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Frank Bonvino v. Las Virgenes Municipal Water District
BC543637
June 4, 2014

OSC re: Preliminary Injunction (Moving Party: Petitioner Frank Bonvino)
Motion for an Injunction Bond (Moving party: Respondent Las Virgenes Municipal Water District)

Respondent's request for judicial notice is granted as to categories A-O. Evidence Code § 452 (c), (d), (h). Judicial notice is confined, however, to the exhibits accompanying the request, and not Respondent's descriptions of what they prove. The Court does not take judicial notice of Exhibits P, Q, and Petitioner's alleged failure to object to the mitigated negative declaration. Neither Exhibit P or Q is established as an official act and no evidence substantiates the assertion that Petitioner did not submit a comment.

Respondent's evidentiary objections are overruled. The objections fail to challenge specific evidence and thus are improper.

Petitioner's application for further injunctive relief is denied. Respondent's motion to set undertaking is denied as moot.

In determining whether to issue a preliminary injunction, the trial court considers two factors: (1) the likelihood that the petitioner will prevail on the merits of its case at trial, and (2) the interim harm that the petitioner is likely to sustain if the injunction is denied as compared to the harm that the respondent is likely to suffer if the court grants a preliminary injunction. *Pillsbury, Madison & Sutro v. Schectman* (1997) 55 Cal.App.4th 1279, 1283; *Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 408. Of particular import is the entitlement to the relief sought: there must be a reasonable probability of success on the merits in order for a preliminary injunction to issue. *San Francisco Newspaper Printing Co., Inc. v. Superior Court of Santa Clara County (Miller)* (1985) 170 Cal.App.3d 438, 442. Additionally, an injunction will not issue unless the moving party establishes both a real threat of immediate and irreparable interim harm (*Choice-in-Education League v. Los Angeles Unified School Dist.* (1993) 17 Cal.App.4th 415, 431), and the inadequacy of legal remedies (*Triple A Machine Shop v. California* (1989) 213 Cal.App.3d 131, 138). The party seeking the injunction bears the burden of proof. *O'Connell v. Superior Court of Alameda County (Valenzuela)* (2006) 141 Cal.App.4th 1452, 1481.

Proposed Injunction. Petitioner seeks an order prohibiting Respondent and its employees and agents:

> From starting or initiating and/or continuing any constructing, building, or blasting related to and/or associated with the project known as Las Virgenes Municipal Water District Backbone Improvement Program specifically related to the construction of a 5 million gallon water storage tank near the reservoir known as Westlake Reservoir (aka Las Virgenes Reservoir or Three Springs Reservoir). (App., p.10:19-25)

Mootness. Respondent contends that the proposed injunction is moot because the blasting activities will be completed by the June 4, 2014 hearing date (Lippman Decl., ¶ 16). The argument would have merit if the proposed injunction only targeted blasting. *Breaux v. Agricultural Labor Relations Board* (1990) 217 Cal.App.3d 730, 743 ("Mootness is sometimes defined in terms of the court's loss of ability to grant effective relief."). However, the proposed injunction addresses "constructing [and] building" as well, which Respondents concede will continue after the hearing date (Lippman, ¶ 17). The injunction is therefore not moot.

Probability of Prevailing. Petitioner must present evidence establishing that it can prevail at trial in order to be eligible for a preliminary injunction. *San Francisco Newspaper Printing Co., Inc.*, *supra*, 170 Cal.App.3d at 442; see also *O'Connell*, *supra*, 141 Cal.App.4th at 1481 (moving party's burden to establish entitlement to injunctive relief).

Statute-of-limitations issues. Much of Petitioner's grievance concerns Respondent's alleged failure to comply with the requirements of CEQA when publishing notice of its intention to proceed through a negative declaration (CEQA Guideline §§ 15072, 15074), failure to comply with the requirements for publishing the decision with the project (CEQA Guidelines § 15075) and the substantive decision to proceed through negative declaration (Public Resource Code §21080(c)). It is undisputed that Respondent published a notice of a "Draft Initial/Mitigated Negative Declaration" in the *Daily News* from August 26, 2009 to October 8, 2009 (RJN, Exh. B). The published notice indicated that public hearings were scheduled on the subject (*id.*). This notice of intention was also provided to the County of Los Angeles on August 26, 2009. (RJN, Exh. O). The mitigated negative declaration was subsequently adopted and the Project was approved at Respondent's regular meeting held on October 27, 2009 (RJN, Exh. C; D). The notice of this determination was subsequently filed with California's State Clearinghouse and filed with the County of Los Angeles Recorder on November 4, 2009 (RJN, Exh. E). All these determinations and publications took place years before the action was filed.

The statutory period of limitations applicable to a challenge to the use of a negative declaration under CEQA is thirty days from the filing of the notice as required by Public Resources Code § 21152(a). Public Resources Code § 21167(b). The statute of limitations is strictly enforced, regardless of the provision of personal notice to a petitioner. *Lee v. Lost Hills Water District* (1978) 78 Cal.App.3d 630, 634; see also *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 499-500 (discussing the "unusually" short statute of limitations and the public interest in the expeditious consideration and adjudication of CEQA challenges). This 30-day limitation also applies to Petitioner's claim that the August 26, 2009 pre-adoption notice of intention was defective. *Committee For Green Foothills v. Santa Clara County Board of Supervisors* (2010) 48 Cal.4th 32, 47-48 ("[*A*]*ny* challenge to that decision under CEQA must be brought within 30 days, regardless of the nature of the alleged violation (emphasis in original)."). Respondent adopted the mitigated negative declaration on October 27, 2009 (RJN, Exh. C) and the notice of determination was filed with the County, as required by Public Resource Code § 211512(a), on November 4, 2009 (RJN, Exh. E). As a result, Petitioner's first two requests for writ relief under CEQA were time-barred as of December 4, 2009 – approximately four years and five months before the petition was filed. Public Resource Code § 21167(b). This renders it extremely unlikely that Petitioner will prevail on those claims,

defeating his entitlement to injunctive relief. *San Francisco Newspaper Printing Co., Inc.*, 170 Cal.App.3d at 442.

Petitioner disputes this result, contending that the default 180-day CEQA statute of limitations applies and that the Project was only actually approved on January 14, 2014. Petitioner must establish both conditions to prevail on his argument. He fails to do so. The application of the 30-day period to Respondent's January 14, 2014 action still renders the petition untimely and the application of the 180-day period does not save the petition insofar as it addresses conduct that occurred in late 2009.

With respect to the first assertion, Petitioner claims that the notice of determination was defective, and therefore the 30-day period cannot be used, citing *Latinos Unidos de Napa v. City of Napa* (2011) 196 Cal.App.4th 1154, 1167 (the 30-day period of limitations did not apply when a notice of determination was not posted as required, applying the 180-day period of limitations). Petitioner contends that Respondent failed to timely file the notice of determination that a mitigated negative determination would be utilized, referencing CEQA Guideline § 15075(d), which provides that:

> If the lead agency is a local agency, the local agency shall file the notice of determination with the county clerk of the county or counties in which the project will be located within five working days after approval of the project by the lead agency. If the project requires discretionary approval from any state agency, the local lead agency shall also, within five working days of this approval, file a copy of the notice of determination with the Office of Planning and Research.

Respondent determined to use the mitigated negative determination on October 27, 2009, as noted above (RJN, Exh. C). The statutory notice was filed on November 4, 2009 (RJN, Exh. E). This is six work days instead of the five required by the statute. Petitioner cites no authority for the proposition that a *de minimus* deviation from a regulatory guideline should effectively disable a strictly enforced statutory limitation period supported by strong public policy. *Latinos Unidos* does not stand for this proposition. *Latinos Unidos* merely deals with a failure to adequately file or post the notice of determination; it does not address the situation where the notice of determination was adequately filed and posted but was untimely. Petitioner makes no reasoned argument that *Latinos Unidos* should apply to this situation as well and it is logically distinguishable. In *Latinos Unidos*, the notice of determination was not posted for an adequate period of time and the Court of Appeal determined that the "trigger event" for the statute of limitations – the "filing of the notice and the posting on a list of such notices" under CEQA Guideline § 15112(c)(1) – did not occur. *Id.*, 196 Cal.App.4th at 1160-1167. Here, the trigger event did occur; it simply occurred one day late. As a result, the 30-day period still applies.

Petitioner also asserts that the period provided for public review of the draft negative declaration was less than the 30 days required by CEQA Guideline § 15105(b), which provides:

> The public review period for a proposed negative declaration or mitigated negative declaration shall be not less than 20 days. When a proposed negative declaration or mitigated negative declaration is submitted to the State

> Clearinghouse for review by state agencies, the public review period shall not be less than 30 days, unless a shorter period, not less than 20 days, is approved by the State Clearinghouse.

The 30-day requirement Petitioner relies upon is for the review of a declaration *by state agencies*. Petitioner does not have standing to raise this objection. More importantly, Petitioner's evidentiary support reveals that he is not referring to review through the State Clearinghouse but rather the public notice in the *Daily News* (Steinhardt Decl., ¶ 14, cited by Petitioner). Regardless of whether this public notice period was adequate, it does not pertain to the post-approval posting with the County or the State, which is the trigger for the statute of limitations. *Latinos Unidos*, 196 Cal.App.4th at 1160-1167. Therefore, the 30-day period of limitations still applies and the first two causes of action of the petition are time-barred.

In any case, Petitioner's assertion that the project was only approved on January 14, 2014 is not supported by a preponderance of the evidence. In the event of substantively defective notice of determination, courts apply the statute of limitations in Public Resource Code § 21167(a), which provides that:

> An action or proceeding alleging that a public agency is carrying out or has approved a project that may have a significant effect on the environment without having determined whether the project may have a significant effect on the environment shall be commenced within 180 days from the date of the public agency's decision to carry out or approve the project, or, if a project is undertaken without a formal decision by the public agency, within 180 days from the date of commencement of the project.

Petitioner asserts that the relevant action for determining the 180-day period of limitations was Respondent Board's awarding of the construction contract concerning the disputed 5,000,000 gallon water tank to Hydrotech at its January 14, 2014 meeting (Ticktin Decl., ¶ 17; Exh. B, thereto). The award of the contract was merely action undertaken in furtherance of the decision to approve the project and act under a negative declaration, which occurred on October 27, 2009 (RJN, Exh. C, D; Lippman, ¶ 9). The Board's subsequent act in furtherance of the earlier approval does not "re-start" the period of limitations for the Petitioner. *Citizens for a Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91, 105-106.

The petition also asserts that Respondent abused its discretion by failing to file a supplemental CEQA document as a result of changed circumstances surrounding the Project, specifically, recent earthquakes and droughts. The requirement of a supplemental review is found in Public Resource Code § 21166, which provides as follows, in relevant part:

> When an environmental impact report has been prepared for a project pursuant to this division, no subsequent or supplemental environmental impact report shall be required by the lead agency or by any responsible agency, unless one or more of the following events occurs:
>
> * * *

(b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.

(c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.

While the language of the statute applies only to proceedings under an environmental impact report, the CEQA Guidelines extend the requirement of a supplemental document to projects proceeding under a negative declaration. CEQA Guideline § 15162; *Abatti v. Imperial Irrigation District* (2012) 205 Cal.App.4th 650, 668-674 (discussing CEQA Guideline § 15162 and the appellate opinion in *Benton v. Board of Supervisors of Napa County* (1991) 226 Cal.App.3d 1467).

Guideline 15162 provides that:

(a) When an EIR has been certified or a negative declaration adopted for a project, no subsequent EIR shall be prepared for that project unless the lead agency determines, on the basis of substantial evidence in the light of the whole record, one or more of the following:

(1) Substantial changes are proposed in the project which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;

(2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or

(3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:

(A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;

(B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;

(C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or

(D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.

(b) If changes to a project or its circumstances occur or new information becomes available after adoption of a negative declaration, the lead agency shall prepare a subsequent EIR if required under subdivision (a). Otherwise the lead agency shall determine whether to prepare a subsequent negative declaration, an addendum, or no further documentation.

(c) Once a project has been approved, the lead agency's role in project approval is completed, unless further discretionary approval on that project is required. Information appearing after an approval does not require reopening of that approval. If after the project is approved, any of the conditions described in subdivision (a) occurs, a subsequent EIR or negative declaration shall only be prepared by the public agency which grants the next discretionary approval for the project, if any. In this situation no other responsible agency shall grant an approval for the project until the subsequent EIR has been certified or subsequent negative declaration adopted.

(d) A subsequent EIR or subsequent negative declaration shall be given the same notice and public review as required under Section 15087 or Section 15072. A subsequent EIR or negative declaration shall state where the previous document is available and can be reviewed.

Petitioner appears to contend that Respondent abused its discretion in failing to draft any supplemental CEQA documentation under Guideline § 15162(b). Respondent's determination in this regard is reviewed under the "substantial evidence" standard and not the "fair argument" standard. *Abatti*, 205 Cal.App.4th at 680; *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1021. Additionally, Petitioner is required to demonstrate that the conditions at issue were followed by a discretionary approval, triggering the requirement to issue a supplemental document. CEQA Guideline § 15162(c). Petitioner does not analyze these legal issues, which suggest substantial defects in his application.

Preliminarily, the Court must review the *entire record* to determine whether or not substantial evidence supports the decision to not issue a supplemental negative declaration or impact report. CEQA Guideline § 15162(a); *Citizens for a Megaplex-Free Alameda*, 149 Cal.App.4th at 112-114. It does not appear that the Court has all the evidence considered by Respondent – including, relevantly, the evidence considered when arriving at the decision to proceed through a mitigated negative declaration in the first place. As a result, the Court cannot determine whether

the allegedly new information or changed conditions require a supplemental compliance document, because it cannot determine if there was substantial evidence in the record supporting a determination that these circumstances met the requirements to compel a new round of CEQA compliance under Guideline § 15162(a). As a result, the Court lacks the necessary evidence to determine whether Petitioner can prevail. Petitioner thus fails to meet his burden of establishing the probability of prevailing. *O'Connell*, 141 Cal.App.4th at 1481. Additionally, Petitioner is required to establish that a discretionary approval has occurred *after* his novel circumstance arose. CEQA Guideline § 15162(c). Petitioner fails to address this issue and fails to carry his burden as a result. Therefore, the application for further injunctive relief must be denied.

Equity and Balance of Harms. To be eligible for an injunction, the proponent must also establish that it would suffer greater injury if the offending conduct is not enjoined than the responding party would suffer from the injunction. *Huong Que, Inc.*, *supra*, 150 Cal.App.4th at 408. Petitioner contends that the balance of harms favors him, invoking the danger of Valley Fever infections to himself and the populace at large, asserting that it is "likely" to harm people and the environment. However, Petitioner advances no evidence that a Valley Fever outbreak is imminent, only that Respondent did not adequately assess the risks of Valley Fever when it tested for the virus in 2011. Petitioner will not be permitted to "bootstrap" the harm caused by a hypothetical Valley Fever outbreak into the equitable calculation of which party the balance of harms favors. *Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1084 (actual evidence of immediate harm is required to support a request for injunctive relief).

Petitioner also asserts that irreparable damage is presumed when an agency fails to thoroughly evaluate the environmental impact of a proposed action. *Save Our Ecosystems v. Clark* (9th Cir. (Or.) 1984) 747 F.2d 1240, 1250. While the balance of harms may ultimately favor Petitioner as a result of this principle, the weight given to this factor is mitigated by the fact that a "thoughtful assessment" of the Valley Fever risk has been conducted, even if Petitioner's expert ultimately finds it incomplete or incorrect (Nirula Decl., ¶ 6). *Friends of the Earth, Inc. v. Coleman* (9th Cir. (Cal.) 1975) 518 F.2d 323, 330 (a "significant" equitable consideration that some form of review had been conducted, even if it was less stringent than what should have been undertaken). Additionally, Respondent provides evidence that halting the project would have a financial impact on Respondent, which would cause injury to Respondent's rate payers and would also pose increased fire risk to the area by rendering the fire flow insufficient, pursuant to County Fire Department Regulations (Lippman, ¶¶ 15, 17). Weighing these factors, the Court cannot find that the balance of harms favors Petitioner.

The Court also considers Petitioner's delay in bringing his application for injunctive relief. The petition was filed in late April 2014, presumably shortly after blasting activities associated with the Project began (Lippman, ¶ 16). However, Petitioner was present at a public workshop concerning the Project on July 30, 2011 (*id.*, ¶ 13; Exh. 1; see also Bonvino Decl., ¶ 3). The minutes from the July 30, 2011 meeting indicate that it included a discussion of "blasting required to construct the tank," as well as a question and answer session (RJN, Exh. H). This suggests a substantial delay in pursuing Petitioner's remedies, which weighs against the granting of injunctive relief. *Linthicum*, *supra*, 175 Cal.App.4th at 266-267 (claims for injunctive relief are resolved upon equitable principles).