

FILE SCANNED

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

MAY 09 2016

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Robert N. Hocker (SBN 159991)
BROWNING|HOCKER
501 West Broadway, Ste. 540
San Diego, CA 92101
tel: 619.235.6818
email: rhocker@browninghocker.com

Attorney for Real Parties in Interest
Marina Point Development Associates
& Irving Okovita

BY *Christina [Signature]*
DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

FRIENDS OF BIG BEAR VALLEY and
CENTER FOR BIOLOGICAL
DIVERSITY

Petitioner/Plaintiff,

v.

COUNTY OF SAN BERNARDINO, and
DOES 1-10,

Respondent/Defendant

MARINA POINT DEVELOPMENT
ASSOCIATES and IRVING OKOVITA,

Real Parties in Interest

CASE NO.: CIVDS-1512175 (consolidated
with Case No. CASE NO.: CIVDS151266)

REAL PARTIES IN INTEREST BRIEF IN
OPPOSITION TO PETITION FOR WRIT OF
MANDATE

Hearing Date: May 27, 2016
Hearing Time: 10:00 am
Department: S33

Honorable GILBERT G. OCHOA

BY FAX

FAXED



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF FACTS 3

 A. The Property and 1983 Project and EIR 3

 B. The 1991 EIR 3

 C. Subsequent Environmental Review Before the Minor Revision..... 4

 D. Minor Revision to Site Plan & Addendum to EIR..... 5

 E. Prior Litigation Regarding the Marina Point Project..... 7

 1. The 2004 State Litigation..... 7

 2. 2004 Federal Litigation..... 7

 3. The 2014 State Litigation..... 7

ARGUMENT 8

 A. Applicable Standard of Review..... 8

 1. The presumption against further review when an EIR exists. 8

 2. The substantial evidence test applies to the agency’s determination not to conduct further environmental review..... 9

 3. The substantial evidence test also applies to the agency’s determination to prepare an Addendum to the EIR..... 10

 B. PETIONERS ARGUMENTS LACK MERIT 10

 1. Petitioners claims premised upon the alleged non-existent 1991 EIR lack merit..... 10

 2. The Addendum is not misleading. 13

 3. Petitioners’ argument that there is a new Project is false..... 16

 4. Petitioners’ claim that further environmental review is required under Public Resources Code § 21166 is without merit..... 17

 5. Petitioners’ argument that the underlying development has expired is without merit..... 21

CONCLUSION 24

Cases

Citizens Against Airport Pollution v. City of San Jose, (2014) 227 Cal. App. 4th 788.....9, 10, 14, 20

Federation of Hillside & Canyon Assns. v. City of Los Angeles (2004) 126 Cal.App.4th 1180 9

Friends of Riverside’s Hills v. City of Riverside (2008) 168 Cal.App.4th 743.....23

Fund for Environmental Defense v. County of Orange (1988) 204 Cal.App.3d 1538..... 8

Latinos Unidos de Napa v. City of Napa, (2013) 221 Cal. App. 4th 192 10

Laurel Heights Improvement Assn. v. Regents of University of California (1988)

1	47 Cal.3d 376	10, 14, 20
2	<i>Mani Brothers Real Estate Group v. City of Los Angeles</i> (2007) 153 Cal.App.4th 1385	9
3	<i>Moss v. County of Humboldt</i> (2008) 162 Cal.App.4th 1041	8
4	<i>River Valley Preservation project v. Metropolitan Transit Dev. Board</i> (1995) 37 Cal.App.4th 154	9
5	<i>Snarled Traffic Obstructs Progress v. City & County of San Francisco</i> , (1999) 74 Cal.App.4th 793	14, 20
6	<i>Torrey Hills Comm. Coalition v. City of San Diego</i> (2010) 186 Cal.App.4th 429,	23
7	Statutes	
8	Code § 66499.47	21, 22
9	Pub. Resources Code §21166	8, 12, 17, 20
10	Pub. Resources Code §21167	12
	Other Authorities	
11	CDC § 85.12.030	16
12	CDC § 87.01.060	22
13	CDC §81.02.020	24
14	CDC §86.06.060	23
15	CDC §86.08.070	23
	Regulations	
16	CEQA Guidelines 15153	11
17	CEQA Guidelines, § 15384	9
18	CEQA Guidelines, §15112	12
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION

This petition pertains to the County of San Bernardino's approval of a Minor Revision to An Approved Action ("Minor Revision") to Marina Point planned development project on Big Bear Lake. The original project ("Project") previously underwent environmental review and has an EIR that was certified in 1991. Since 1991, the Project has continued to undergo environmental review from other governmental agencies as development progressed. The Project has also survived over a decade of litigation seeking to derail it. Contrary to Petitioners' suggestions, Real Parties in Interest have prevailed in every lawsuit challenging the Project. That *litigation has merely succeeded in delaying the Project. The instant petition only serves to* continue that trend.

Here, Petitioners claim that a 2014 Project revision, ("Amended Plan") which decreased the number of residential units from 133 to 120, violates CEQA. As referenced above, this Project already has an EIR. There is a crucial difference between evaluating a Project at the outset and evaluating proposed changes to an approved Project. After an initial EIR is certified, there is a statutory presumption against additional environmental review. The County of San Bernardino's *approval of the revised Project is reviewed under the substantial evidence test and this Court* resolves reasonable doubts in the evidence in favor of the agency's actions. If substantial evidence supports the County's determination, it must be upheld.

All of Petitioners' claims lack merit.

First, Petitioners attack the Amended Plan by falsely claiming the 1991 EIR does not exist. The record however clearly shows the 1991 environmental review and resulting 1991 EIR that was certified by the County in 1991. Even if this were not the case, Petitioners' claims are barred by the *statute of limitations and by Petitioners' failure to exhaust their administrative* remedies as they have never raised this argument with the County. Since many of Petitioners' arguments are premised upon the false assertion that there was no 1991 EIR, the vast majority of their arguments simply evaporate.

Second, Petitioners' claim that further environmental review of the Amended Plan is

1 required under Public Resources Code § 21166 is also erroneous:

2 (a) Petitioners incorrectly assert that the Amended Plan substantially increased in
3 size. The record clearly establishes otherwise. The Amended Plan, the testimony from the Project
4 engineer and the testimony from the County's Planning Director all establish the Amended Plan
5 decreased in size. Petitioners' evidence to the contrary is merely a guestimate from Petitioner
6 Friends of Big Bear Valley's (FBBV) executive director. Even if Petitioners' size calculations of
7 the Amended Plan had any substance there still would not be a basis to grant the petition since
8 there is substantial evidence in the record to support the County's finding that the Project changes
9 were minor and insignificant.

10 (b) Petitioners incorrectly claim that the Amended Plan has resulted in more
11 significant environmental impacts (i.e., impacts on the Bald Eagle, drought, etc.). These
12 arguments are also based upon the false premise that the Amended Plan is larger. Also, this Court
13 previously ruled in conjunction with Petitioners' motion for a preliminary injunction that the
14 Petitioners' proffered evidence is insufficient to require further environmental review. Further,
15 there is clear evidence in the record to establish that the Amended Plan has no additional impacts
16 on the Bald Eagle, water supply or other environmental issues.

17 (c) Petitioners also incorrectly claim that the County failed to consider the
18 Amended Plan's impact on greenhouse gas emissions. Again this argument is equally based on
19 false premises – that there was no 1991 EIR and the Amended Plan has significantly increased the
20 *Project in size and environmental impact. This claim also lacks merit because courts have held*
21 *that greenhouse gas emissions were known by the late 1970s and, as such, cannot form the basis*
22 *for further review of a Project certified in 1991.*

23 Finally, Petitioners' argue that the Project has expired. This argument is not new. Indeed,
24 this Court has previously ruled twice that this claim is time barred, most recently in December of
25 last year. Petitioners are also incorrect on the merits of this claim as the development has not
26 expired.

27

28

1 **STATEMENT OF FACTS**

2 ***A. The Property and 1983 Project and EIR***

3 The Marina Point property is located in the town of Fawnskin on the north shore of Big
4 Bear Lake. (AR 14:3829) The property consists of 12.51 acres, a 3.5 acre commercial marina and
5 zone of influence into the lake that is covered by a perpetual commercial boat landing permit with
6 Big Bear Municipal Water District, the owner of the lake. (AR 13:3807)

7 On May 2, 1983, the County the Board of Supervisors approved a zoning change for the
8 property to multi-family residential and approved a Large Scale Housing Plan for a 132-unit
9 resort and approved an Environmental Impact Report ("EIR") associated with the project. (AR
10 7:1895-1930)

11 Time passed and Real Party in Interest, Marina Point Development Associates ("MPDA"),
12 a new owner, had to reapply for Project approval after a water moratorium halted development
13 and caused the Project to expire. (AR 15:4277, 18:4880, lines 9-11.) MPDA applied to have the
14 Project re-approved in 1990, which resulted in additional review by the US Army Corps of
15 Engineers (ACOE), the U.S. Fish & Wildlife Service (USFWS) and the California Dept. of Fish
16 & Game. (AR 3:688.)

17 ***B. The 1991 EIR***

18 MDPA's application to reapprove the Project lead to further environmental review. In
19 1991, the County as "Lead Agency" in the CEQA process prepared a Revised Initial
20 Environmental Study ("Initial Study") on the final Project. (AR 3:688-706) In August 1991, the
21 County filed a Notice of Preparation of Draft EIR and then a Notice of Completion. (AR 1:6-7).

22 On December 9 1991, the County Board of Supervisors approved the Preliminary and
23 Final Development Plan ("FDP") for the Project, approved the tract map, adopted staff's findings,
24 adopted the Statement of Overriding Considerations and certified the use of a single EIR for the
25 Project. (AR 7:1833). On December 10, 1991, the County certified the Notice of Determination
26 ("NOD"). (AR 1:3)

1 The 1991 EIR was prepared in conjunction with an Initial Study that incorporated by
2 reference relevant sections and information from the prior 1983 Project EIR as well as the 1988
3 Bear Valley Community Plan EIR. (AR 3:688) The County's use of the 1983 EIR included
4 updated analyses, including the following: 1991 Initial Environmental Study (AR 3: 688-706);
5 Staff Report Findings (AR 3:737-745); Environmental Issues Analysis (AR 1:183-224); Water
6 Feasibility Study (AR 1:226-234); Sewer Feasibility Study (AR 1:236-242) Hydrology Study
7 (AR 1:244-259); Traffic Study (AR 1:261-327); *Geotechnical Engineering Report* (AR 1:329-
8 373); Statement of Overriding Considerations (AR 3:635-652); Conditions of Approval (AR
9 1:34-54); and Mitigation Monitoring Requirements (AR 3:653-686).

10 In December 2000, the County approved the Project's final improvement plans, Final
11 Subdivision Tract Map 12217 ("Tract Map") (AR V7 P1936-1938) and a related Composite
12 Development Plan ("CDP") (AR V10 P289-2895) that provides precise details of the
13 development and requirements prior to building permit issuance. On December 21, 2000 the
14 County recorded a single Tract Map that subdivided the Property into 8 legal parcels, each
15 representing a phase of the CDP and FDP after Real Parties entered security agreements and
16 posted bonds that secured installation of all public improvements on all phases of Project. (AR
17 6:1733-1784, 7: P1758-1804)

18 **C. *Subsequent Environmental Review Before the Minor Revision***

19 The Project was then halted for many years due to litigation filed in 2004. (See below.)
20 After MDPA prevailed in that litigation, which was not until 2009, Project construction resumed
21 in 2010. (see AR 18:4881.) This led to further environmental assessments of the Project by
22 various agencies, including the ACOE and USFWS. *Id.* Agency oversight resulted in more
23 environmental studies including a series of biological assessments by conducted by Merkel &
24 Associates in 2004, 2006 and 2007. (AR 17:4639-4783, 16:4338-4548, 14:3823-4043).¹ These
25 biological assessments cover many topics, including plant and animal life, and also include
26 analysis of the Bald Eagle population in the area the Project's impact on Bald Eagles. (cf. AR
27

28 ¹ The Project was also subject 900 hours of on-site biological monitoring. (*Id.* see also 18:4848)

1 3838, 3841, 3835-3861, 3882-3897.) Merkel & Associates concluded that Bald Eagles were not
2 adversely affected by the Project construction. (AR 14:3897)

3 **D. Minor Revision to Site Plan & Addendum to EIR**

4 In March 2014, MPDA applied for a minor revision to the underlying development plan
5 ("Minor Revision") that proposed a density reduction of the Project's residential component from
6 133 to 120 units. (AR 3:751, 755, 18:4832) By this time, the site was graded, old structures had
7 been demolished, a block wall built and extensive shore-zone improvements had been completed.
8 (AR 5:1367; see also 18:4848, 4858)

9 The County Land Use Services Department prepared an Addendum to the 1991 EIR for
10 the Minor Revision. (AR 1:7, 3:786-804) This Addendum describes the changes to the EIR
11 necessary to achieve CEQA compliance for the proposed revisions to the Project, which was a
12 reduced version of the Project described in the EIR. (AR 3:788-804). The Addendum provides
13 15 pages of analysis of environmental issues and concludes that the proposed changes to the
14 Project are minor and that there will be no new significant environmental impacts not previously
15 disclosed in the EIR. (AR 3:788-789.) The Addendum references 32 documents, including
16 permits and environmental documents prepared between 2004 -2007. (AR 3:802-804)

17 On December 30 2014, the Minor Revision to an Approved Action was administratively
18 approved by the County's Land Use Department. (AR 1:8.) Petitioners appealed the
19 administrative decision based upon the Amended Plan's substantial increase in size and the
20 alleged 2005 expiration of Project approvals. Petitioners never raised the claim that the 1991 EIR
21 was non-existent. (AR 3:805-809; see also 18:4871-4895, 4831-4870.) This resulted in hearings
22 before the Planning Commission (AR 18:4871-4895) and the County Board of Supervisors (AR
23 18:4831- 4870) in 2015. At the hearings, testimony was given about the size and environmental
24 impact of the Amended Plan. *Id.* The changes to revised Project were set out in a site plan
25 entitled "PLANNED DEVELOPMENT SITE PLAN, MINOR REVISION TO AN APPROVED
26 ACTION 10-10-14", hereinafter referred to as the "Amended Plan. (AR 3:751.) The Amended
27 Plan was prepared by a license professional engineer, Kenneth Discenza. (AR 3:751, AR 4879.)
28

