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SUPERIOR COURT OF CALIFORNIA
COUNTY OF DEL NORTE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF DEL NORTE

BERTSCH-OCEAN VIEW COMMUNITY SERVICES DISTRICT,

Petitioner,

v.

DEL NORTE LOCAL AGENCY FORMATION COMMISSION,

Respondent.

CITY OF CRESCENT CITY and ELK VALLEY RANCHERIA,

Real Parties in Interest.

Case No. CVPT-2016-1124

~~[REVISED PROPOSED]~~ ORDER DENYING PETITION FOR WRIT OF MANDATE

Date: April 3, 2017
Time: 9:00 a.m.
Judge: Hon. Leslie C. Nichols

Action Filed: April 15, 2016

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On April 15, 2016, Petitioner Bertsch-Ocean View Community Services District ("Bertsch") filed a Verified Petition for Writ of Administrative Mandamus ("Petition") challenging Del Norte County Local Agency Formation District's ("LAFCo") approval of the City of Crescent City's ("City") application to extend water services outside of the City's boundary to two parcels of land owned by Elk Valley Rancheria, California ("Tribe").

The Petition came on for hearing on April 3, 2017 at 9:00 a.m. All parties appeared through counsel. The Court having considered all pleadings in this matter and arguments of counsel, Bertsch's Petition is DENIED. Responding Parties' Joint Request for Judicial Notice is GRANTED.

Standard of Review

To prevail on its CEQA claims, a petitioner must establish that the agency prejudicially abused its discretion, either by making a determination or decision that is not supported by substantial evidence or by failing to proceed in a manner required by law. *See* Public Resources Code § 21168.5[1]; *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376, 392. While CEQA requires informed and balanced decision-making, courts have warned that the statute "must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement." *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 576; see *also Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal.App.5th 677, 685 ("CEQA is not a weapon to be deployed against all possible development ills."). Consistent with this ~~principal,~~ principle. an agency's decision is supported by substantial evidence if there is "enough relevant information [in the record] and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." Cal. Code Regs., tit. 14 (California Environmental Quality Act "Guidelines"), § 15384. Petitioners must also affirmatively show prejudice to prevail, as "there is no presumption that error is prejudicial." § 21005(b); *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013)

[1] Further unspecified section references are to the Public Resources Code.

1 57 Cal.4th 439, 463.

2 For all other claims, a petitioner seeking a writ of administrative mandate must
3 demonstrate that the agency abused its discretion by failing to proceed in the manner required by
4 law, or that the decision is not supported by the findings, or the findings are not supported by the
5 evidence. Code Civ. Proc. § 1094.5. There is a presumption that the agency performed its
6 regular duties (Evid. Code § 664), and that the agency's findings are supported by substantial
7 evidence (*Smith v. Regents of Univ. of Cal.* (1976) 58 Cal.App.3d 397, 405). Courts "may not
8 reweigh the evidence and must view it in the light most favorable to the [agency's] actions,
9 indulging all reasonable inferences in support of those actions." *Ghilotti Construction Co. v.*
10 *City of Richmond* (1996) 45 Cal.App.4th 897, 903. Similarly, courts do not substitute their
11 judgment for that of the administrative body. *Pitts v. Perluss* (1962) 58 Cal.2d 824, 834-35, fn.
12 4.

13 **First Cause of Action: CEQA**

14 The Petition's First Cause of Action alleges that LAFCo violated the California
15 Environmental Quality Act, Public Resources Code section 21000, et seq. ("CEQA") by failing
16 to prepare a new negative declaration or environmental impact report for the proposed water
17 services extension ("Project"). Verified Petition for Writ of Administrative Mandamus ("Pet.")
18 ¶ 42. However, LAFCo properly relied on a 2010 Initial Study and Negative Declaration ("2010
19 Negative Declaration") prepared by the County, which analyzed the environmental impacts of a
20 local coastal program amendment permitting the extension of City sewer and water services to
21 the Tribe's property and concluded those impacts would be less than significant. Bertsch did not
22 challenge the adequacy of that document, and the time to do so has long since passed.
23 § 21167(b).

24 Nor has Bertsch demonstrated that supplemental environmental review was required.
25 CEQA Guidelines section 15162(a) provides that, where a negative declaration has already been
26 prepared, a new negative declaration or a supplemental EIR is required *only* if: "(1) Substantial
27 changes are proposed in the project which will require major revisions of the previous EIR or
28 negative declaration due to the involvement of new significant environmental effects or a

substantial increase in the severity of previously identified significant effects; [or] (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[.]" *See also Friends of College of San Mateo Gardens v. San Mateo County Community College* (2016) 1 Cal.5th 937, 944 (EIR or new negative declaration required if "major revisions to the previous environmental document are nevertheless required due to the involvement of new, previously unstudied significant environmental impacts").[2]

Bertsch has not identified any substantial changes in the Project since the 2010 Negative Addendum was prepared. Bertsch asserts that the Tribe now plans to construct a smaller resort-casino than originally planned, but a *reduction* in the size and scope of a development project is not a "substantial change" requiring new environmental analysis under CEQA. *Snarled Traffic Obstructs Progress v. City and County of San Francisco* (1999) 74 Cal.App.4th 793, 801. Bertsch also argues that the extension of services to the two-acre, Ocean Way Motel property is a "substantial change" to the project requiring subsequent environmental review. But this extension was already part of the "project" approved by the County and California Coastal Commission in 2011. Administrative Record ("AR") 436-38, 432-33.

At the merits hearing, Bertsch also argued that the "project" had changed because earlier project descriptions had not indicated that water could be provided to the Tribe through Bertsch's infrastructure. However, the record indicates otherwise. For example, the environmental impact statement ("EIS") prepared by the Bureau of Indian Affairs in 2006 specifically identified and analyzed the impacts of obtaining City potable water "either directly from the City's system or via the Bertsch-Ocean View Community Services District (BOVCSD)." AR 360.24; *see also* AR 609. The 50-page water supply assessment attached to

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[2] Additional review may also be required where "[n]ew information of substantial importance" comes to light and reveals new or increased significant effects. Guidelines § 15162(a)(3). Bertsch does not claim that any such new information has become available here.

1 the EIS described in detail Bertsch's system and capacity (*see generally* AR 360.6-360.59), and
2 concluded that there would be no significant, adverse environmental impacts associated with
3 delivering City water through Bertsch's infrastructure. AR 689 (Bertsch has sufficient capacity
4 to serve casino and resort; project would require adding lines to the existing corridor and but
5 would not require alteration of the existing lines). The 2010 Negative Declaration cites to this
6 EIS repeatedly, noting that the EIS analyzed the environmental impacts related to developing the
7 resort and casino. *See, e.g.*, AR 070, 077, 079, 086.

8 In 2005, the Coastal Commission also noted that the casino and resort project would be
9 served by City water either directly through City infrastructure or through Bertsch when it
10 determined that the Tribe's resort and casino was consistent with California's Coastal
11 Management Program. AR 360.67 (project description in 2005 Coastal Commission consistency
12 findings, stating "[w]ater [for the Tribe's resort and casino] would be served by the City of
13 Crescent City or the (adjacent) Bertsch Ocean View Community Services District (BOVCSD)").
14 In 2011, the Coastal Commission reiterated this point in considering the water supply impacts of
15 allowing the City to provide water to the Tribe's land. AR 380 ("Therefore, the Commission
16 finds that expansion of the Bertsch Ocean View Community Service District's domestic water
17 supply public works facilities to serve the area that the approved LCP amendment would
18 facilitate would not result in a deprival of water services to other essential and priority types of
19 development and uses …").

20 In fact, Bertsch's own correspondence and pleadings indicate that it has known for years
21 that the Tribe's property could be served with water either through City infrastructure or through
22 Bertsch's. *See, e.g.*, AR 315 (noting Bertsch had discussed the possibility of providing water to
23 the Tribe for eight years); Opening Brief of Petitioner Bertsch-Ocean View Community Services
24 District ("Open. Br.") at 3 ("Beginning in 2008, the City and the Tribe proposed to provide
25 water services to the Martin Ranch and Ocean Way Motel properties by 'wheeling' water
26 through Bertsch's distribution system."). As a result, substantial evidence supported LAFCo's
27 determination that there had been no significant changes to the project warranting new
28 environmental review.

Further, Bertsch fails cite to any evidence that extending water services to the Tribe's property would have new, unanticipated, and significant environmental impacts. A petitioner seeking a writ of mandate under CEQA "has the burden of proof of establishing by citation to the record the existence of substantial evidence supporting a fair argument of significant environmental impact." *See Citizens for Responsible & Open Gov. v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1333 (citations and internal quotation marks omitted). A "significant effect on the environment" is "a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance. An economic or social change by itself shall not be considered a significant effect on the environment." *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 881; Guidelines § 15382; *see also Citizens for Responsible & Open Gov.*, 160 Cal.App.4th at 1333; Guidelines § 15358(b) ("Effects analyzed under CEQA must be related to a physical change."); § 21068. The mere existence of public controversy is not evidence that a project may have significant environmental impacts. § 21082.2(b).

The only record citation offered by Bertsch to support its claims of potential environmental impacts is a letter from its attorney to LAFCo; Bertsch asserts that "the Tribe's responses [to Bertsch's questions] lacked sufficient technical information to allow Bertsch (and LAFCo) to adequately assess the potential that Bertsch's reservoir might be emptied under certain scenarios, thus 'causing physical strain to both [Bertsch's and Tribe's] water systems and dragging up sediments in [Bertsch's] distribution system.'" Open. Br. at 10 (quoting attorney letter at AR 356).[3] But Bertsch offers no explanation why such effects, even if they were to

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[3] At the merits hearing, counsel for Bertsch cited to several pages within this letter to support its claim that new CEQA review was required. In particular, counsel asserted that the letter included information about a "failure" in the Bertsch system that happened after the 2010 Negative Declaration was approved. However, the cited letter simply states that there was "[a] recent failure of the County's pressure sewer crossing of Highway 101[, which necessitated closure of the BOVCSD's water feed and dependence on its reservoir for a number of hours
(footnote continued on next page)

occur, would constitute *environmental* impacts subject to analysis under CEQA. Courts have consistently rejected claims that a lead agency must consider and analyze impacts under CEQA that do not result in physical changes to the environment. *See, e.g., City of Hayward v. Bd. of Trustees of Cal. State Univ.* (2015) 242 Cal.App.4th 833, 843 (impacts to emergency services); *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, 697 (impacts to parking availability); *Goleta Union School Dist. v. Regents of the Univ. of Cal.* (1995) 37 Cal.App.4th 1025, 1032 (impacts on school overcrowding); *No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 256 (effect on local business). Bertsch has never explained, must less supported with evidence, how increasing use of its infrastructure would translate to new significant environmental impacts. Bertsch offers no evidence that extending water services to the Tribe's property would, for example, "[r]equire or result in the construction of new water . . . facilities or expansion of existing facilities, the construction of which could cause significant environmental effects" (AR 094), or exceed available water supplies (AR 097), two thresholds of significance adopted by LAFCo.[4]

Moreover, the assertions of Bertsch's counsel that the project will have significant environmental impacts are not substantiated with any factual evidence in the record, such as the opinion of a technical expert, and thus do not constitute "substantial evidence" that any such impact may occur. *See, e.g., Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928-929 ("mere argument, speculation, and unsubstantiated opinion, even expert opinion, is not substantial evidence for a fair argument"); *Citizens' Com. to Save Our Village v. City of*

(footnote continued from previous page)
during the repair process." AR 357. There is no indication in the letter when this failure occurred or why it would suggest that providing water to the Tribe's land would have significant impacts.

[4] The remainder of Bertsch's comments during the administrative proceedings raised questions about the water demands of the Tribe's resort and casino. *See, e.g.*, AR 317 (list of questions). As the record reflects, Bertsch was provided with answers to these questions repeatedly over the years. *See, e.g.*, AR 348-49 (responding to questions about water demand and noting that the responses had been provided to Bertsch in August and September 2009). Moreover, simply expressing confusion about the scope of a project is not substantial evidence that the project will have significant environmental impacts.

Claremont (1995) 37 Cal.App.4th 1157, 1170 (expert's speculation and conjecture about potential impacts did not amount to substantial evidence, because they rose only to the same level of reliability and credibility as the evidence constituting their foundation). In fact, the only evidence in the record on this point clearly shows that providing water to the Tribe would have no adverse impacts on the environment or Bertsch's infrastructure. *See* AR 689, 629, 360.14, 360.46 (analyzing average daily usage of 80,000 or 86,000 gpd).

Likewise, Bertsch offers no substantial evidence indicating that the Tribe plans to develop the Ocean Way Motel property. Open. Br. at 12. Indeed, the record clearly shows the contrary: the Tribe's only plan for that property was to demolish the existing structure and clean up the site, a plan the Tribe already completed. AR 108-09, 282, 346. Without any concrete development proposal for the site, additional environmental review would be meaningless. *Friends of the Sierra Railroad v. Tuolumne Park & Recreation Dist.* (2007) 147 Cal.App.4th 643, 657-58.

Finally, Bertsch also appeared to argue at the merits hearing that the decision to "wheel" City water through Bertsch's infrastructure—rather than annex the Tribe's property into Bertsch's service area—triggered CEQA's requirement for new environmental review. Once again, however, Bertsch offers no evidence that a "wheeling" arrangement would have any different environmental impacts from a direct contract between Bertsch and the Tribe. In fact, when pressed on this point at the LAFCo hearing, Bertsch's engineer conceded there was none; the only difference was financial, not environmental. AR 166-67 (only difference between annexation and wheeling is money, not impact to system). Moreover, the City filed a Notice of Exemption under CEQA on April 10, 2015 for the water wheeling MOU between the City and the Tribe. As a result, even if the decision to "wheel" water were a "project change," it would not require new environmental review because there is no evidence that this change would have new significant environmental impacts.

Second Cause of Action: Cortese-Knox-Hertzberg Act

The Petition's Second Cause of Action alleges that LAFCo violated the Cortese-Knox-Hertzberg Local Government Reorganization Act ("Act"), Government Code sections 56133

and 56375. Pursuant to Government Code section 56375(p), LAFCOs may "authorize a city or district to provide new or extended services outside its jurisdictional boundaries pursuant to Section 56133." Government Code section 56133 provides:

> (a) A city or district may provide new or extended services by contract or agreement outside its jurisdictional boundaries only if it first requests and receives written approval from the [LAFCO].
>
> (b) The [LAFCO] may authorize a city or district to provide new or extended services outside its jurisdictional boundary but within its sphere of influence in anticipation of a later change of organization.

LAFCO approval is not necessary, however, for "[a]n extended service that a city or district was providing on or before January 1, 2001." Gov. Code § 56133(e)(4).

This second cause of action fails for three reasons. *First*, it is undisputed that the property to be served is within the City's sphere of influence, and the plain text of Government Code section 56133(b) does not require LAFCo to make any additional findings to approve the extension. As Bertsch acknowledges, a "sphere of influence" is defined as "a plan for the probable physical boundaries and service area of a local agency." Open. Br. at 15; Gov. Code § 56076. Thus, by definition, land within a sphere of influence is, by definition, intended to be annexed in the future, and no evidence other than a property's location within a sphere of influence is necessary to satisfy this section.

Second, there is substantial evidence in the record that the City and Tribe intend for the Tribe's land to be annexed within the City's boundaries in the future. In its February 15, 2016 letter to LAFCo, the Tribe explained that, although it was not reasonably feasible to submit a concurrent application for annexation at that time due to potential Coastal Commission opposition, "the Tribe is willing to enter into a Memorandum of Understanding consenting to annexation ('Consent MOU') of the Martin Ranch and Ocean Way Motel properties into the City should annexation become feasible in the future." AR 343. The City echoed these sentiments in its February 18, 2016 letter to LAFCo, which states that its purpose "is to demonstrate" that the City's request to serve the Tribe's property "is in anticipation of a future change of organization." AR 352. This letter notes that there is "potential for annexation in the future," and that, if annexation becomes feasible, the City will consider annexing the properties.

proceeding[s] designed to achieve justice where no other remedy is available"). Thus, Responding Parties' Request for Judicial Notice is granted in its entirety.

IT IS SO ORDERED. Responding Parties are directed to prepare the judgment.

DATED: MAY 1, 2017

HON. LESLIE C. NICHOLS

887439.1

PROOF OF SERVICE BY MAIL (1013a, 2015.5 C.C.P)

I am a citizen of the United States and a resident of the County of Del Norte. I am over the age of eighteen (18) years and am not a party to the entitled action; my business address is 450 H St, Crescent City California 95531.

On MAY 04 2017 I served ORDER DENYING PETITION FOR WRIT OF MANDATE dated 5/1/2017 by depositing a true copy in the United States mail in Crescent City, California, in a sealed envelope with postage prepaid, addressed as follows:

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And by depositing a true copy as follows;

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I certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that it was executed at Crescent City, California this date.

DATED: MAY 04 2017

J. Reynolds

Judy Reynolds
Judicial Assistant