Filed 1/28/20 Golden State Environmental Justice Alliance v. City of L.A. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

GOLDEN STATE ENVIRONMENTAL JUSTICE ALLIANCE, Plaintiff and Appellant, v. CITY OF LOS ANGELES, et al. Defendants and Respondents; DOUGLAS EMMETT MANAGEMENT, LLC, Real Party in Interest and Respondent.	B294231 (Los Angeles County Super. Ct. No. BS168429)

APPEAL from an order of the Superior Court of Los Angeles County, John A. Torribio, Judge. Affirmed.

Blum Collins, Craig M. Collins and Hannah Bentley for Plaintiff and Appellant.

Michael N. Feuer, Terry Kaufmann Macias, John W. Fox, and Leonard P. Aslanian; Burke, Williams & Sorensen, Anna C. Shimko, Gail E. Kavanagh, and Stephen E. Velyvis for Defendants and Respondents.

Armbruster Goldsmith & Delvac and Damon P. Mamalakis for Real Party in Interest and Respondent.

In 2015, real party in interest Douglas Emmett Management LLC (Douglas Emmett) filed an application with the City of Los Angeles (City) to build a 34-story residential building on Wilshire Boulevard in West Los Angeles. The City prepared an environmental impact report (EIR) in connection with the project, which it certified in January 2017.

Appellant Golden State Environmental Justice Alliance (Golden State) filed a petition for writ of mandate challenging the City's certification of the EIR. The superior court denied the petition in significant part, and Golden State appealed. On appeal, it urges the EIR does not comply with the California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.) because it does not demonstrate compliance with the 2030 and 2050 greenhouse gas emissions reduction targets set out in Executive Orders issued by Governors Schwarzenegger and Brown.

We affirm. As we discuss, Golden State failed to exhaust its administrative remedies because it did not assert in the administrative proceedings the specific claims it now makes on appeal. Accordingly, we are precluded from considering Golden State's contentions on the merits.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Landmark Apartment Project and the Draft EIR

In 2015, Douglas Emmett proposed the construction of a 34-story residential building, to contain up to 376 dwelling units, on a 2.8-acre site on Wilshire Boulevard in West Los Angeles (the Project). The Project site was then occupied by a 42,900-square foot, single-story supermarket building, which the developer proposed to demolish, and a 17-story office building, which would remain.

The City released a draft EIR for public comment in April 2016. As relevant here, the draft EIR concluded that the greenhouse gas emissions associated with the Project would have a "less than significant" impact on climate change.

B. Golden State's Comments to Draft EIR

Golden State submitted comments to the draft EIR on June 13, 2016. With regard to greenhouse gas emissions, Golden State urged the EIR was inadequate or contained erroneous information because it (1) compared the Project's greenhouse gas emissions to the prior supermarket use; (2) amortized construction emissions over the life of the Project; (3) failed to adequately explain the basis for its conclusion that the Project would result in a 16.5 percent reduction in emissions from "mobile sources;" (4) double-counted some energy savings; and (5) concluded the Project would have less-than-significant greenhouse gas impacts because the Project complied with regulatory programs meant to reduce greenhouse gas emissions.

C. Final EIR

The City issued a final EIR in September 2016.[1] In October 2016, the Deputy Advisory Agency, an arm of the City's Planning Department, certified the EIR.

D. Golden State's Appeal of Certification of EIR

Golden State appealed the approval of the Project and certification of the EIR to the City Planning Commission. With regard to greenhouse gas emissions, Golden State urged that the City had erred by (1) miscalculating a reduction based on mobile sources; (2) calculating reductions based on the elimination of hearths and compliance with the "CalGREEN Code"; (3) "assum[ing] that a local land use Project should be compared to AB 32 standards to determine a proper percentage reduction"; and (4) failing to commit to using Energy Star appliances.

E. Project Approval and Certification of EIR

On November 17, 2016, the City Planning Commission certified the EIR, denied Golden State's appeal, and granted other approvals for the Project.

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[1] The EIR responded to Golden State's comments by noting that a comparison to the prior supermarket use was proper; it was reasonable to amortize construction emissions over the life of the project; the projected 16.5 percent emissions reduction was based on the Project's proximity to public transit and the percentage of units set aside for very low-income residents; there was no double-counting; and the City, as lead agency, was permitted by statute to select a significance threshold, and it had done so based on recent direction from the California Supreme Court in *Center for Biological Diversity v. Department of Fish and Wildlife* (2015) 62 Cal.4th 204 (*Center for Biological Diversity*), by assessing compliance with greenhouse gas emission reduction standards, including the standards set forth in Executive Orders S-3-05 and B-30-15.

On January 31, 2017, the City Council's Planning and Land Use Management (PLUM) Committee recommended that the City Council certify the EIR and uphold the Planning Commission's approvals. On February 14, 2017, the City Council certified the EIR and approved the project.

F. Mandate Proceeding

Golden State filed a petition for writ of mandate in March 2017. Among other things, the petition asserted that the EIR did not comply with CEQA because the City inadequately assessed greenhouse gas emissions impacts.

On June 28, 2018, the superior court issued an order denying the mandate petition with regard to greenhouse gas emissions.[2] Subsequently, on October 2, 2018, the court entered a peremptory writ of mandate. Golden State appealed.[3]

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[2] The superior court granted the writ petition with regard to a single issue, the EIR's description of energy impacts. As to that issue only, the court ordered the City to decertify the EIR and prepare, circulate for public view, and recertify the energy impact analysis of the EIR. The City did so, and the court discharged its writ of mandate on March 22, 2019. The energy impacts issue is not before us in this appeal.

[3] Golden State filed notices of appeal from both the June 28 order and the October 2 writ of mandate. By order of November 16, 2018, we dismissed the appeal from the June 28 order, concluding that because the trial court continued to exercise jurisdiction, the June 28 order was not final.

In *Dhillon v. John Muir Health* (2017) 2 Cal.5th 1109, 1117, our Supreme Court held that a trial court's order in an administrative mandamus proceeding should be treated as a final judgment if it terminates the litigation between the parties, leaving "no issue. . . for the court's ' "future consideration except

DISCUSSION

Procedurally, Golden State contends it exhausted its administrative remedies as a predicate to pursuing this appeal. On the merits, it contends: (1) the City erred by directly applying the state's 2030 and 2050 greenhouse gas emissions goals set forth in Executive Orders S-3-05 and B-30-15 to the Project; (2) substantial evidence did not support the City's conclusion that the Project would achieve a 40 percent reduction in greenhouse gas emissions by 2030, or an 80 percent reduction by 2050, as required by Executive Orders S-3-05 and B-30-15; and (3) the draft EIR was inadequate as an informational document with regard to compliance with 2030 and 2050 emission reduction goals.

The City and Douglas Emmett urge that Golden State did not exhaust its administrative remedies. They further urge that each of Golden State's contentions fails on the merits.

As we discuss, we conclude that Golden State failed to exhaust its administrative remedies because it did not raise 2030 or 2050 emissions goals in the administrative proceedings. We therefore affirm.

I.
Executive Orders S-3-05 and B-30-15

Golden State makes three separate arguments on appeal, but all concern the Project's compliance with Executive Orders S-

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the fact of compliance or noncompliance with the terms of the first decree." ' " In this case, the matter before the trial court has been fully resolved and, subsequent to the filing of the notice of appeal, the writ was discharged. Thus, although not captioned as such, the June 28 order *as modified by the October 2 writ of mandate* is functionally a final judgment from which appeal may be taken.

3-05 and B-30-15, which established state greenhouse gas emissions reduction targets.

Executive Order S-3-05, signed by Governor Schwarzenegger in 2005, established greenhouse gas emissions reduction targets for 2010, 2020, and 2050—namely:

- by 2010, reduction of greenhouse gas emissions to 2000 levels;
- by 2020, reduction of greenhouse gas emissions to 1990 levels; and
- by 2050, reduction of greenhouse gas emissions to 80 percent below 1990 levels.

Executive Order B-30-15, signed by Governor Brown in 2015, adopted a 2030 greenhouse gas emission reduction target of 40 percent below 1990 levels.

In 2006, the Legislature adopted the 2020 emissions target of Executive Order S-3-05 in Assembly Bill No. 32 (2005-2006 Reg. Sess.) (AB 32), codified as Health & Safety Code section 38550. Subsequently, in 2010, the state Natural Resources Agency adopted a new CEQA guideline on determining the significance of impacts from greenhouse gas emissions, which provides that a lead agency should attempt, as part of a CEQA analysis for a proposed project, to "describe, calculate or estimate" the amount of greenhouse gases the project will emit. (Cal. Code Regs., tit. 14, § 15064.4; see *Center for Biological Diversity, supra,* 62 Cal.4th at p. 217.)[4]

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[4] Senate Bill No. 32 codified Executive Order B-30-15. (See Health & Saf. Code, § 38566.) That statute, however, did not go into effect until January 1, 2017—after the City Planning Commission certified the EIR.

II.
Golden State Failed to Exhaust Administrative Remedies

The City and Douglas Emmett contend Golden State failed to exhaust its administrative remedies because Golden State did not assert in the administrative proceedings below the theories of CEQA noncompliance it raises on appeal—namely, that the EIR failed to adequately assess compliance with the 2030 and 2050 emission goals set out in Executive Orders S-3-05 and B-30-15. For the reasons that follow, we agree.[5]

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[5] At oral argument, Golden State urged the City had forfeited the exhaustion issue by failing to raise it in the trial court. Not so.

In the trial court, Golden State contended that the EIR erred by comparing the Project's greenhouse gas emissions to the statewide goals "with no substantial evidence supporting the conclusion that the statewide goal[s] [were] the appropriate measure;" premising greenhouse gas emissions reductions on eliminating hearths; and failing to establish compliance with "regulatory programs." With regard to the final contention, Golden State urged that Executive Orders S-3-05 and B-30-15 "are not 'regulatory programs,' " and thus the City could not rely on those Executive Orders to demonstrate compliance with greenhouse gas emissions requirements." In a footnote, Golden State suggested that "[i]n addition to the problem that the Executive Orders S-3-05 and B-30-15 and SB 32 are not 'regulatory programs,' the EIR did not contain substantial evidence supporting a conclusion that the Project would comply with them."

The petitioner bears the burden of demonstrating that the issues raised in the judicial proceeding were first raised at the administrative level (*Monterey Coastkeeper v. State Water Resources Control Bd.* (2018) 28 Cal.App.5th 342, 359 (*Monterey*

A. The Exhaustion Doctrine

" ' "Exhaustion of administrative remedies is a jurisdictional prerequisite to maintenance of a CEQA action." [Citation.] [Public Resources Code] section 21177 sets forth the exhaustion requirement . . . here. That requirement is satisfied if "the alleged grounds for noncompliance with [CEQA] were presented . . . during the public comment period provided by [CEQA] or prior to the close of the public hearing on the project before the issuance of the notice of determination." ' (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 791-792, fn. & italics omitted.)" (*City of Long Beach v. City of Los Angeles* (2018) 19 Cal.App.5th 465, 474 (*City of Long Beach*).)

" ' "The rationale for exhaustion is that the agency ' "is entitled to learn the contentions of interested parties before litigation is instituted. If [petitioners] have previously sought administrative relief . . . the [agency] will have had its opportunity to act and to render litigation unnecessary, if it had chosen to do so." ' " ' " (*City of Long Beach*, *supra*, 19 Cal.App.5th at p. 474.) The exhaustion requirement thus serves " 'to provide an administrative agency with the opportunity to decide matters in its area of expertise prior to judicial review. [Citation.]' [Citation.]" (*Santa Clarita Organization for Planning the*

Coastkeeper); thus, Golden State, not the City, had the burden of demonstrating to the trial court that it had properly exhausted its administrative remedies. In any event, because Golden State discussed the alleged failure to demonstrate compliance with 2030 and 2050 emissions goals only in a footnote, the City was not required to address it. (E.g., *Hall v. Department of Motor Vehicles* (2018) 26 Cal.App.5th 182, 193 [argument is forfeited if raised " 'only in a footnote' "]; *People v. Crosswhite* (2002) 101 Cal.App.4th 494, 502, fn. 5 [same].)

Environment v. City of Santa Clarita (2011) 197 Cal.App.4th 1042, 1051 (*SCOPE*).) It also " ' " 'lighten[s] the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief.' [Citation.]" ' (*Sierra Club v. San Joaquin Local Agency Formation Com*. (1999) 21 Cal.4th 489, 501.)" (*Monterey Coastkeeper*, *supra*, 28 Cal.App.5th at p. 359.)

" 'To advance the exhaustion doctrine's purpose "[t]he '*exact issue*' must have been presented to the administrative agency . . . ." [Citation.] While " 'less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding' ". . . "generalized environmental comments at public hearings," "relatively . . . bland and general references to environmental matters" [citation], or "isolated and unelaborated comment[s]" [citation] will not suffice. The same is true for " '[g]eneral objections to project approval . . . .' [Citations.]" [Citation.] " '[T]he objections must be sufficiently specific so that the agency has the opportunity to evaluate and respond to them.' " ' [Citation.]" (*City of Long Beach*, *supra*, 19 Cal.App.5th at pp. 474-475, italics added; see also *SCOPE*, *supra*, 197 Cal.App.4th at p. 1050; *Monterey Coastkeeper*, *supra*, 28 Cal.App.5th at p. 359 ["the *exact issue*, not merely generalized statements, must be raised," italics added].)

The petitioner bears the burden of demonstrating that the issues raised in the judicial proceeding were first raised at the administrative level. (*Monterey Coastkeeper*, *supra*, 28 Cal.App.5th at p. 359.) This court reviews de novo whether the petitioner has exhausted its administrative remedies. (*Ibid*.; *City of Long Beach*, *supra*, 19 Cal.App.5th at p. 475.)

B. Golden State Did Not Address the Project's Compliance With 2030 and 2050 Emissions Goals in the Administrative Proceedings

Each of Golden State's appellate contentions concerns the Project's compliance with the 2030 and 2050 emissions goals set out in the Executive Orders. Specifically, Golden State urges:

(1) The City used an incorrect methodology because it "scal[ed] down" to the project level the statewide emissions goals set forth in Executive Orders S-3-05 and B-30-15—that is, it "assum[ed] without analysis that reducing [the Project's] emissions by the same percentage as the statewide reduction goal would be sufficient under CEQA";

(2) Substantial evidence did not support the City's conclusion that the Project would achieve a 40 percent reduction in greenhouse gas emissions below 1990 levels by 2030, or an 80 percent reduction below 1990 levels by 2050, as required by Executive Orders S-3-05 and B-30-15; and

(3) Because the EIR used an erroneous methodology and its conclusions were not supported by substantial evidence, the EIR was inadequate as an "informational document" with regard to compliance with the 2030 and 2050 emissions reduction goals set out in Executive Orders S-3-05 and B-30-15.

In contrast to Golden State's appellate arguments, its comments to the draft and final EIR submitted during the administrative proceedings did not address compliance with the 2030 and 2050 emission reduction goals of Executive Orders S-3-05 and B-30-15. Instead, as we have said, Golden State's comments focused on *other* issues, including whether the City had properly compared the Project's greenhouse gas emissions to the prior supermarket use, had properly amortized construction

emissions over the life of the Project, had double-counted some energy savings, had miscalculated a reduction based on mobile sources, had improperly calculated reductions based on the elimination of hearths and compliance with the CalGREEN Code, and should have committed to using Energy Star appliances. (See Factual and Procedural Background, sections (B), (D), *ante*.)

Golden State urges it exhausted its administrative remedies because it "specifically brought up Executive Order B-30-15 in its initial comment letter" and "Executive Order [S-3-05][6] in its comments to the City Planning Commission." In support, it relies on two comments, the first pertaining to the draft EIR, and the second pertaining to the final EIR. The comments, in their entirety, are as follows:

- "You have also amortized your construction emissions. We believe this is contrary to the mandates of A.B. 32 and Executive Order B-30-15, which require reduced emissions in the near term."
- "At DEIR IV.C-45, the City concedes that compliance with Executive Order S-3-05 will require 'rapid market penetration of efficiency and clean energy technologies,' yet it hasn't even committed to Energy Star appliances within the apartments in the building."

These comments were insufficient to exhaust Golden State's administrative remedies with regard to its appellate contentions because although Golden State cited the Executive Orders in its comments, it did not do so with reference to 2030 and 2050 emissions targets. Instead, Golden State referenced

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6 The appellant's opening brief refers to Executive Order "S-3-015," which appears to be a typographical error. The correct citation is Executive Order S-3-05.

only "near term" (presumably 2020) reduction goals. Further, Golden State referenced Executive Order B-30-15 solely with respect to amortization of construction emissions, and Executive Order S-3-05 solely with regard Energy Star appliances.

Golden State urges that its comments "cover[] all the arguments in the present appeal" because the citation to the Executive Orders was sufficient to put the City on notice of Golden State's claim that the emissions standards described would not be met. Moreover, it says, the references to Energy Star appliances and construction emissions were merely "example[s]" of "the mitigations necessary to make . . . a less-than-significant impact." In other words, Golden State contends, it "pointed out that the Project was not complying with Executive Order S-3-05, ***and*** it provided an ***example*** as to why: the Project was not 'even' committing to using Energy Star appliances."

Golden State's contention misapprehends the obligation to exhaust administrative remedies. As we have said, to exhaust administrative remedies, the "exact issue" must have been presented to the administrative agency to allow the agency " ' "to receive and respond to articulated factual issues and legal theories *before* its actions are subjected to judicial review." ' " (*Sustainability, Parks, Recycling & Wildlife Defense Fund v. Department of Resources Recycling & Recovery* (2019) 34 Cal.App.5th 676, 697 (*Sustainability, Parks, etc.*).) Thus, for example, the Court of Appeal in *South of Market Community Action Network v. City and County of San Francisco* (2019) 33 Cal.App.5th 321 (*South of Market*) concluded it could not consider the merits of a challenge to San Francisco's approval of a mixed-use development because the bases for the challenge—specifically, complaints concerning the EIR's analysis of the

project's wind impacts, including that the EIR used the wrong baseline in evaluating wind impacts, the project did not comply with a provision of the San Francisco Planning Code, and the EIR inappropriately relied on " 'wind baffling measures' "—had not been raised below. (*Id.* at p. 346.) The court explained that although commenters had raised concerns about wind impacts during the public comment period, those comments "reflected *general* concerns about the amount of wind generated by the" project, not the specific issues raised on appeal. These general comments, the court concluded, were "insufficient to raise the *specific* issues plaintiffs assert on appeal." (*Id.* at p. 347, italics added.)

The court similarly concluded in *Monterey Coastkeeper*, where several environmental groups (referred to collectively as Coastkeeper) challenged an agency's issuance of a pollution discharge waiver on a variety of grounds, including lack of compliance with an "antidegradation policy." (*Monterey Coastkeeper*, *supra*, 28 Cal.App.5th at pp. 347, 350, 356.) The Court of Appeal declined to review the antidegradation policy issue on the merits because Coastkeeper had not raised it before the responsible regional and state water quality boards. The court explained: "Coastkeeper argues administrative remedies were exhausted because the Regional Board was apprised of the need to satisfy the antidegradation policy. Several comments urged the board to act to prevent further degradation. Coastkeeper notes the Regional Board made findings that the policy had been satisfied. While it is clear the Regional Board was aware of the policy and the need to comply with it, there was no specific objection that it had failed to do so. . . . Thus, administrative remedies were not exhausted as to the objection of

noncompliance with the antidegradation policy." (*Id.* at p. 361; see also *Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 910 [" 'General objections to project approval or general references to environmental issues are not sufficient' "]; *Berkeley Hills Watershed Coalition v. City of Berkeley* (2019) 31 Cal.App.5th 880, 893–894 [rejecting interest group's contention, made for the first time on appeal, that construction of single-family homes might activate a landslide affecting protected coast oak trees: "Plaintiffs failed to raise this issue during the administrative process, and thus have failed to exhaust their administrative remedies"]; *Sustainability, Parks, etc., supra,* 34 Cal.App.5th at pp. 697-698 [" ' "The essence of the exhaustion doctrine is the public agency's opportunity to receive and respond to articulated factual issues and legal theories *before* its actions are subjected to judicial review." ' . . . [T]he same reasoning justifies the requirement that a party fully present *all issues* at every stage of administrative proceedings. It is unfair to criticize the County for something that [appellant] never argued to the hearing panel at the county level, particularly when there are factual matters in dispute."].)

The present case is analogous to *South of Market* and *Monterey Coastkeeper*. Like the petitioners in those cases, Golden State asserted in the administrative proceedings that the EIR failed to comply with Executive Orders S-3-05 and B-30-15 in some limited respects, but it did not raise the *specific* issues it asserts in this appeal—namely, failure to demonstrate compliance with the 2030 and 2050 greenhouse gas emissions targets described in the Executive Orders. We therefore conclude that the doctrine of exhaustion of administrative remedies bars

Golden State from challenging on appeal the EIR's compliance with Executive Orders S-3-05 and B-30-15.

Golden State suggests that the present case is distinguishable from *South of Market* and *Monterey Coastkeeper* because it, unlike the petitioners in those cases, "directly raised compliance with both Executive Orders" in the administrative proceedings. Not so. As we have said, *South of Market* and *Monterey Coastkeeper* require petitioners to demonstrate that they exhausted administrative remedies by addressing with the administrative agencies *the very same issues* they raised on appeal. Here, for the reasons we have discussed, Golden State failed to do so.

Golden State also urges, citing *SCOPE, supra,* 197 Cal.App.4th 1042, that some appellate decisions have applied a more lenient exhaustion standard, finding administrative remedies exhausted "if the issue was raised in some form." It is not clear to us that *SCOPE* applied a different exhaustion standard than did the courts in *South of Market* and *Monterey Coastkeeper*: The *SCOPE* court noted that the petitioner had attached to its comment a "list of mitigation measures developed by the Attorney General," and it concluded the petitioner exhausted administrative remedies because this reference to mitigation measures " 'fairly apprised' " the city of the petitioner's concerns. (*Id.* at p. 1052.) To the extent *SCOPE* applied a more lenient exhaustion standard, however, we decline to follow it.

For all the foregoing reasons, we conclude Golden State failed to exhaust its administrative remedies. We therefore affirm the order of the superior court.

DISPOSITION

The June 28, 2018 order, as modified by the October 2, 2018 writ of mandate, is affirmed. Respondents are awarded their appellate costs.

Respondents' request for judicial notice, filed August 22, 2019, is granted as to Exhibit I, and is otherwise denied. Respondents' motion to strike, also filed August 22, 2019, is denied. Appellant's request for judicial notice, filed September 25, 2019, is granted as to exhibits A–D and F, and is denied as to exhibit E.

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EDMON, P. J.

We concur:

LAVIN, J.

EGERTON, J.