IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

EL SOBRANTE VALLEY LEGAL DEFENSE FUND,

Petitioners and Plaintiffs,

vs.

Dept. 3 - No. C90-04032

CITY OF RICHMOND; CITY COUNCIL OF RICHMOND; et al.,

NOTICE OF DECISION

Respondents and Defendants.

THE ANDEN GROUP, a California limited partnership DENNIS O'BRIEN; et al.,

Real Parties in Interest.

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This petition raises a number of issues relating to the City of Richmond's approval of a tentative subdivision map for a single family residential development known as the "San Pablo Pointe" project. This project would permit the construction of 332 single family detached dwellings on approximately 134 acres. Approximately 101 acres would be developed and 33 acres would remain open space.

The site is currently undeveloped and is moderately to steeply sloping with average slopes of 17% to 30%. Approximately 60% to 70% of the site consists of landslides and unstable areas. Approximately one million cubic yards of earth will be moved in order to complete the project. AR I: 51; 33-34) It is immediately adjacent to Wildcat Canyon Regional Park. Also adjacent to the site is the Live Oak Living Center, a 97 bed licensed skilled nursing facility.

In October, 1987, a Draft Environmental Impact (DEIR) report was prepared and in June, 1989, a Draft Supplement EIR (DSEIR) was completed. The City Planning Commission approved the Final EIR and approved the project on July 5, 1990, by adopting Resolution 90-21 (ARA: 1230-1254) This action was appealed to the City Council which denied the appeal on August 13, 1990, in Resolution 172-90. (ARA 1294)

Petitioners attack approval of the project on two main grounds. It is contended that the procedures set forth under the California Environmental Quality Act (CEQA) were not followed and that internal inconsistencies in the City's general plan make approval of the project invalid. For the reasons set forth below the writ is granted.

The purpose of an EIR is set forth in Laurel Heights Improvement Assn. v. Regents of University of California (1988) 47 Cal.3d 376:

> "An EIR is an 'environmental 'alarm bell' whose purpose is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return."... The EIR is also intended "to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action...Because the EIR must be certified or rejected by public officials, it is a document

> of accountability. If CEQA is scrupulously followed, the public will know the basis upon which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees..." Laurel Heights Improvement Assn v. Regents of University of California, supra at page 392.

The standard for judicial review of an EIR is well settled. The City's approval of the EIR must be supported by substantial evidence in the administrative record and all reasonable doubts must be resolved in favor of the City's decision and findings. A court may not set aside a decision merely because reasonable minds may differ. Laurel Heights Improvement Assn v. Regents of University of California, supra. Applying this standard of review to the record before this Court, the Court finds that the EIR is inadequate in two respects.

Section 15125 of the California Code of Regulations provides in part that "An EIR must include a description of the environment in the vicinity of the project...". The Live Oak Center is situated immediately adjacent to the project site. It is a skilled nursing facility that is licensed for 97 residents. At the time the City Council approved the project approximately 75% to 80% of the residents had Chronic Obstructive Pulmonary Disease and heart disease. (AR III: 1321,1323) The EIR, however, does not discuss the fact that such a facility is in the vicinity of the project site nor does it discuss the impacts if any that the project will have on this center. As Respondents concede "the EIR did not initially single out the Live Oak Living Center for special discussion".

It is implicit from the cursory mention of Live Oak that the City recognized that there will be some impacts which will need to be mitigated but no one can tell what the special measures will be or what led to Finding 46 other than the general mention of factors which are inherent in a project of this size. Without some description and discussion of the Center in the environmental documents neither the public nor the Court can determine what route led the City to make Finding 46 of the Findings in regard to mitigation made by the Council on August 13, 1990.[1]

In addition to failing to discuss and adequately analyze the effects on the Live Oak Center, the EIR also does not adequately discuss reasonable alternatives to the project. One of the purposes of an EIR is serve as an informational document to protect the environment. Laurel Heights Improvement Assn. v. Regents of University of California, supra. Part of this process is to identify significant effects and determine if those effects can be avoided or at least mitigated.

Recently in Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal.3d 553, our Supreme Court noted:

> "Each case must be evaluated on its facts, which in turn must be reviewed in light of the statutory purpose. Informed by that purpose, we here reaffirm the principle

[1] Respondents have attached as Exhibit A to their Points and Authorities in Opposition to the Writ findings made by the City Council and note that they are found at Tab 140 in the Addendum to the Administrative record. The Court has not found these Findings at Tab 140, but the existence of the Findings do not appear to be in dispute.

that an EIR for any project subject to CEQA review must consider a reasonable range of alternatives to the project, or to the location of the project, which : (1) offer substantial environmental advantages over the project proposal....; and (2) may be 'feasibly accomplished in a successful manner considering the economic, environmental, social and technological factors involved.' Citizens of Goleta Valley v. Board of Supervisors, supra at page 566.

In this case the EIR did discuss three basic alternatives: Large Lot Residential, Mixed Lot and No Project. Respondents note that "What is a reasonable alternative for consideration in the EIR must be viewed in the context of the existing development situation and the policies of the City of Richmond, not in some vacuum." (Respondents Brief 24;24-25;25:1-2) In addition the reasonable range of alternatives which must be discussed must also be considered in the context of the purposes of an EIR. A discussion of reasonable alternatives is required in order for the public and decision makers to consider and determine if there are alternatives which will have less of an impact on the environment.

There are a number of City policies which indicate that a reasonable range of alternatives were not discussed. The staff report notes that the project is contrary to a portion of the City's Hill area Development policy. (AR III:1225). The Court does note that at the hearing Respondents stated that Resolution 8620 was never adopted by the City, but nevertheless the decision making bodies for the City were presented with this information in the staff report prepared for the tentative map. There is nothing in the record to establish that either the public or the decision makers were advised or were aware of this apparent error. The General Plan recommends that slopes in excess of 30% in steepness not be developed and that cuts and fills and removal of vegetation should be minimized. (G.P. I:300; 331.) The DEIR notes that "The site is in the High Risk Landslide Area and in the Critical Landslide Hazard Special Management Area indicated in the Seismic Safety Element of the Richmond General Plan." (AR I:67) It further notes that the City's policies in its Seismic Safety Element related to this area is to encourage continued agricultural use, public acquisition or very low single family residential density. (AR I:68)

As can be seen from the above the City's own policies appear to discourage the type of development which was approved. Respondents are correct in that most of these policy provisions do not appear to be mandatory, but when a development conflicts with these policies it is reasonable to require the EIR to consider reasonable alternatives which would be more consistent with the goals and policies of the City. The EIR failed do this.

The discussion of alternatives in the EIR, ignores the possibility of public acquisition or a clustered type of development as suggested by the comments to the project. Only three alternatives were discussed and one is basically the approved project. (ARA:1239) The City did discuss the possibility of a lower density development on the site in its findings made pursuant to the CEQA Guidelines (ARA:1304) The findings, however, dismiss the Large lot alternative and the El Sobrante General Plan Alternative with conclusory language. There is no discussion setting forth data as to how these conclusions were reached. As reiterated in Laurel Heights Improvement Assn. v. Regents of University of California, supra, the EIR must contain facts and analysis, not just the agency's bare conclusions or opinions. This requirement is even more

meaningful when the proposed development at least facially appears to be contrary to the City's own development policies for this site. The City's findings do not permit the public or the Court to determine how these conclusions rejecting the Large Lot and El Sobrante General Plan alternatives were reached.

Petitioners also allege that approval of the Tentative Map is invalid because the City's general plan is defective in ways which relate to the approval of the Tentative Map. It is clear that the Transportation element of the General Plan is involved in the approval of the Tentative Map for the project. In Kings County Farm Bureau v. City of Hanford (1990) 221 Cal.App.3d 692, the Court stated:

> "The lack of a mandatory element invalidates the general plan if the missing element is directly involved in the project under review.... The issuance of a use permit is beyond the authority of the issuing agency if the general plan is deficient in its treatment of mandatory elements which are involved in the uses sought by the permit." Kings County Farm Bureau v. City of Hanford , supra at page 742.

The law requires that a city's general plan consist of "a statement of development policies and... diagrams and text setting forth objective, principles, standards, plans and proposals." Moreover the general plan must contain, at a minimum seven mandatory elements: land use, circulation, housing, conservation, open space, noise, and safety. Government Code section 65302. In addition "the general plan and elements and parts thereof comprise an integrated, internally consistent and compatible statement of policies for the adopting agency". Government Code section 65300.5.

Provisions of a general plan must be internally consistent (Government Code section 65300.2), city zoning ordinances must be consistent with the general plan (Government Code section 65860) and all proposed subdivisions must be consistent with he general plan. (Government Code section (66476.5). This consistency is required as the result of the general plan being "atop the hierarchy of local government law regulating land use. It has been aptly analogized to "a constitution for all future developments" Neighborhood Action Group v. County of Calaveras (1984) 156 Cal.App.3d. 1176. If the plan is not in substantial compliance with the requirements of state law relating to general plans, a city has failed in the performance of an act which the law specifically enjoins. Camp v. Board of Supervisors (1981) 123 Cal.App.3d. 334.

Although Respondents contend that Petitioners are barred from raising this issue based upon the 120 day limitation period set forth in Government Code section 65009(c)(1), Petitioners' claim is timely. Petitioners are not seeking to set aside the City"s general plan or any element thereto. They are attacking the approval of the Tentative Map for the project which requires that an action be brought within 90 days of approval. Government Code section 66499.37. Petitioners have certainly filed their claim within this 90 day period. The fact that they are attacking the tentative map based upon alleged deficiencies in the General Plan does not compel a contrary result. A similar issue was raised and rejected in Kings County Farm Bureau v. City of Hanford (1990) 221 Cal.App.3d 692.

It is obvious from the administrative record that the density of the project was in issue and in fact was reduced as the result of the EIR process. The site does not have a single density designation under the General plan, but has two

separate and different designations, Suburban Medium and Rural Medium. When the Richmond general plan is reviewed two different densities can be found for Medium Rural Density and for Medium Suburban Density designation. The City's general plan contains an "Urban Design" element. (GP I: 39) In a table entitled "SUMMARY OF ENVIRONMENTAL CHARACTERISTICS & STANDARDS" Suburban Medium Density is described as "3.5 to 5.0 D.U./acre. Minimum lot size 7000 sq.ft." Rural Medium Density is described as "3.5 D.U./Acre max. Typical lot size for detached dwelling 20,000 sq. ft." (G.P. I:55).

In the "Land Use" element of the general plan Suburban Medium Density is described as 5 to 6.9 dwelling units per net acre with lot areas of 8,712 square feet to 6,229 square feet. Rural Medium Density is described as 2 to 3.9 dwelling units per net acre with lot areas of 21,800 to 10,889 square feet. (G.P. I: 65) Although these differences may not be significant, the differences become greater in the urban designations.

From the above it can be seen that the Urban Design element and the Land Use element within the general plan are not facially consistent. Respondents contend that the Urban Design element is conceptual only and cannot be considered as setting forth the density requirements. The Urban Design Element contains distinct sections relating to "existing environment" and "proposed environment". (G.P.I: 47; 49-55). Further the Land Use Element density standards refer to the Urban Design Element. (GP I: 65)

They cannot be considered as mutually exclusive or separate provisions. One element of the General Plan is not entitled to preference over another. In Sierra Club v. Board of Supervisors (1981) 126 Cal.App.3d 698, the County attempted to avoid inconsistencies between its land use element and open space element by adopting a precedence clause which would give the land use element precedence over the open space element. The Court rejected this noting that Government Code section 65300.5 requires that the elements of the general plan be integrated and internally consistent and the precedence clause could not subordinate the land use element to the open space element. Similarly, the City has no authority to subordinate the Urban Design element to the Land Use element in this case. The public has a right to know what the General Plan calls for in regard to density and not to speculate as to what administrative interpretation might be given by staff to conflicting provisions.

Although Respondents argue that the density question is clear and is confirmed by administrative interpretation of the general plan, this position is not supported by the record. The City of Richmond general plan is a massive document that has been amended several times over the years since its adoption in 1964. The difficulty of dealing with the plan is manifested by the City's adoption of a "Concise General Plan" in 1987. (GP II 630-820) The staff report on the tentative map notes that "the Tentative Map proposal for 332 units which, at 4.08 units per net acre, would conform to the General Plan density ceilings for the respective areas if a limited density transfer (about six acres from open space) is approved". (ARA: 1225, emphasis added.) At argument Respondents contend that no density transfer was ever needed, and that may be the case, but the Planning Commission's Resolution approving the project states; "The Tentative Map proposal for 332 units conforms in terms of average density but the Commission should acknowledge their approval of a limited density transfer for the upper slopes." (ARA: 1231-1232).

Another problem relates to the square footage requirements for each lot. In the staff report to the Planning Commission it is noted that: "There is a discrepancy between a few of the proposed lots sizes in the Rural Medium Density area and the 10,890 SF minimum implied by the General Plan range, but overall the project meets the averaged lot size requirements." (AR III;1232) This language was also adopted in the Planning Commissions Resolution in which certain findings and certifications are made which include "density transfer" and "discrepancy in a few of the proposed lot sizes" (ARA :1232) There is nothing in the record to support or explain these findings other than it is not that clear as to what the density requirements for the project are.

Petitioners also attack approval of the Tentative Map on the basis that the Circulation Element is Not correlated to the Land Use Element. Government Code section 65302(b) provides that the General Plan shall consist of: "A circulation element consisting of the general location of existing and proposed major thoroughfares, transportation routes, terminals, and other local public utilities and facilities, all correlated with the land use element of the plan."

The circulation element of the General Plan was adopted in 1964 and remains basically unchanged. There is no statutory requirement that this element of the general plan be updated, but if it is to be correlated with the land use element and serve as a guide for future development it should reflect current assumptions and realities relating to transportation. This element refers to proposed roadways that have never been built or not yet completed. Some of the assumptions and proposals made in 1964 have no relevance to the actual development of the area. The circulation element notes as a basic assumption that the Northwest Freeway will be completed by 1985. (GPI: 124). It has not been completed. It notes that Wildcat Canyon Road is an important connection across the Berkeley Hills. (GP I:131,132) It does not exist.[2] It also notes that Castro Ranch Road has a long range recreational potential yet the General plan Amendments show that there have been numerous amendments to the General Plan which have increased the allowable density along Castro Ranch Road thereby permitting residential development. (GP I: 132) In approving these amendments the City has recognized that traffic will increase significantly in the area (GP I: 841)

Although basic assumptions made in 1964 have proved not to be accurate, the Circulation element has remained the same despite numerous amendments to the land use element. It is difficult to see how the Land Use Element, which has been repeatedly amended, can be correlated with a Circulation element which has remained basically static for 26 years. The Circulation element cannot be considered to be a constant factor to be correlated with the Land Use Element which has been amended numerous times to reflect the changing needs of the community. If the correlation requirement between the two elements is to have any meaning in serving as a guide for community development, the Circulation element must reflect facts, assumptions and planning that are more contemporary than those set forth in the General Plan adopted in 1964.

The requirement that the Land Use Element of a general plan be correlated with the Circulation Element was discussed in Concerned

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[2] The Court takes judicial notice of these facts pursuant to Evidence Code section 451(f).

Citizens of Calaveras County v. Board of Supervisors (1985) 166 Cal.App.3d 90. In explaining the correlation requirement the Court stated:

> "The statutory correlation requirement is evidently designed in part to prohibit a general plan from calling for unlimited population growth in its land use element without providing in its circulation element, Proposals 'for how the transportation needs of the increased population will be met'. Concerned Citizens of Calaveras County v. Board of Supervisors, supra at page 100.

The fact that Calaveras County may be more rural than the City of Richmond does not make the rationale of the case inappropriate to the issues confronting the City of Richmond. In fact in an urban area, the need for correlation between land use and transportation may be even more acute. One only need travel the I 80 corridor to experience the effect of development in the Bay Area and its direct impact on transportation facilities.

For the reasons set forth above, the Court finds that the General Plan is internally inconsistent and that the Land Use and Circulation Elements are not correlated as required by law.

The relief prayed for by Petitioners is granted. Counsel for Petitioners shall prepare an appropriate order consistent with the above and shall submit it to opposing counsel for approval as to form and content prior to presenting it to the Court for signature.

STEPHEN L. WEIR, COUNTY CLERK By /s/ J. Desmond Deputy