SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

HALL OF JUSTICE

TENTATIVE RULINGS - December 07, 2015

EVENT DATE: 12/11/2015 EVENT TIME: 09:00:00 AM DEPT.: C-73

JUDICIAL OFFICER: Joel R. Wohlfeil

CASE NO.: 37-2015-00007420-CU-TT-CTL

CASE TITLE: DONNA TISDALE VS SAN DIEGO BOARD OF SUPERVISORS [E-FILE]

CASE CATEGORY: Civil - Unlimited CASE TYPE: Toxic Tort/Environmental

EVENT TYPE: Motion Hearing (Civil)

CAUSAL DOCUMENT/DATE FILED: Motion - Other, 10/21/2015

The Motion (ROA # 142) of Respondent and Defendant San Diego County Board of Supervisors ("Board") and Real Parties in Interest Soitec Solar Development LLC, Tierra Del Sol Solar Farm LLC, and Rugged Solar LLC ("Respondents") for an order to discharge the Peremptory Writ of Mandate ("Writ") issued on July 29, 2015, in the above-entitled action, on the ground that the Board complied with the Writ, is GRANTED.

As discussed below, Board was not required to recirculate a draft PEIR for public review and comment.

Paragraph 1 of the Peremptory Writ of Mandate commanded Board to "rescind and vacate" the project approvals issued on July 29, 2015. Paragraph 2 provides Board with the option of submitting "a revised EIR and certification and findings regarding the same" that comply with the Court's July 8, 2015 order. If Board elects to proceed in this manner "then the Court will conduct a review of the same for compliance with its Order, Judgment and this Peremptory Writ of Mandate, and applicable provisions of CEQA."

Board filed its "Return On Peremptory Writ Of Mandate" on October 21, 2015. The Return notes that the subject approvals were, in fact, rescinded on October 14, 2015, during a regular meeting of the County Board of Supervisors. The Return also demonstrates that Board took other discretionary action, including the certification of a "Revised Final Program Environmental Impact Report" ("RFPEIR"), which removed the energy storage component from the project, and the approval of associated "major use" permits. Given paragraph 2 of the writ of mandate, the Court cannot discharge the writ until it has reviewed the RFPEIR, and the associated permits, "for compliance with its Order, Judgment and this Peremptory Writ of Mandate, and applicable provisions of CEQA."

A. Jurisdiction of Board to Address and Adopt Major Use Permits

Petitioners Backcountry Against Dumps, et al. ("Petitioners") contend that Major Use Permit ("MUP") Nos. PDS 2012-3300-12-007 (Rugged) and PDS 2012-3300-12-010 (Tierra del Sol), and Ordinance No. 10394 (rezoning Tierra del Sol) required prior review by the Planning Commission. As Planning Commission review did not occur, the Board's actions are void as lacking jurisdiction. This argument lacks merit.

Section 7352(c) of the County Zoning Ordinances requires that applications for granting or modifying the conditions of a use permit "shall receive a recommendation from the Planning Commission prior to action by the Board of Supervisors." Section 7502 of the Zoning Ordinances vests the Board of

Supervisors with "jurisdiction with respect to granting, denying, or modifying requests to amend The Zoning Ordinance. The Planning Commission shall make a recommendation to the Board of Supervisors on all requests to amend The Zoning Ordinance."

The retained jurisdiction under section 21168.9 is limited to ensuring compliance with the peremptory writ of mandate. Ballona Wetlands Land Trust v. City of Los Angeles (2011) 201 Cal.App.4th 455, 480. A trial court evaluating a return to the writ may not consider any newly asserted challenges arising from the same material facts in existence at the time of the judgment. Id. To do so would undermine the finality of the judgment. Id. The doctrine of res judicata bars Petitioner's challenges to those findings in the second proceeding when the material facts have not changed and the issues asserted in the later proceeding could have been asserted in the prior proceeding. Id.

The Court agrees with the general premise set forth in the reply brief that the plain language of the zoning ordinance sections do not require Board to obtain a new Planning Commission recommendation where no purpose would be served by obtaining a duplicative recommendation. Thus, the issue becomes whether the record supports the existence of changed conditions warranting renewed review by the Planning Commission. The record reflects that the MUP and rezoning ordinance for the TDS project did not change between the initial approval in early 2015 and the present. Removal of the battery storage component at the Rugged project does not impact or effect the TDS project in any way. There is nothing within the administrative record suggesting that the nonexistence of battery storage at the Rugged site will in any way effect the necessity of a backup energy source at the TDS site. To the extent a backup energy source at the TDS site will have a significant impact on the environment, Petitioners were required to address this impact within their original writ petition.

The Rugged solar project changed to the extent that Board granted a new MUP without the energy storage component. However, this was a configuration the Planning Commission originally considered before making its recommendation: it evaluated the original Rugged MUP both with and without the battery storage element. Thus, its review remains viable, and there were no changed conditions warranting additional review by the Planning Commission.

Even assuming the zoning ordinances required a renewed Planning Commission recommendation, the failure to comply with these zoning ordinances is not a proper basis on which to deny Board's request to discharge the writ of mandate. If the Court finds that any determination of a public agency has been made without compliance with CEQA, "the court shall enter an order" mandating that the determination "be voided by the public agency, in whole or in part." Pub. Resources Code § 21168.9(a)(1). The order shall be made by the issuance of a peremptory writ of mandate specifying what action by the public agency is necessary. Id. at (b). The trial court must "retain jurisdiction over the public agency's proceedings by way of a return to the peremptory writ" until the Court has determined that the public agency has complied. Id. The Court may make any orders necessary and proper for the complete enforcement of the writ. City of Carmel-By-The-Sea v. Board of Supervisors (1982) 137 Cal.App.3d 964, 971 (quoting Code of Civ. Pro. § 1097). On the other hand, section 21168.9 expressly prohibits the Court from "direct[ing] any public agency to exercise its discretion in any particular way." Id. at (c). Thus, the "corrective power" granted is "distinctly limited... and essentially negative." Schellinger Bros. v. City of Sebastopol (2009) 179 Cal.App.4th 1245, 1266. Although a public agency may be directed to comply with CEQA, or to exercise its discretion on a particular subject, the Court cannot order that discretion to be exercised in a particular fashion, or to produce a particular result. Id. The narrow review afforded by section 21168.9 does not extend to compliance with local zoning ordinances. Also, as set forth above, paragraph two of the writ of mandate limited this Court's review to verifying compliance with the writ and "applicable provisions of CEQA." Thus, any purported non-compliance with the zoning ordinances cannot constitute a basis on which to prevent discharge of the writ of mandate.

B. Grading and Water Use Impacts

Respondents are correct in that the confusion surrounding discussions within the FPEIR regarding project impacts on grading and related water use was created by inclusion of the battery storage system.

The removal of the energy storage system alleviates this confusion without the necessity of recirculation. It is now reasonably clear that only limited grading operations will be necessary because of the manner in which the CPV tracker units are installed. The PEIR was originally circulated without the energy storage component such that removal of this addition from the RFPEIR does not constitute a change requiring recirculation. Similarly, removal of the energy storage component does not create any new impacts related to grading operations or water use. In short, the discussion within the RFPEIR of these topics is sufficient and complies with CEQA.

C. Cumulative Noise Impact: Rugged Site Combined with Tule Wind Project

Petitioners note that the construction schedule for the subject solar project has changed. Also, there has been a change in the construction schedule for the unrelated "Tule Wind project." This results in an overlap period of seven months. According to Petitioners, these overlapping construction periods may cause a significant cumulative noise impact. Even assuming this new potential impact was sufficiently addressed in the RFPEIR (see the memorandum from Dudek Consulting titled: "Supplemental Memo Addressing Updated Schedules Cumulative Construction Noise Impacts – Rugged and Tule Wind" at AR 0081929, et seq.), Petitioners maintain that there was no public review of this impact in violation of CEQA.

"Recirculation is not required if a revision simply clarifies, amplifies, or makes insignificant modifications to an adequate EIR. On the other hand, when substantial new information on the environmental consequences of a project is added to an inadequate EIR, recirculation is essential." Marin Mun. Water Dist. v. KG Land California Corp. (1991) 235 Cal.App.3d 1652, 1667. The "significant new information" language is intended to reaffirm the goal of meaningful public participation in the CEQA review process, but without promoting endless rounds of revision and recirculation. Laurel Heights Improvement Assn. v. Regents of University of California (1993) 6 Ca1.4th 1112, 132 (recirculation intended to be an exception, rather than the general rule).

The record consists of the September 25, 2015 supplemental memorandum from Dudek, as well as the January 9, 2015 memorandum addressing the same subject. See AR at 0081929-0081930 and 0081937-0081939. These documents indicate that the cumulative noise associated with the construction of both projects would only constitute a potentially significant impact if the most noise intensive construction activities of both projects occurred simultaneously. However, the most noise intensive construction phases of the Rugged solar farm project and Tule Wind project construction schedules do not presently overlap such that the cumulative impact continues to be less than significant. The Tule Wind project is not scheduled to commence until September 2016. This is several months after completion of the clearing and grading construction phase at the Rugged site. Therefore, the modified construction schedules for both projects do not rise to the level of significant new information requiring recirculation.

D. Air Quality Impact Associated with Need for Backup Power Source

Petitioners argue that previous approval of the Rugged solar project was premised upon dual use of the energy storage component as a backup power system. Removal of the battery storage will necessitate the inclusion of a backup power generation system (e.g., a 1.5 MW diesel-powered emergency generator). This will have a significant negative impact on air quality such that a new round of circulation and review is necessary to comply with CEQA.

The DPEIR, FPEIR and RFPEIR adequately explain that the Rugged and TDS projects will be equipped with backup power to bring CPV trackers into "stow mode position" in case of an electrical outage. The FPEIR explains that the Rugged project required backup power in the event the optional energy storage system was not developed. The DPEIR and FPEIR analyzed emissions associated with the use of backup power sources at the Rugged and TDS solar farm sites, including air contaminants from diesel particulate matter. Both versions of the EIR concluded the impacts would be less than significant. In addition, the DPEIR and FPEIR both concluded that any backup power source would not create a

significant GHG emission impact. The nearly identical analysis in the RFPEIR reaches the same conclusion. Thus, the optional energy storage component was not needed as a mitigation measure to address air quality and GHG emissions. Board's approval was not contingent on a representation that the optional energy storage system would lessen project impacts. Therefore, decreased air quality associated with removal of the battery storage component does not rise to the level of significant new information requiring recirculation.

Petitioners' Request (ROA # 155) is GRANTED. The Court takes judicial notice of Exhibit 1 - San Diego County Zoning Ordinance, Section 7352 and Exhibit 2 - San Diego County Zoning Ordinance, Section 7502 filed in opposition to Respondents' Motion.