arcadia Municipal Code by approving a Specific Plan that failed to provide

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[1]Westfield and Arcadia First each join in the other's opening brief insofar as the brief presents issues raised in that party's Petition.

legally adequate information concerning sewage facilities.

Westfield seeks to have the certification of the FEIR and approval of design review set aside under CCP section 1094.5, and the approval of the Specific Plan, zoning change, General Plan, and the Development Agreement set aside under CCP section 1085.

Petitioner Arcadia First filed a Petition for Writ of Mandate (BS 108937) on May 17, 2007, against Respondent Arcadia and Real Parties. The Petition alleges seven causes of action. Six of them are under CEQA. The first cause of action alleges that the final EIR inadequately assesses aesthetic, historic resource traffic, air pollution, water quality, growth inducing, and cumulative and impacts of the Shops Project. The second cause of action alleges that the final EIR inadequately analyzes feasible alternatives to the Project. The third cause of action alleges that the final EIR's analysis and imposition of mitigation measures are inadequate. The fourth cause of action alleges that the mitigation measures are too vague and unenforceable to be adequate under CEQA. The fifth cause of action alleges failures with respect to notice and recirculation of a draft EIR. The sixth cause of action alleges a lack of substantial evidence to support the final EIR's overriding considerations. The seventh cause of action is not a CEQA claim. It alleges that the Specific Plan unconstitutionally delegates decision-making to an unelected official.[2]

On or about September 18, 2007, the City answered both petitions. Real Parties answered both petitions on or about August 28, 2007.

On July 23, 2007, the court ordered that the cases were consolidated only for purposes of the record and case preparation. A single administrative record shall be admitted in both cases and the cases shall be tried together, but separate judgments would be entered.

B. Preliminary Issues

1. Standing and Timeliness

Real Parties concede the standing of Arcadia First. *See* Kane v. Redevelopment Agency, (1986) 179 Cal.App.3d 899, 904 (citizen or resident of affected area is sufficient to satisfy the liberal standing requirement for private individuals acting in the public interest to enforce CEQA). Organizations devoted to environmental interests with members who are residents in the project area also have CEQA standing. Id.

Real Parties argue that Westfield lacks standing to make a CEQA claim. They point out that Westfield is a competitor of the Shops Project, and CEQA does not exist to remedy economic concerns or ensure fair competition. They rely on Waste Management of Alameda County, Inc. v. County of Alameda, (2000) 79 Cal.App.4th 1223, 1233-34, in which the appellate court declined to find CEQA standing for a business competitor which sought to remedy financial issues, not to enforce environmental interests. Opp. at 32.

Mandate may be issued upon the verified petition of the party beneficially interested. CCP §1086. This is synonymous with standing (*see* People ex. Rel. Dept. Of Conservation v. El Dorado County, (2005) 36 Cal.4th 971), and is equivalent to the federal "injury-in-fact" test, requiring that a party prove that it has suffered an invasion of a legally protected interest that is

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[2]Real Party-in-Interest Magna Entertainment Corp. was named in both cases but dismissed on October 1, 2007.

concrete and particularized, and actual or imminent, not conjectural or hypothetical. Id. It involves a two step inquiry: (1) the petitioner must have "some special interest to be served or some particular right to be protected over and above the interest held in common with the public at large." Carsten v. Psychology Examining Comm., (1980) 27 Cal.3d 793, 796; and (2) the interest that the petitioner seeks to advance must be within the zone of interests to be protected or regulated by the legal duty asserted. The courts have generally applied a liberal standard for standing in CEQA cases. Murrieta Valley Unified Schoool District v. County of Riverside, (1991) 228 Cal.App.3d 1212, 1223-25.

In general, any property owner whose property has a geographical nexus with the site of the challenged project has standing. Citizens Association for Sensible Development of the Bishop Area v. County of Inyo, (1985) 172 Cal.App.3d 151, 158. While the geographic nexus test has limits (Waste Management, *supra*, 79 Cal.App.4th at 1236 (competitor and property owner four miles away from project lacked standing), a property owner who pleads specific environmental harm from the project to his or her property will have standing.

Westfield's property is in close proximity to the Shops Project, and it has environmental concerns over and above the interest held in common with the public. Westfield has alleged that the Shops Project will result in unique environmental harm to it, its tenants, and its customers, and contends that those impacts include traffic, parking, sewer, and air quality impacts. *See* Pet., ¶10. These environmental concerns are also within the zone of interests protected and regulated by CEQA. Westfield has a competitor's economic motivation to bring suit, but that motivation alone is not a basis to deny standing. *See* Burrtec Waste Industries, Inc. v. City of Colton, (2002) 97 Cal.App.4th 1133, 1137-38. Westfield has standing to raise its CEQA claim.

The action are timely on CEQA issues, having been filed by Westfield on May 15, 2007 and by Arcadia First on May 17, 2007, within 30 days of the City's May 2, 2007 Notice of Determination ("NOD") that the EIR had been certified. *See* Pub. Res. Code §21167(c).

2. The Administrative Record

The City has certified the administrative record. Pub. Res. Code §21167.6; LASC 9.24(e). The court separately ruled on the parties' efforts to augment the administrative record through motions and requests for judicial notice. The entire record was received in evidence at trial.

C. Statement of Facts

1. The Shops Project

In 1996, the City adopted a General Plan update which noted that the Santa Anita Racetrack ("Santa Anita" or the "Racetrack") is a key community feature and an important component of Arcadia's character, but had seen a reduction in attendance over the past ten years. As a result, the Racetrack's parking did not need to be reserved strictly for horse race event parking. This had given rise to much community discussion about additional uses in the Racetrack parking areas. The City wanted to retain live horse racing long-term, preserve the grandstand structure, yet develop the Racetrack's southern parking lot in a manner recognizing the unique attributes of the Racetrack and the Westfield Mall. AR 28354. The City designated this area as commercial in order to assist free market forces to introduce new uses compatible with the Westfield Mall, downtown area, and other commercial areas, and create a "synergistic

economic relationship between the Mall, Racetrack, and new commercial uses. AR 28352.[3] Of utmost concern to the City was the continued success of both the Racetrack and the Mall. AR 28350.

In 2004, representatives of Real Parties began meeting with City officials for a possible commercial development adjacent to the Racetrack. The City convened public hearings and meetings to receive public input on any proposed development. The Shops Project is the culmination of these efforts. The Shops Project site is adjacent to and north and east of the Westfield Mall. AR 18178, 18182, 18189-90.

The Shops Project is a "hybrid lifestyle center" (*see* AR 8354) that would provide many of the same benefits – sensitivity to an historic landmark, helping surrounding businesses, and helping the community tax base – as "The Grove," another project developed by Caruso in Los Angeles. AR 26611-13. The Grove has been characterized by media sources and the Caruso Real Parties as an immensely popular unique shopping and tourist destination that pulls customers from 78 zip codes and draws 20 million annual visitors, which is more than Disneyland. AR 10494.

As proposed in 2006, the Shops Project would have 829,250 square feet of shopping center retail and office uses arranged as a pedestrian-oriented Main Street, an approximately 98,000 sq. foot Simulcast Center for expanded gambling activities, a 1.4 acre landscaped open space, a wireless electric trolley traveling on fixed rails, improvements to vehicle and pedestrian access, and a 3.5-acre water feature resembling a lake, all on the Racetrack's 85-acre southern parking lot. AR 18177. The proposed Project also would include 295,750 square feet of residential floor area in up to 300 multi-family residential units on top of the retail center. AR 23780, 23714. To accommodate the Project, the Racetrack's existing Saddling Barn and South Ticket Gates would be demolished and a replacement Saddling Barn constructed. The western part of the Grandstand also would be modified to accommodate the Simulcast Center. Id.

2. The First DEIR

In connection with the proposal, the City released a draft EIR (the "First DEIR") for public comment on December 23, 2005. AR 23619.

In August 2006, the Keeper of the National Register of Historic Places ("Keeper") determined that portions of the Racetrack were eligible for listing as an historic district with national significance as "property ... associated with events that have made a significant contribution to the broad patterns of our history." As a result, the district was automatically listed on the registry of California historic resources. AR 18353. The district consists of the Racetrack and 53 contributing and 21 non-contributing resources, meaning that alterations to any of the district's structures would require environmental review under CEQA. Id.

In September 2006, Caruso and Santa Anita entered into agreements concerning the development and operation of the Shops Project (the "Operating Agreements"). The Operating Agreements identify The Grove as the "Comparable Project" for the Shops Project to emulate in

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[3]The Westfield Mall opened in 1974. Westfield acquired it in 1998, two years after the General Plan was amended to permit commercial development on the Racetrack south parking lot. AR 4378.

terms of construction, leasing, tenant relations, and overall management. AR 10362. The Operating Agreements permit Caruso, at his election, to develop in the future a portion of the Shops Project with residential uses. AR 10335.

At the October 26, 2006 meeting of the California Horse Racing Board ("CHRB"), Frank DeMarco, Jr. ("Demarco"), a representative of Santa Anita, addressed the Racetrack's plan to reconstruct the approximately 70 stables and their 1,950 stalls which were in a deteriorating condition (the "Stables Reconstruction Project"). AR 9734, 10514-24. The CHRB had been demanding that the Racetrack commence the Stables Reconstruction Project for some time and, out of frustration, passed a motion threatening the loss of race days if the Stables Reconstruction Project was not commenced in 2007. AR 10522-24, 10560, 10563. DeMarco stated to the CHRB at the meeting that the Stables Reconstruction Project would require environmental review under CEQA, but Santa Anita did not envision such review occurring until after the Shops Project's EIR was approved. AR 10517, 10522. When the CHRB pressed Santa Anita with the prospect of losing racing days if the Stables Reconstruction Project did not move forward, DeMarco stated that Santa Anita might be able to tear down the barns on a fire safety basis. AR 10523.

At a subsequent CHRB meeting on January 23, 2007, DeMarco assured the CHRB that he was mindful of the threat of lost race days, stated that Santa Anita had retained an historic district expert for the Stables Reconstruction Project and had obtained two bids, and indicated that a reasonable estimate for the work to begin was 60 days. ARA 4362-63.

3. The Second DEIR

After release of the First DEIR, various parties raised concerns about the impacts of the Shops Project's proposed residential apartment housing on an already overcrowded school system and whether such housing would impact the City's character and quality of life. AR 23585, 23718, 26776, 26790. Real Parties understood that residents did not want the housing component and withdrew it, revising the Project to delete all residential uses and add an office component intended for rent-free occupancy by the Arcadia Unified School District (the "School District"). AR 23585, 3707, 8172-74, 23127.

Because the initial proposal had changed substantially, the City and Real Parties began the CEQA process over again from the beginning, including a new Notice of Preparation ("NOP"), a new scoping period, and preparation of a "Revised Environmental Impact Report (the "Second DEIR") in May 2006. AR 23039-52. The Second DEIR was circulated for public comment from October 23 to December 14, 2006. AR 18071-73, 18066. The City's Planning Commission also held a public hearing on November 28, 2006 to accept oral comments on the Second DEIR. AR 17912.

4. The FEIR

In February 2007, the City released the FEIR for the Shops Project. The FEIR consisted of the Second DEIR, approximately 1500 pages of responses to comments (AR 7969-9682), and a Mitigation Monitoring Program. AR 8048-86.

In response to comments submitted on the Second DEIR and at hearings on the Project, Real Parties modified the Shops Project again by (a) moving and reducing the size of some planned buildings so they would no longer encroach upon the concrete drainage channel known

as Arcadia Wash, moving the theater building and reducing its size from 16 screens to 13 screens, and redesigning a parking structure to reduce its footprint (AR 2859-60); and (b) restoring, instead of demolishing, portions of the Saddling Barn to reduce impacts on this historic resource and moving it to its original 1934 location. AR 2860-63. The City analyzed the environmental impacts of these changes in a March 2007 document entitled "Additional Environmental Analysis In Response to the City of Arcadia's March 9,2007 Staff Report Recommending Study of Potential Modifications to The Shops at Santa Anita Project" ("AEA"). AR 2857-2940.

Real Parties also made an change in access design. The Westfield Mall and the Racetrack share a common set of access roadways (AR 1354), and Westfield had proposed a Gate 8 entrance configuration in the Addendum for its Phase 1B expansion. Real Parties adopted this configuration. AR 1441. The Gate 8 change was analyzed in a "syncro study" prepared by the City. AR 2845-52.

In March 2007,[4] the City released a draft copy of the Development Agreement negotiated between the City and Real Parties in closed session with the City Council. AR 7556, 7595-7653. The Development Agreement contains Real Parties' covenant that the Shop Project's tenant mix would be consistent with "a first class shopping center" and shall include upscale tenants such as those occupying space at four benchmark retail centers in Southern California: Newport Beach's Fashion Island, Costa Mesa's South Coast Plaza, and Caruso's The Grove and Americana on Brand in Glendale. AR 7613.

The City's Planning Commission held hearings on the Project on March 19, 2007 (AR 7237), and again on March 21, 2007. AR 7067. At the latter hearing, the Commission voted to approve all the entitlements for the Shops Project. AR 7062-63.

5. <u>The City's Final Approval</u>

The Sanitation Districts of Los Angeles County ("Sanitation Districts") commented in a December 2006 letter on the DEIR that the existing sewer in the area of the Shops Project is nearing capacity and will not be able to accommodate any additional flow between two the manholes directly above and below the Shops Project, but the Sanitation Districts would be able to accommodate the anticipated flow from the Project by connecting to the sewer system further downstream. *See* AR 4470.

On April 2, 2007, the Sanitation Districts commented in a new letter that flow measurements indicated an overall increase in peak flows since the last measurements in 2005. As a result, it did not appear that there would be sufficient capacity downstream to accommodate the anticipated discharge from the Shops Project during peak periods. As the peak flow problem affected everyone in the area, the Sanitation Districts stated that it was preparing a design and construction of a relief sewer that will take a minimum of two to three years to construct. If the Shops Project were completed before the sewer relief, downstream discharges in off-peak hours may still be an option, and other options may be available upon further analysis. AR 4471.

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[4]The Development Agreement apparently was released to the public on March 9, 2007, thirty three days before the City Council approved it. AR 634-35. It also was attached to a March 19, 2007 staff report.

The City Council held a public hearing on the Shops Project on April 11, 2007. AR 3664.[5] Prior to the hearing, in response to a public concern over potential problems associated with gambling, the City and Real Parties decided to delete the Simulcast Center. AR 299.[6] At the hearing, DeMarco appeared on behalf of the Racetrack and testified that the Stable Reconstruction Project "is not moving forward." AR 3880.

The City Council deliberated and on April 17, 2007 adopted resolutions certifying the FEIR, approving design review for the Revised Project, and approving General Plan Amendments. AR 621-622. The City Council also introduced as a first reading the ordinances that would approve the Specific Plan, the Development Agreement and the necessary zone change for the Shops Project. AR 622. The City issued a NOD for the Shops Project on April 19, 2007. AR 609.

On April 19, 2007, DeMarco appeared at a CHRB hearing. Despite telling the City Council eight days earlier that the Stables Reconstruction Project "is not moving forward," DeMarco testified that the Racetrack was indeed proceeding with the Stables Reconstruction Project, it was "going to tear down and rebuild ten barns to start," this would be done "immediately," and would continue thereafter until the barns were all rebuilt. AR 30335, 30337-30338.

Petitioners submitted a letter to the City dated April 20, 2007 disclosing DeMarco's April 19 statements. AR 30321. The Racetrack responded in an April 26, 2007 letter to the City saying that there is no current plan to replace barns at Santa Anita and DeMarco clearly was expressing his opinion as to what a future plan might entail. AR 30348.

A second reading of the ordinances required for the Specific Plan, Development Agreement, and zone changes was approved at the City Council's next hearing on May 1, 2007. AR 16-19. The City issued a new NOD for the Shops Project on May 2, 2007. AR 3.

D. Standard of Review

A party may seek to set aside an agency decision for failure to comply with CEQA by petitioning for either a writ of administrative mandamus (CCP §1094.5) or of traditional mandamus. CCP §1085.

CEQA review of quasi-adjudicatory agency actions in which a hearing is required, evidence taken, and the agency determines factual issues are governed by administrative mandamus under CCP section 1094.5, in which the court determines whether the agency's decision is supported by substantial evidence. Pub. Res. Code §21168. Examples of such actions include issuance of use permits (Neighborhood Action Group v. County of Calaveras, (1984) 156 Cal.App.3d 1176, 1186), planned use development permits (City of Fairfield v. Superior Court, (1975) 14 Cal.3d 768, 773), and zoning variances. Topanga Assn. For a Scenic

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[5]Petitioners submitted additional written comments the day before the hearing. AR 4041-4467. Though pressed for time, the City prepared additional responses. AR 2181-2372, 630-720.

[6]The City Council decided that the elimination of the Simulcast Center had no environmental impact. AR 1035-36.

Community v. County of Los Angeles, (1974) 11 Cal.3d 506, 517.

CEQA review of quasi-legislative agency actions is governed by traditional mandamus per CCP section 1085, in which the court determines whether the agency prejudicially abused its discretion by not proceeding in a manner required by law or by making a decision not supported by substantial evidence. Pub.Res. Code §21168.5. Examples of such actions include adopting a general plan or zoning or rezoning property. O'Loane v. O'Rourke, (1965) 231 Cal.App.2d 774, 784-85 (general plan); San Diego Building Contractors Assn. v. City Council, (1974) 13 Cal.3d 205, 212-13).

The parties agree that the City's decisions to amend the General Plan, amend its zoning ordinance, adopt a Specific Plan, adopt an ordinance approving a Development Agreement are quasi-legislative actions governed by traditional mandamus, and that the City's decisions to adopt the final EIR and approve design review of the Shops Project were quasi-adjudicatory actions governed by administrative mandamus. In any event, there is no practical difference between the standards of review applied under traditional or administrative mandamus in CEQA cases. Friends of the Old Trees v. Dept. Of Forestry & Fire Protection, (1997) 52 Cal.App.4th 1383, 1389.

Public entities abuse their discretion if their actions or decisions do not substantially comply with the requirements of CEQA. Sierra Club v. West Side Irrigation District, (2005) 128 Cal.App.4th 690, 698. Whether an agency abused its discretion requires "scrutiny of the alleged defect" depending on whether the claim is predominately "improper procedure or dispute over the facts." Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova, ("Vineyard") (2007) 40 Cal.4th 412, 435. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence. Western States Petroleum Assn. v. Superior Court, (1995) 9 Cal.4th 559, 568.

Where an EIR fails to provide certain required information and/or was misleading is failing "to proceed in a manner required by CEQA" and an issue of law. Vineyard, *supra*, 40 Cal.4th at 435. Such issues require "a critical consideration, in a factual context, of legal principles and their underlying values." Harustak v. Wilkins, (2000) 84 Cal.App.4th 208, 212. On the other hand, whether an agency abused its discretion in an EIR's findings must be answered with reference to the existence of substantial evidence in the administrative record. "Substantial evidence," is defined 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." Guidelines[7] §15384(a). The substantial evidence standard requires deference to the agency's factual and environmental conclusions based on conflicting evidence, but not to issues of law. Laurel Heights Improvement Assn. v. Regents of University of California, ("Laurel Heights") (1988) 47 Cal.3d 376, 393, 409. Argument, speculation, and unsubstantiated opinion or narrative will not suffice. Guidelines §15384(a), (b). Whether substantial evidence exists is a question of law. *See* California School Employees

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[7]As an aid to carrying out the statute, the State Resources Agency has issued regulations called "Guidelines for the California Environmental Quality Act" ("Guidelines"), contained in Code of Regulations, Title 14, Division 6, Chapter 3, beginning at section 15000.

Association v. DMV, (1988) 203 Cal.App.3d 634, 644.

Westfield's allegations that the Shops Project is inconsistent with the City's General Plan, and that the City violated the Arcadia Municipal Code ("AMC") by approving a Specific Plan that failed to provide legally adequate information concerning sewage facilities, and Arcadia First's allegation that the Specific Plan unconstitutionally delegates decision-making to an unelected official, are non-CEQA, quasi-legislative, traditional mandamus claims. The City is entitled to great deference in interpreting its own ordinances. The court must uphold the agency's action unless it is "arbitrary and capricious, lacking in evidentiary support, or made without due regard for the petitioner's rights." Citizens for Improved Sorrento Access, Inc. v. City of San Diego, (2004) 118 Cal.App.4th 808, 814; Sequoia Union High School District v. Aurora Charter High School, (2003) 112 Cal.App.4th 185, 195. Petitioners have the burden of showing that the agency decision is unreasonable or invalid as a matter of law. City of Arcadia v. State Water Resources Control Board, (2006) 135 Cal.App.4th 1392, 1409.

E. CEQA

The purpose of CEQA (Pub. Res. Code §21000 *et seq.*) is to maintain a quality environment for the people of California both now and in the future. Pub. Res. Code §21000(a). "[T]he overriding purpose of CEQA is to ensure that agencies regulating activities that may affect the quality of the environment give primary consideration to preventing environmental damage." Save Our Peninsula Committee v. Montery County Board of Supervisors, (2001) 87 Cal.App.4th 99, 117. CEQA must be interpreted "so as to afford the fullest, broadest protection to the environment within reasonable scope of the statutory language." Friends of Mammoth v. Board of Supervisors, (1972) 8 Cal.3d 247, 259.

The Legislature chose to accomplish its environmental goals through public environmental review processes designed to assist agencies in identifying and disclosing both environmental effects and feasible alternatives and mitigations. Pub. Res. Code §21002. Public agencies must regulate both public and private projects so that "major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian." Pub. Res. Code §21000(g).

Under CEQA, a "project" is defined as any activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment (1) undertaken directly by any public agency, (2) supported through contracts, grants, subsidies, loans or other public assistance, or (3) involving the issuance of a lease, permit, license, certificate, or other entitlement for use by a public agency. Pub. Res. Code §21065. The word "may" in this context means a reasonable possibility. Citizen Action to Serve All Students v. Thornley, (1990) 222 Cal.App.3d 748, 753. "Environment" means the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance. Guidelines §21060.5.

The "project" is the whole of the action, not simply its constituent parts, which has the potential for resulting in either direct or reasonably foreseeable indirect physical change in the environment. Guidelines §15378. An indirect physical change must be considered if that change is a reasonably foreseeable impact which may be caused by the project. On the other hand, a change that is "speculative or unlikely to occur is not reasonably foreseeable."

Guidelines §15064(d)(3). The term "project" may include several discretionary approvals by government agencies; it does not mean each separate government approval. Guidelines §15378©).

An EIR must be prepared for a project if the agency concludes that "there is substantial evidence, in light of the whole record... that the project may have a significant effect on the environment." Pub. Res. Code §21080(d). The EIR is the "heart" of CEQA, providing agencies with in-depth review of projects with potentially significant environmental effects. Laurel Heights, *supra*, 6 Cal.4th at 1123. An EIR describes the project and its environmental setting, identifies the potential environmental impacts of the project, and identifies and analyzes mitigation measures and alternatives that may reduce significant environmental impacts. Id. Using the EIR's objective analysis, agencies "shall mitigate or avoid the significant effects on the environment... whenever it is feasible to do so. Pub. Res. Code §21002.1. The EIR serves to "demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its actions." No Oil, Inc. v. City of Los Angeles, (1974) 13 Cal.3d 68, 86. It is not required to be perfect, merely that it be a good faith effort at full disclosure. Kings County Farm Bureau v. City of Hanford, (1990) 221 Cal.App.3d 692, 711-12. A reviewing court passes only on its sufficiency as an informational document and not the correctness of its environmental conclusions. Laurel Heights, *supra*, 47 Cal.3d at 392.

All EIRs must cover the same general content. Guidelines §§ 15120-32. An EIR should be prepared with a sufficient degree of analysis to provide decision-makers with information which enables them to make a decision which intelligently takes account of environmental consequences. The environmental effects need not be exhaustively reviewed, but the EIR's sufficiency is viewed in the light of what is reasonably feasible. Guidelines §15151. The level of specificity of an EIR is determined by the nature of the project and the "rule of reason." Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners, (1993) 18 Cal.App.4th 729, 741-42. The degree of specificity "will correspond to the degree of specificity involved in the underlying activity which is described in the EIR." Guidelines §15146.

F. Analysis

1. Notice

Arcadia First contends that the notice provided for the FEIR was inadequate, both with respect to the Second DEIR and the Development Agreement, and the environmental review process was conducted in a manner that thwarted public participation. Both Arcadia First and Westfield contend that the FEIR should have been recirculated when significant new information became known after the FEIR was released.[8]

a. The Lack of a Summary of Changes

Arcadia First contends that there was considerable public comment on the First DEIR, including considerable comment about the residential component. The City and Real Parties

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[8]The contention by both Westfield and Arcadia First that the FEIR also failed to provide good-faith, reasoned responses to all public and agency comments is not supported by argument or citation to evidence and has been waived.

revised the Project to delete all residential uses and add an office component intended for rent-free occupancy by the School District and began the CEQA process over again. Arcadia First argues that it was extremely difficult to discern the differences between the First DEIR and the Second DEIR. As a result, it requested a summary of the changes so the public could understand. AR 9714. The NOP for the Second DEIR summarized the changes in the Project, but did not summarize the changes between the two documents, a violation of Guidelines section 15088.5(g) (when recirculating a revision to EIR, the agency must summarize the changes made). AF Br. at 4.

There was no failure to summarize changes between the First DEIR and the Second DEIR because the City and Real Parties started the CEQA process anew from the beginning; they did not revise the First DEIR. Hence, the City issued a new NOP, began a new scoping period, and prepared a new DEIR (the Second DEIR). Starting over means just that: starting over. Recirculation applies to significant new information added to an existing EIR (Pub. Res. Code §21092.1, 21092.2; Guidelines §15088.5), but it has no application to a new CEQA process. While it may have been beneficial to anyone interested in the Project to know what changes had been made between the First DEIR and the Second DEIR, this helpful information was not required by law.

The City referred to the Second DEIR as a "revised DEIR" (*see* AR 18076), and this may have caused confusion for Arcadia First and others. Nonetheless, substance trumps a failure of form. The NOP summarized the Project changes (AR 22973-80), and made clear that new comments must be made to the Second DEIR (though previous comments would be included in the record and may be addressed). AR 22976. Under these circumstances, where there is no claim of intention to confuse or mislead, the City had no obligation to compare the Second DEIR to the First DEIR.

Nor has Arcadia First shown any prejudice from the procedure used. The City received numerous comments from Westfield, Arcadia First, and others on the Second DEIR. Those commenting obviously understood that they had to comment on the Second DEIR as a new CEQA document and were able to do so. *See* Pub. Res. Code §21005(b).[9]

b. <u>Failure to Disclose the Development Agreement</u>

Arcadia First contends that, despite repeated earlier requests, the Development Agreement was released in March 2007[10] only after the FEIR was released. Arcadia First argues

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[9]Arcadia First also argues that while the City provided notice of the NOP for the Second DEIR, it did not provide individual notice when the Second DEIR was available for review or that the FEIR would not respond to comments made to the First DEIR. AF Br. at 5.

The record shows to the contrary. Public notice of both was given. AR 18071 (published notice of Second DEIR availability) , 22976 (notice that FEIR will not necessarily respond to comments on First DEIR). The City also sent the Second DEIR to a long list of persons who asked for it or who commented on the First DEIR. AR 22586-22643.

[10]The Development Agreement apparently was released to the public on March 9, 2007, 33 days before the City Council approved it. AR 634-35. It was also attached to a March 19,

that the Development Agreement provides a number of benefits to the Real Parties, including limiting their obligation to contribute to mitigation impacts on the entire 304 acre Racetrack site, and constraining the City's future discretion to review changes within the site for future development. These provisions would tie the City's hands for future development such as residential development and renovation of the "Saddling Barns." (Arcadia First probably means the Stables Reconstruction Project; the Shops Project calls for the demolition and replacement of the Saddling Barn). Yet, the public was not informed of these benefits to Real Parties in time to comment, and no impacts from the Development Agreement were analyzed in the FEIR.[11] AF Br. at 5-6.

In general, the purpose of a development agreement is to vest project approvals. City of West Hollywood v. Beverly Towers, Inc., (1991) 52 Cal.3d 1184, 1193, n.6; *See* Citizens for Responsible Govt. v. City of Albany, (1997) 56 Cal.App.4th 1199, 1219 (development agreeements restrict ability of agency to mitigate or propose alternatives in the future). CEQA does not require an analysis of each and every activity carried out in conjunction with a project, and no CEQA case holds that an EIR is defective for failure to analyze a development agreement that merely creates vested rights with respect to project approvals. Natvie Sun/Lyon Communities v. City of Escondido, (1993) 15 Cal.App.4th 892, 909. It is sufficient if the EIR adequately apprises all interest parties of the true scope of the project for intelligent weighing of environmental consequences. Id.

The issue is whether the Development Agreement adds anything to the true scope of the Shops Project such that it should have been available earlier for public comment. The Development Agreement performs the vesting function that a development agreement generally is intended to perform by setting for the parties' respective rights and duties with respect to the Shops Project. Specifically, the Development Agreement requires Real Parties to work towards development of the Project, complying with all existing approvals and conditions imposed by the City and future approvals that may be imposed under defined circumstances. In exchange, the City agrees that Real Parties have the vested right to do so subject to the existing approvals and conditions and such limited future approvals. AR 7607.

This vesting provides Real Parties with certainty that the City will not impose any future condition on the Shops Project that adversely affect it. It does not change the nature or scope of the Project, but rather ensures that the Real Parties will be able to build it under the conditions already imposed, as well as specifically defined future conditions. The City's finding that the Development Agreement does not have any separate environmental impacts of its own (AR 1091) is well supported for this vesting.

Arcadia First's contention that the Development Agreement would tie the City's hands

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[11]Arcadia First also contends that the Development Agreement was the result of closed session meetings of the City Council in violation of the Brown Act (Govt. Code §54960.1(a)) (AF Br. at 6-7), but failed to plead a Brown Act claim. Nothing in CEQA requires every agency meeting discussing an environmental issue to be open to the public. Therefore, any claim concerning closed meetings has been waived.

for the Stables Reconstruction Project and residential development misunderstands the Development Agreement provision limiting future development approvals. That provision limits the City's ability to disapprove any necessary additional approvals *for the Project.* It says nothing about future approvals for renovating the stables, which are not part of the Project, or about residential development in the northern parking lot, which is not part of the Project site (though it is part of the Specific Plan). AR 7609.

Arcadia First also argues that the Development Agreement would limit Real Parties' obligation to contribute to mitigation impacts on the entire 304 acre Racetrack site. AF Br. at 6. The Development Agreement provides that the City shall not impose "development exactions" (defined as a requirement for the dedication of land, construction of public improvements, or payment of fees) in connection with Real Parties' development of the "entire property" (defined as the Racetrack) except those attached in Exhibit D, and those fees may not be changed for five years. AR 7609, 7603. Real Parties receive a credit on the development exaction fee for the cost of public improvements relating to traffic. AR 7653.

The inference drawn by Arcadia First from this provision of the Development Agreement is that the City may not impose a development exaction to mitigate environmental impacts for a five year period should Real Parties develop a portion of the Racetrack outside the Shops Project site in that time frame.

The City and Real Parties do not explain why the entire Racetrack was included in the development exaction clause, as opposed to merely the Project site. *See* Opp. at 37. The court agrees with Arcadia First that the FEIR does not analyze the impact of this fee freeze on future development at the Racetrack's location. However, that failure is irrelevant for any speculative future development that is not reasonably foreseeable. The scope of the Shops Project is the development of a shopping center, not residential development in the northern parking lot (which is expressly prohibited). *See infra.* The limitation on Real Parties' obligation for development exactions would be relevant to the environmental review of a future residential project occurring within the five year period, but such a project is totally speculative in light of the current prohibition against it.

The Stables Reconstruction Project stands on a different footing. Though not within the scope of the Shops Project, the Stables Reconstruction Project is a reasonably foreseeable future project that should have been included in the FEIR's discussion of cumulative impacts. *See infra.* The Development Agreement's limitation on Real Parties' obligation for development exactions is relevant to that discussion of cumulative impacts. For this reason, Arcadia First is correct that the Development Agreement should have been discussed in the FEIR, and the public should have been entitled to comment on it, as part of the cumulative impacts analysis.[12]

2. <u>Project Description</u>

Westfield contends that the FEIR description for the Shops Project is defective because it (1) misleadingly fails to provide a stable description of the type of retail center contemplated,

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[12]Although the City Attorney argued at the April 17, 2007 City Council meeting that the Development Agreement had been released in time for public comment (AR 635), the opposition by the City and Real Parties does not maintain this argument.