

**SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF SAN DIEGO  
CENTRAL**

**MINUTE ORDER**

DATE: 10/02/2012

TIME: 08:44:00 AM

DEPT: C-71

JUDICIAL OFFICER PRESIDING: Ronald S. Prager

CLERK: Lee Ryan

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT:

CASE NO: **37-2011-00091507-CU-TT-CTL** CASE INIT.DATE: 05/19/2011

CASE TITLE: **SIERRA CLUB vs. 22nd District Agricultural Association**

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

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**EVENT TYPE:** Motion Hearing (Civil)

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**APPEARANCES**

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The Court, having taken the above-entitled matter under submission on 09/13/12 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

The Court modifies its ruling on petitioner Sierra Club's ("Petitioner") petition for writ of mandate as follows:

This ruling will serve as the Court's Statement of Decision pursuant to California Rules of Court, rule 3.1590.

Petitioner is represented by Jan Chatten-Brown, Amy Minter, Josh Chatten-Brown, and Michelle Black of Chatten-Brown & Carstens.

Respondent 22<sup>nd</sup> District Agricultural Assn. ("Respondent") is represented by Haley Peterson of the Office of the Attorney General.

Petitioner challenges Respondent's decision, on April 18, 2011, to certify the EIR and approve the 2008 Master Plan, No Hotel Alternative (Alternative 3) ("Project"). (A000001-004.)

The Project consists of near-term and long-term projects. The near-term projects consist of: (1) Solana Gate realignment to provide three lanes and a sidewalk in order to afford better pedestrian access and efficient use of the Backstretch facilities; (2) Paving of the East Lot to provide 3,200 all-weather parking spaces, incorporating water quality best management practices; (3) Sewer hook-ups for 62 recreational vehicle parking spaces (water and electricity already provided); (4) New exhibit hall with breakout rooms, subterranean parking and three rooftop sports field to replace three existing exhibit halls and a tent

structure; (5) New official gate/administration office facility and ticket box office; (6) Relocate existing maintenance buildings/yard; (7) Two-sided, 192 square foot electronic reader board along the I-5; (8) Health club/sports training facility adjacent to the I-5 in the Surf and Turf area; (9) Widening of the turf track by 25 percent (B154; 149 [aerial].) The long-term projects include a seasonal train platform; multilevel parking structure; rebuilding stables and living quarters in the Backstretch area; new Horseman's Village; truck tunnel under the racetrack; and a new vehicle wash rack (B154, 151 [aerial].)

The Court has reviewed the record in light of the parties' briefs and the applicable law and concludes the petition for writ of mandate should be granted in part and denied in part for the reasons stated below.

*Standard of Review.* An agency fails to proceed as required by law if the EIR does not substantially comply with CEQA's procedural requirements regarding the contents of an EIR. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4<sup>th</sup> 412, 435.)

Otherwise, the substantial evidence test applies. Respondent notes that "[t]he agency is the finder of fact and we must indulge all reasonable inferences from the evidence that would support the agency's determinations and resolve all conflicts in the evidence in favor of the agency's decision." (*Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4<sup>th</sup> 99, 117.)

As a preliminary matter, Petitioner's request for judicial notice is denied.

#### Wetlands.

*Baseline.* An EIR must describe the physical environmental conditions in the vicinity of the project as they exist at the time the agency commences its environmental analysis. (CEQA Guidelines §15125(a).) Here, Respondent has used the East and South lots for parking and special events since before the Coastal Act was enacted in 1976. (B002075; B004820.) Thus, Petitioner's contention that the 1985 Master Plan is the proper baseline fails.

As to Petitioner's contention that certain coastal development permits ("CDPs") prohibit the use of the lots except during the Fair and races, Respondent notes that only some of these CDPs contain use restrictions and that Petitioner cited no evidence that Respondent has violated these conditions.

Finally, as to Petitioner's contention about how Respondent has been using the lots, the Court notes that it declined to consider evidence proffered by Petitioners via a request for judicial notice made with its reply brief on the ground that it constitutes inadmissible extra-record evidence and struck all references to the documents at issue cited in Petitioner's reply brief. Nevertheless, Respondent correctly notes that courts have determined that the "preparation of an EIR is not an appropriate forum for determining the nature and consequences of prior conduct...." (*Riverwatch v. County of San Diego* (1999) 76 Cal.App.4<sup>th</sup> 1428, 1434.)

*Atypical Situation Methodology.* The record shows that the lots have been used as parking for more than 40 years. (B002074-75.) Thus, parking is the normal condition. (*Ibid.*) Also, the record indicates that heavy rainfall caused vegetation management not to be performed prior to the consultant site visits. (B002094.) As a result, the atypical methodology was not necessary for the vegetation.

*Surveys.* The record indicates that surface ponding existed during the site visits. (B002086.) It also shows that, unlike previous delineations, no vegetation clearing had occurred prior to the site visits and vegetation was present and identifiable. (B002086.) Finally, the site visits occurred at a time when

there was above-average rainfall. (B002075.)

*Disclosure of Wetland Studies.* The record includes references to the 1992 and 1996 wetland studies, including an exhibit comparing the current wetlands delineation to the 1993, 1996, and 2001 delineations. (B002100.)

*Mitigation.* The record indicates that realignment of the Solana Gate will impact 0.02 acres of wetlands and that paving of the East lot will impact 0.06 acres of wetlands. (B000624.) To offset the 0.02 acre impact from the Solana Gate realignment, Respondent will restore 0.37 acres of wetlands near the impacted drainage feature and 0.20 acres of salt marsh and/or Diegan sage scrub in the South lot. (B000642-43.) In addition to an ongoing 2.14 acre salt marsh restoration and the 0.20 acre restoration described above, Respondent will restore the remaining one-third of the South lot (for a total of approximately 3 acres) to wetlands and other native habitat to be used to offset impacts of near-term projects, including paving of the East lot, if needed to fulfill permit requirements. Otherwise, Respondent will bank the mitigation to offset future projects. (B000644; B005384-85.) In sum, Respondent will restore a total of 3.37 acres to offset impacts to 0.08 acres.

In sum, there is substantial evidence in the record to support Respondent's conclusions with respect to wetlands.

*Biological Resources.*

*Special-status species.* As to Respondent's failure to exhaust argument, Petitioner correctly pointed out that concerns about impacts to species were properly exhausted during the administrative process. (B006929; B006932; B007169.)

The record indicates that the EIR properly analyzed impacts to the San Diego pocket mouse, western mastiff bat, and two-striped garter snake. (B000625-626.) More specifically, it recognized the existence of these species and set forth the potential short-term and long-term impacts to them. (B000625-628.)

As to the short-term impacts of the Project, the EIR states that direct and indirect construction related impacts may result in mortality, increased exposure to localized pollution from construction equipment, disruption from noise and dust etc. (B000626.) Operational impacts would include the slight loss of potential habitat and disruption due to noise, lighting, and human activities, and potential adverse effects from the accidental or deliberate introduction of invasive or exotic species. (*Ibid.*) It concludes that "direct impacts are not anticipated to result in significant adverse impacts to these species" "because the habitat on site is not sufficient to support large numbers of individuals, and because these species are not listed as threatened or endangered and this point are not considered to be at a high risk of extinction." As a result, "project impacts are unlikely to cause local populations of these species to drop below self-sustaining levels." (B000627.) It also addresses the impacts to special interest species in the San Dieguito Restoration Area and concludes that the "operational impacts are expected to be minimal and localized, and therefore less than significant." (*Ibid.*) Finally, as to indirect-construction related impacts, the EIR states that mitigation measures like 4.6.8 will be implemented. (*Ibid.*; B000643-644.)

As to the long-term impacts of the Project on these species, the EIR reiterates that the impacts are not likely to be significant because "the habitat on site is not sufficient to support large numbers of individuals, and because these species are not listed as threatened or endangered and at this point are not considered to be at a high risk of extinction." (B000628.)

The record also indicates that the EIR properly analyzed impacts to the California brown pelican or the California least tern. It documented sightings of these species (B000610) and, with respect to short-term impacts, noted that "special interest bird species are not expected to nest in these areas but may occasionally forage in these areas" and that "short-term impacts could temporarily discourage special-interest bird species from foraging in the habitat adjacent to the construction site" which could have a significant impact which can be avoided or minimized through appropriate mitigation measures during construction. (B000626.) As noted above, direct impacts were not likely to adversely affect local populations for the reasons stated above. (B000627.)

As to the long-term impacts of the Project on these species, the impacts would be as noted above. (B000628.)

Finally, Mitigation Measure 4.6.8 states that Respondent will "avoid direct or indirect disturbance to rare natural communities" by clearly delineating where they are "on construction plans when they occur in proximity to or within the project impact footprint" and that "[n]o staging areas or temporary access routes shall be placed with such communities." (B000643.) Finally, it provides that "[a]ny unforeseen or accidental impacts to such communities shall be subject to appropriate restoration following construction, in accordance with a habitat restoration plan prepared by a qualified restoration biologist" and that Respondent "shall verify implementation of this measure." (B000643-644.)

*Light and Noise.* Although Petitioner generally referenced inadequacies regarding impacts to light and noise, it only cited to Mitigation Measure 4.6.12 ("MM 4.6.12") in its moving papers, which only addresses the issue of light impacts, as being inadequate since it only applies to breeding season and contains the phrase "[t]o the maximum extent feasible." (B005697.) In response, Respondent cited to Mitigation Measure 4.5.1 ("MM 4.5.1"), which provides for a year round lighting limitation and does not include the modifier "to the maximum extent feasible." (A000011-12.) MM 4.5.1 stated that Respondent "shall prepare lighting plans designed to minimize light spillage and glare to minimize both daytime and nighttime visual effects." (A000011.) Outdoor lighting fixtures "shall be directed, shielded, or located in such a manner that the light source is not visible off site, to minimize light emission above the horizontal plan...." (*Ibid.*) Also, "outdoor lighting used to illuminate recreational activities will terminate at or before 10:00 p.m., except during the Fair, and shall be equipped with automatic timing devices and shielded to minimize light pollution. During the Fair, the lighting will be turned off at the end of the Fair day." (A000012.) In addition, MM 4.6.12 states that Respondent will ensure that "lighting adjacent to all sensitive biological areas is directed away from and/or shielded so as not to illuminate native habitats." (B005697.)

*Restoration Areas.* Contrary to Petitioner's contentions, the record indicates that the EIR did address the Project's off-site impacts to the restoration areas. The EIR concludes that the cumulative impacts to special interest species would be less than significant and that impacts to their habitat would be offset by restoration in the South Lot proposed as mitigation. (B000638.) This conclusion was based on the fact that the project directly impacts a very small area of habitat, the project will not increase indirect impacts from those current operations already caused, and impacts to species are unlikely to result in the loss of population viability. (*Ibid.*) In addition, the EIR explains that the surrounding area will not be developed except for restoration projects.

In sum, there is substantial evidence in the record to support Respondent's conclusions with respect to biological impacts.

*Aesthetic Impacts.*

*Visual Setting.* The record indicates that Respondent provided photographs of several views of the Project site. Petitioner takes issue with the particular photographs that were selected. However, the EIR's analysis of the visual setting was not limited to the provision of photographs and descriptions thereof. It also included written analyses of impacts to views and concluded that the impact would not be adverse and that no mitigation was required. (B000571.) In addition, the EIR indicates that the "project is not within the view corridor of any officially designated State Scenic Highway." (B000574.) Finally, Respondent notes that all of the photographs submitted during the administrative process were before the governing board when it made its decision. (B007712-714.)

*Lighting Plan.* The EIR includes preliminary photometric, or lumen, studies for all new light sources and, in response to a request updated photometric diagrams to account for the 14 foot elevation of the Exhibit Hall. (B000594; B005002; B005946; B005950.) The updated lighting diagrams conclude spill lighting will range from 0.02 to 0.05 footcandles directly east of the structure along I-5 and from 0.03 to 0.06 footcandles within 300 feet to the north, south, and west of the Health Club/Sports Training Facility. (B005002-03; B005946; B005950.) The Health Club/Sports Training Facility will not generate additional lighting near the San Dieguito River/Lagoon. (B000594-95.) MM 4.5.1 (A000011-12) reduces impacts to below a level of significance. (B005003.) The analysis is adequate because the EIR includes studies which adequately disclose the Project's impacts and mitigates all impacts from lighting.

*Reader Board.* Respondent presented evidence that the reader board will be placed in an already urbanized environment and will be adjacent to the I-5. (B005006.) As to whether said board will distract motorists, Respondent noted that freeway signs are not uncommon in this area of San Diego County. (*Ibid.*)

In sum, there is substantial evidence in the record to support Respondent's conclusions with respect to aesthetic impacts.

#### Traffic Impacts.

*Baseline.* "[T]he California Supreme Court has instructed that predicted conditions may serve as an adequate baseline where environmental conditions vary. [T]he date for establishing baseline cannot be a rigid one. Environmental conditions may vary from year to year and in some cases it is necessary to consider conditions over a range of time periods." (*Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552, 1572 (hereafter "*Pfeiffer*").) It distinguished *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351, 1373, which held that "[a]n EIR must focus on impacts to the existing environment," by stating that the traffic baseline in *Pfeiffer* "were not limited to projected traffic condition in the year 2020, but also included existing conditions and the traffic growth anticipated from approved but not yet constructed developments." (*Pfeiffer, supra*, 200 Cal.App.4th at p. 1573.) It further stated that "this court acknowledged in *Sunnyvale West* that future conditions may be considered in determining a proposed project's impacts on the environment" and "that the CEQA Guidelines expressly provide for consideration of potential future conditions." (*Ibid.*)

Here, the EIR calculates the Project's traffic impacts based on existing plus foreseeable traffic. The EIR stated that existing conditions should not be used as the baseline for analyzing traffic impacts because the existing conditions plus the Project's traffic would not account for anticipated land use projects or ambient growth that "should also be required to provide for, or contribute to, necessary traffic improvements to the circulation system in the area." (B000355.) Existing conditions were also rejected because they do not include "other anticipated circulation system improvements." (*Ibid.*)

Instead, the EIR relied on a baseline it terms the "near-term baseline." (B000356.) It includes 49 proposed development projects in Del Mar, Solana Beach and San Diego, many of which have not been approved. (B000360-361; B004600-608.) In addition to residential and commercial development projects, the near-term baseline also includes several proposed highway widening projects. (B004603; B004606.) Respondent's traffic consultant concluded that "[n]o new impacts were calculated measuring project traffic against the 'existing' baseline." (E002311.)

*Long-Term Traffic Impacts.* Substantial evidence supports Respondent's decision to analyze long-term impacts only during the interim season. (B000350.) The EIR does not contain long-term traffic volumes for the Fair and race seasons because they are considered special-event conditions, and 2030 traffic model data is not available for them. (*Ibid.*) The EIR also explains that the interim season is the most prevalent of the three seasons; the traffic model cannot be adjusted to produce future background model volumes for special events such as the Fair and races; and model volumes are only valid for a weekday analysis as the model does not produce weekend results. (B000450.)

Del Mar acknowledged that the SANDAG traffic model does not forecast volumes for weekends or "account for special conditions, such as seasonal traffic peaks, or special events at locations such as sports arenas, concert halls, fairgrounds, racetracks, etc.," but suggests Respondent should have applied "adjustment factors and/or growth factors" to predict future race meet and Fair conditions. (B006246.) In response, Respondent explained that "[i]t is not standard practice to forecast long-term, special event traffic conditions" and that the long-term analysis in the DEIR "sufficiently represents typical long-term operations in the study area without and with the project." (B005102.)

The only Project improvement anticipated to increase traffic during the Fair and races is the health club/sports training facility. (B000404; B000432.) The Exhibit Hall and East parking lot will be in use during the Fair for Fair-related exhibits and parking and during the race meet for race-related uses. (*Ibid.*) The roof top sports fields would not be used for sporting events during the Fair or races. (*Ibid.*) Therefore, while traffic is most congested during the Fair and races, the cumulative analysis is most appropriately determined during the interim season when the traffic inducing elements will have most impact.

*Traffic Generation.* Staff opinions do not constitute substantial evidence regarding trip generation. Staff opinions can only constitute substantial evidence if they are supported by facts. (See CEQA Guidelines §15384.) Here, there are no such facts to support staff's claims regarding trip generation rates from the exhibit halls during the interim season. Evidence of past and current Fairgrounds operations are not included in the record. The record also lacks evidence to support staff's opinion that the exhibit halls will not generate increased trips during the Fair and race seasons. Notably, in response to comments from the City of Solana Beach regarding the lack of evidentiary support for the estimated increases in traffic volume, Respondent concluded the comments were not substantive and that no further response was necessary. (B005162; B006851-852.) In addition, there is no evidence that the staff qualify as traffic experts who are able to determine trip generation rates. The cases cited by Respondent, *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884 and *Browning-Ferris Indus. v. City Council* (1986) 181 Cal.App.3d 852, do not assist it as the staff opinion that was considered substantial evidence was the agency staff's determination of whether outside expert analysis was adequate. This is very different than relying on the unsupported opinions of staff members that the record fails to establish as traffic experts. Finally, Petitioner noted that there are other sources Respondent could have used for trip generation e.g., Institute of Transportation Engineers ("ITE") Trip Generation Manual. (See B000377.) Respondent used it for the hotel and health club but did not say why it did not do so for the

exhibit hall.

*Traffic Mitigation.* The EIR fails to include any assessment of the cost associated with the improvements, what Respondent's fair share would be, and if Respondent has adequate funding to make such fair share contributions. It also fails to analyze whether the identified roadway improvements are feasible or whether there would be any potential impacts associated with the improvements. Moreover, the relevant agencies with jurisdiction over the roadway improvements do not have plans committing themselves to implementing the improvements. A mitigation measure that requires the payment of an unspecified amount of money, at an unspecified time, in compliance with an unspecified traffic improvement funding program is inadequate. (*San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 79.) Furthermore, where the recommended mitigation requires a project applicant to pay the project's fair share of needed improvements, the EIR must identify the project's fair share percentage, the cost of the necessary improvements, and the dollar amount of the project's fair share. (*Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1189.) "To be adequate, these mitigation fees...must be part of a reasonable plan of actual mitigation that the relevant agency commits itself to implementing." (*Id.* at p. 1188.)

*Direct Access Ramps.* Substantial evidence supports Respondent's rejection of a direct access ramp from I-5 to the Fairgrounds as mitigation. Given that the estimated cost of a direct access ramp is \$20 million to \$40 million, and that the project contribution to the I-5/Via de la Valle interchange is calculated to be approximately 8 percent over the baseline volumes, the potential cost of the proposed improvement compared to the Project's actual contribution is not proportionate. (B004892-4893; CEQA Guidelines §15126.4(a)(4).) Respondent contends that temporary traffic controls e.g., manual control of key signalized intersections by uniformed public safety personnel, directional redistribution of lane throughput using cones and signs, flaggers and other traffic control personnel at driveways, etc., is the most effective way to mitigate the special event impacts. (B004893.)

In sum, there is substantial evidence in the record to support Respondent's conclusions with respect to the baseline, long-term traffic impacts, and direct access ramps. However, the record lacked substantial evidence with respect to traffic generation and mitigation.

*Greenhouse Gas Emissions ("GHGs").*

*Baseline.* As to Respondent's failure to exhaust argument, Petitioner correctly pointed out that concerns about whether the EIR quantified existing traffic emissions and compliance with Executive Order ("EO") S-03-05 were properly exhausted during the administrative process. (B007447-748; B005995; B007227-728.)

There currently appears to be a lack of guidance on the methods for evaluating GHGs. (2 Kostka & Zischke, Practice Under the California Environmental Quality Act (Cont.Ed.Bar 2010) §20.84, p. 1033 ("Kostka").) Thus, agencies have adopted various approaches to determine the project's contribution to GHGs. (*Ibid.*) Here, the EIR provides the existing GHG emissions (B000859-860) and the Project's estimated emissions, including vehicle emissions. (B000893.) Furthermore, the EIR includes mitigation measures to reduce emissions from transportation sources (B000904-905.) In addition, the record indicates that the EIR included analysis of the Project's consistency with "plans for the reduction of [GHGs]." (B000885-889; CEQA Guidelines §15125(d).)

Petitioner takes issue with the fact that Respondent did not include the Fairgrounds' baseline GHGs from traffic. The EIR specifically noted that the portion of the roadway traffic that is attributable to the

Fairgrounds is unknown and thus could not be estimated. (B000859.) Respondent provided no reason why the EIR failed to estimate the portion of traffic attributable to Fairgrounds activity especially given the availability of visitor estimates, average trip lengths, and parking payments. A good-faith effort, supported by this available factual data, is required. (CEQA Guidelines §15064.4(a).) As a result, the Master Plan EIR omitted information necessary to analyze the Plans' GHG impacts. It is required, but did not, disclose the existing environmental setting for vehicular emissions. (CEQA Guidelines §§15125(a), 15064.4(a).) Without such disclosure, the EIR cannot compare pre-project impacts to post-project impacts. (CEQA Guidelines §§15126.6(e)(1); 15126.2(a), 15125(a).)

*Mitigation Measures.* As to Respondent's failure to exhaust argument, Petitioner correctly pointed out that concerns about mitigation enforceability (B007445; B007226) and trip reductions (B007446; B007226; B007262; B007467) were properly exhausted during the administrative process.

Petitioner contends that the EIR's GHG mitigation measures are vague and unenforceable. However, it has been held that when mitigation is built into the project's design, the lead agency may presume that the project will be implemented consistent with the project description. (*Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4<sup>th</sup> 1018, 1035.) Respondent notes that project description in this case incorporates the mitigation. More specifically, said description contains the following sustainability commitments: (1) will evaluate and phase in effective replacement of its existing fleet as vehicles age with low- and zero-emission vehicles and will require the race meet operator to do the same; (2) will provide bike racks, accommodate on-site bus stops, provide shuttle service, coordinate with transit providers to provide bus connections from the Solana Beach Train Station during the Fair and race seasons, and work with transit agencies to location a seasonal train platform on the Fairgrounds site (identified as one of the Master Plan's long-term projects); (3) evaluate, develop, and implement an on-site tree planting program that locates trees adjacent to buildings in order to reduce energy consumption and provide assistance to community groups that promote tree planting in the adjacent communities; and (5) seek new opportunities to promote commuter carpooling and transit use, as well as alternative transportation for Fairgrounds and racetrack events. (B000900.) In addition, because LEED certification is part of the project description, it is not considered a mitigation measure and Respondent properly did not include it in the MMRP. MM 4.16.4 through 4.16.14 complement and supplement the LEED-NC Silver design by requiring energy-efficient light fixtures, enhanced insulation, limited air leakage, energy audits and/or commissioning for new buildings, ENERGY STAR-rated windows, and solar panels in new structures, as appropriate. (B000902-904.)

As to the issue of the reduction of vehicle trips, the efforts to reduce vehicle trips are set forth in the project description. Thus, it was not necessary to include it as a mitigation measure. In addition, CEQA Guidelines section 15125.4 subd. (a)(2) states, in relevant part, that "[i]n the case of the adoption of a plan, policy, regulation, or other public project, mitigation measures can be incorporated into the plan, policy, regulation, or project design." Here, the strategy to partner with transit agencies (B000905) is among the programmatic impact avoidance and mitigation strategies that will be "implemented as appropriate to address the potential impacts of long-term projects." (B000904.)

Finally, the mere inclusion of the terms "as feasible" or "as appropriate" does not render MM 4.3.14 and MM4.16.3 unenforceable and provides Respondent with some flexibility to adjust the mitigation measure to accommodate project changes since this is a planning document.

*Sea Level Rise.* Respondent was not required to discuss the impact of sea level rise as a result of global warming on the Project, as "the purpose of an EIR is to identify the significant effect of a project on the environment, not the significant effects of the environment on the project." (*Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4<sup>th</sup> 455, 473.) Nevertheless, the record indicates that Respondent adequately addressed the issue. It noted the potential for sea level rise and committed



to mitigate the impact to comply with current flood control standards. (B000857; B000787.) It also noted that uncertainty exists with regard to "methodology for assessing the timing and magnitude of sea level rise impacts and quantifying the projected costs and benefits of implementing adaptation measures" but identified "[p]otential adaptations for the built environment" such as the "construction of dikes and seawalls; beach nourishment; and elevating structures and roadways." (Ibid.) In sum, although not required to do so, Respondent assessed sea level rise impacts, adopted mitigation to comply with current standards, and noted possible adaptations despite uncertainty with respect to measuring sea level rise.

In sum, there is substantial evidence in the record to support Respondent's conclusions with respect to mitigation measures and sea level rise. However, Respondent used an improper baseline.

#### Water Supply.

**Baseline.** The EIR used an incorrect baseline. The appropriate baseline is the "existing physical conditions in the affected area"[] (Communities For A Better Environment v. South Coast Air Quality Management Dist. (2010) 48 Cal.4th 310, 321.) Here, the EIR incorrectly compares 2030 projected water use of the near-term projects to the projected water use of the *entire* City of San Diego. (B000812; B000818.)

**Short-Term Water Supply.** The EIR concludes that the Project's water supply impacts would not be significant. (B005332; B005334.) However, the record indicates that the Water Authority pointed out uncertainties regarding the availability of short term water supplies (B005705) and indicated that Respondent's statement in the EIR that the Water Authority had adequate documentation to show the availability of water to meet the demand through 2030 was inaccurate (B007164). In *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 432, the California Supreme Court stated that "where, despite a full discussion, it is impossible to confidently determine that anticipated future water sources will be available, CEQA requires some discussion of possible replacement sources or alternatives to use of the anticipated water, and of the environmental consequences of those contingencies." Instead, the record indicates that Respondent made reference to the Water Authorities' implementation of a Drought Management Plan, Water Surplus and Drought Management Plan, 5-Year Action Plan, and Water Supply Allocation Plan. (B005332.) Respondent failed to discuss alternate water supplies or potential impacts of alternate supplies.

In addition, the City of Del Mar and City of San Diego supply water to portions of the Project site. (B000811) The record indicates that the City of Del Mar does not have "excess capacity" to support the Project's additional water needs. (B006064; B000797; G006762.) Thus, any water Respondent would seek from the City of Del Mar is paper water. (*Planning & Conserv. League v. Dept. of Water Resources* (2000) 83 Cal.App.4th 892, 908 fn. 5.)

In sum, Respondent used an improper baseline and its conclusions regarding short-term water supply are not supported by substantial evidence.

#### Responses to Comments.

An agency's response to comments may take the form of a revision to the draft EIR or may be a separate section in the final EIR. (CEQA Guidelines §15088(d).) The agency's response shall describe the disposition of "significant" environmental issues raised. (CEQA Guidelines §15088(c).) Where an agency's responses to comments, viewed "as a whole[,] evince good faith and a reasoned analysis" and "adequately serve the disclosure purpose which is central to the EIR process," the fact that, in certain respects, " the responses are not exhaustive or thorough" is not fatal to the agency." (*Twain Harte Homeowners Assn. v. County of Tuolumne* (1982) 138 Cal.App.3d 664, 686.) The detail required to respond to comments on a general plan is less than for a specific construction project. (*Id.* at pp. 677, 681.) The lead agency need not respond to comments which raise no new environmental issues. (*Id.* at

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p. 679; *People v. County of Kern* (1974) 39 Cal.App.3d 830, 841-842.)

*Wetland Buffer.* Respondent adequately responded to comments regarding the wetland buffer. The record indicates that Respondent voted unanimously to amend the Master Plan to require the "greenway open space on the south side of [the] property to be a minimum of 100 f[ee]t for the length of [the] San Dieguito River." (C000474-475.)

*Environmentally Sensitive Habitat Areas ("ESHAs").* Respondent adequately responded to comments regarding ESHAs. In response to the Coastal Commission's comment that an assessment of ESHAs is needed, Respondent stated that the DEIR identified "where sensitive resources are located and describe[d] the reasons for their sensitivity." (B004869.) It also stated that the DEIR identified "mitigation measures or design features, including buffers, which minimize impacts on such resources." (*Ibid.*) More importantly, Respondent stated that identification of ESHAs "is a Coastal Commission function and would be speculative at this time" (*Ibid.*) because "[t]he CEQA action by [Respondent] is separate from the subsequent Coastal Commission action during the permitting stage for the project....It is not possible to know with certainty what the Coastal Commission's deliberations and actions pertaining to future applications will be. There are no specific written and adopted guidelines for most of these issues, only precedents...Conjecture with regard to future deliberations is speculative because it is not possible to know at this time what information will be available to the Coastal Commission at a future date, and what the nature of the deliberation will be. However, the document considers the reasonably foreseeable consequences of the Coastal Act and policies, just as it would for any other relevant land use planning document." (B004812.) Thus, Respondent acknowledged the Coastal Commission's concerns and directly addressed why it believed that compliance with the request at this time is not possible.

*Water Quality Impacts.* Respondent adequately responded to comments regarding downstream water quality impacts. Construction of the Master Plan projects will result in an increased discharge from the project site to the river during the 100-year storm, primarily due to paving of the East parking lot. "The detention of storm water in the driving range will control future discharges to the San Dieguito river in a manner that is comparable to existing conditions. (B004834.) Respondent concluded that the impact would be less than significant in accordance with Thresholds 4.11.4 and 4.11.8, described in the DEIR, Section 4.11. (*Ibid.*) Finally, Respondent concluded that the proposed impacts to facilities the Coastal Commission listed as important public resources would be less than significant. (B004869.)

*Cumulative Traffic Impacts.* Respondent adequately responded to comments regarding traffic impacts. Respondent concluded that an increased number of events would not result in a substantial contribution to a cumulative impact if contained on site (B004869-70) and directed the Coastal Commission to its discussion of traffic and circulation in section 4.2 of the EIR. (B004870.)

*Lighting.* Respondent adequately responded to comments regarding increased lighting. The DEIR specifically acknowledges that the operational impacts of the Project include impacts to adjacent habitats from lighting. Respondent prepared preliminary and updated photometric diagrams to analyze the new sources of light proposed and the potential impacts of new source. (B005002-03.) An additional study would not have added to the analysis since Respondent identified the Project's probable lighting impacts and imposed mitigation to address them. (CEQA Guidelines §15024.) Moreover, Respondent amended the Master Plan's lighting directives to require that the lights be shut off at 10:00 pm rather than 11:00 pm except during the Fair. (C000490-92.)

*Recreational Areas.* Respondent adequately responded to comments regarding the Coast to Crest trail. The Park's concern was limited to the Project's alleged failure to provide visitors better access to the Trail. In response, Respondent explained that currently, during the Fair and race, parking and traffic

impede access to the trail. These are existing conditions that need not be studied since the purpose of an EIR is to disclose the proposed Project's potential impacts on the existing environment. (B005350.)

*Aviary Impacts.* Respondent adequately responded to comments regarding potential bird strikes. Respondent stated that it would consider the recommendation to use non-reflective glass during the final design. (B004886.) The FEIR also includes the following mitigation measure: "During final design, the [Respondent] shall use nonreflective glass on exhibit halls and other structures to the extent feasible to reduce the potential for avian collisions with buildings." (A000019.)

In sum, there is substantial evidence in the record to support Respondent's conclusions with respect to the wetland buffer, *ESHAs*, water quality impacts, cumulative traffic impacts, lighting, recreational areas, and aviary impacts.

Alternatives.

*Scope of Alternatives.* An EIR must describe a range of reasonable alternatives to the project. (CEQA Guidelines §15126.6(a), (c).) The nature and scope of the alternatives to be studied is governed by the rule of reason. (*Ibid.*; *In re Bay-Delta Programmatic Environmental Impact Report Coord. Proceedings* (2008) 43 Cal.4<sup>th</sup> 1143, 1163; *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4<sup>th</sup> 889, 920.) Notably, an EIR need not include alternative versions of the alternatives it evaluates. (*Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4<sup>th</sup> 704, 714; see also *Mira Mar Mobile Comm. v. City of Oceanside* (2004) 119 Cal.App.4<sup>th</sup> 477, 491; *Marin Mun. Water Dist. v. KG Land Cal. Corp.* (1991) 235 Cal.App.3d 1652, 1664.)

Petitioner contends that alternatives that eliminated or reduced the size of components that cause the greatest impacts should have been considered. As to the no Health Club/Sports Training Facility alternative and the Smaller Hotel and/or Smaller Health Club/Sports Training Facility, Respondent noted that Alternative 3 (Reduced Project/No Hotel Alternative) was "evaluated to identify the prototypical reduction in impacts possible with a reduced project." (B004862.) With respect to the former suggested alternative, Respondent stated that there were "no significant unavoidable impacts of the proposed project that are specific to the Health Club/Sports Training Facility component." (B004861-862.) With respect to the latter suggested alternative, Respondent stated that the Smaller Hotel and/or Smaller Health Club/Sports Training Facility "would have greater impacts than Alternative 3 but reduced impacts compared to the proposed project. Therefore, [it] would not offer a significant advantage in comparison with the alternatives presented in the DEIR...." (B004862.)

As to the green energy alternative, Respondent noted that "green energy sources have been included in the proposed project and/or are required in project mitigation, and an alternatives analysis for these features is not required." (B004862.)

As to the No East Lot Paving and Alternative Location for Parking Structure, Respondent correctly noted that it was not required to evaluate components of the Project. (B004861; (*Big Rock Mesas Prop. Owners Assn. v. Bd. of Supervisors* (1977) 73 Cal.App.3d 218, 227.)

*Infeasibility.* CEQA Guidelines section 15126.6 subd. (c) provides that an EIR should identify the alternatives that a lead agency considered but rejected as infeasible and its reasons for its determination. The agency's reasons for excluding alternatives in an EIR based on infeasibility or inability to fulfill project objectives may also be included in responses to comments in the final EIR. (See *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4<sup>th</sup> 889, 922.) With respect

to a finding of economic infeasibility, courts have required a showing that the additional costs or lost profits would make the project impractical. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 737.)

Respondent's mission statement is "[t]o manage and promote a world-class, multi-use, public assembly facility with an emphasis on agriculture, education, entertainment, and recreation in a fiscally sound and environmentally conscientious manner for the benefit of all." (B000909.) To do so, Respondent must upgrade existing, relevant facilities; remove limiting and irrelevant facilities; and construct new facilities that respond to San Diego County residents' needs. (*Ibid.*) Income-producing events almost exclusively fund operations, maintenance, reconstruction of aging facilities, and construction of new facilities. (*Ibid.*) "Therefore, the goal of the Master Plan is to identify key physical improvements that will promote the mission of the Del Mar Fairgrounds as a regional entertainment, recreational, cultural, and community asset, while continuing the financially responsible practice of maintaining self-sustainability." (*Ibid.*) Additional objectives include: to develop facilities and operational programs that have a synergistic economic benefit for the Fairgrounds and adjacent communities; provide sufficient on-site hotel accommodations, dining facilities, and modern exhibit hall space to support multiday conference/convention events; implement improvements that will attract a variety of events and users to enhance the Fairgrounds' economic self-sustainability; implement improvements that represent a balance of permanent facilities and open, flexible-use areas to support a wide range of activities relating to agriculture, education, entertainment, and recreation consistent with the mission statement, etc. (B000909-10.)

As to Alternative 2 (No Project/Existing Plan), Respondent did not find it to be economically infeasible. Rather, the EIR finds that it fails to meet several key Project objectives. It would not develop the facilities and operational programs to have a synergistic economic benefit for the Fairgrounds and the adjacent communities. It does not include facilities that would support increased use of the Project site during the interim season and lead to increased indirect economic benefits for the adjacent areas. It does not provide hotel and modern exhibit hall space to enable the successful operation of major events or overnight residential accommodations needed to support the continued success of horseracing at the Fairgrounds. (B000922.)

As to Alternative 4 (Reduced Project/No Interim Uses), it assumes implementation of the 2008 Master Plan project but limits Fairgrounds operation to the Fair and race meet without any activity during the 9-monthly interim period. (B000915-916.) Respondent did find this alternative financially infeasible as well as inconsistent with its Mission Statement and project objectives. (B000917.) Contrary to Petitioner's contention, the EIR provides comparative economic and financial information. It states that revenues received during the interim season represent approximately 32 percent of Respondent's current income. (B000916.) Both the total amount and percentage contribution of the interim season activity to Respondent's budget is expected to increase with implementation of the proposed Master Plan projects and the increased use of and revenue from the site during the interim season. (*Ibid.*) This alternative would result "in at least a 32 percent decrease in the [Respondent's] income, whereas the proposed project would result in income growth." (B004953.)

In sum, there is substantial evidence in the record to support Respondent's conclusions with respect to the scope of alternatives and infeasibility.

Based on the foregoing, the Court grants in part and denies in part Petitioner's writ. Petitioner is directed to prepare the Judgment and Writ.

**IT IS SO ORDERED.**

*Ronald S. Prager*

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Judge Ronald S. Prager