SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

Bel Air Homeowners Alliance, Petitioner, v. City of Los Angeles, et al., Respondents.	Case No. BS151411 **Order Denying Petitioner's Motion for a Preliminary Injunction, and/or a Stay**

Background

On October 2, 2014, Petitioner Bel Air Homeowners Alliance (Petitioner) sued Respondents City of Los Angeles, the Los Angeles City Council, the Planning and Land Use Management Committee, and the Board of Building and Safety Commissioners (collectively, the City). Petitioner asserts two causes of action against the City: violation of the California Environmental Quality Act ("CEQA"), Public Resources Code § 21000 et seq.; and violation of Los Angeles Municipal Code section 91.70067.7.4(5) governing issuance of haul route permits. Petitioner also sued WPG 10697 Somma, LLC (WPG) and Shannon Nonn (Nonn) as Real Parties in Interest. In essence, Petitioner seeks to prevent WPG from building a 40,000 square-foot residential home[1] on two adjacent lots at 10697 and 10699 Somma Way in the City of Los Angeles (Project Site).

On January 16, 2015, Petitioner filed an ex parte application to enjoin the City and WPG from "commencing or continuing any vegetation clearance, grading, drilling, or dirt hauling, away from the Project Site located on two lots at 10697 and 10699 West Somma Way, in the Bel Air community of the City," until the City complies with CEQA by preparing and certifying an Environmental Impact Report (EIR). (Ex Parte Application, p. 1). Judge Robert O'Brien denied the application the same day. He explained that "the Court is unable to conclude that Petitioner is likely to prevail or the Respondents are unlikely to prevail. . . . [and] a stay at this stage of the proceedings would be against the public interest."

Notwithstanding Judge O'Brien's ruling, on February 23, 2015 Petitioner filed a motion for a preliminary injunction and/or an administrative stay. Notably, Petitioner's notice of motion does not state which party it seeks to enjoin or what acts it seeks to enjoin. Although Petitioner's proposed order seeks to enjoin both WPG and the City from commencing and/or continuing the export of earth from the Project Site, and to stay the haul route permit and Mitigated Negative Declaration issued by the City to WPG, it is not clear from the memorandum of points and authorities that Petitioner seeks any relief against the City or Nonn, and, in fact, the City did not file an opposition to the motion. Since WPG does not raise any objection to Petitioner's notice

[1] The house itself will be 16,300 square-feet in size on two levels; the remaining square footage is for an underground garage and basement. (Hallo Declaration, ¶ 9).

of motion, and since the body of the memorandum of points and authorities states that Petitioner "seeks to enjoin the now imminent export of approximately 25,074 cubic yards of earth from the Project Site on thousands of large dump trucks," the Court assumes this is the scope of the requested injunction against WPG.[2] The matter was argued and submitted on March 17, 2015. The motion is denied for the reasons that follow.

Evidentiary Objections

Petitioner objects to various declarations submitted by WPG because the evidence in these declarations was not included in the administrative record. The objections are overruled. These declarations were filed by WPG in opposition to Petitioner's motion for a preliminary injunction, not in opposition to its request for a writ of mandate. Code Civ. Proc. § 527(e) expressly provides that the opposing party may present affidavits relating to the granting of the preliminary injunction. In fact, *Petitioner* has submitted declarations in support of its motion to establish that it is likely to prevail on the merits. (See, e.g., Reply Brief, p. 9:27-28 to p. 10:10, referencing the Herscu Declaration; and p. 9:13 ("The Declarations from Bel Air Neighbors Are Also Substantial Evidence").)

Summary of Applicable Law

Code Civ. Proc. § 527, subdivision (a), provides that: "An injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor." Thus, while the injunction may rest upon either a verified complaint or affidavits, the law is settled that the allegations of either must be factual; conclusory averments in either are insufficient to support issuance of an injunction. For example, allegations declared to be true on "information and belief" will not support an injunction. Riviello v. Journeymen Barbers, (1948) 88 Cal.App.2d 499, 503.

The determination whether to issue a preliminary injunction requires the trial court to exercise its discretion by considering and weighing two interrelated factors, specifically, the likelihood that plaintiffs will prevail on the merits at trial, and the comparative harm to be suffered by plaintiffs if the injunction does not issue against the harm to be suffered by defendants if it does. King v. Meese, (1987) 43 Cal.3d 1217, 1226. The more likely it is that plaintiffs will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue. Id. at p. 1227. Further, "if the party seeking the injunction can make a sufficiently strong showing of likelihood of success on the merits, the trial court has discretion to issue the injunction notwithstanding that party's inability to show that the balance of harms tips in his favor. [Citation.]" Common Cause v. Board of Supervisors, (1989) 49 Cal.3d 432, 447. The degree of adverse effect on the public interest or interests of third parties may also be considered by the court. Cohen v. Board of Supervisors, (1985) 40 Cal. 3d 277, 286 n. 5.

[2] To the extent Petitioner also seeks to enjoin the City or Nonn, it has not explained why or what evidence supports an injunction against them.

Discussion

1. *Likelihood of Success*

CEQA's fundamental purpose is to promote the "maintenance of a quality environment for the people of this state now and in the future . . . ." Public Resources Code, §21000(a). Since its enactment in 1970, the courts have acknowledged that the act's purpose is an important one. See, e.g., Friends of Mammoth v. Board of Supervisors,(1972) 8 Cal. 3d 247, 259 ("[T]he Legislature intended [it] to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.").

When a local agency considers the environmental effects of a proposed project, CEQA provides three options. The agency must prepare and certify the completion of an EIR if the project "*may* have a significant effect on the environment." Public Resources Code § 21151, subd. (a), (italics added). If the agency determines the project will not have a significant effect on the environment, it must prepare a negative declaration to that effect. Public Resources Code § 21080, subd. (c)(1); Cal. Code Regs., tit. 14, § 15064, subd. (f)(3).) Finally, if the project has potentially significant environmental effects but these effects will be reduced to insignificance by mitigation measures that the project's proponent has agreed to undertake, CEQA requires the local agency to prepare a mitigated negative declaration. Public Resources Code § 21080, subd. (c)(2).

Determination of whether an EIR is required when a project is first reviewed depends upon the "fair argument" test. See Friends of Davis v. City of Davis, (2000) 83 Cal.App.4th 1004, 1016–1017; Sierra Club v. County of Sonoma, (1992) 6 Cal.App.4th 1307, 1316. "The 'fair argument' test is derived from section 21151, which requires an EIR on any project which 'may have a significant effect on the environment.' That section mandates preparation of an EIR in the first instance 'whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact.' [Citation.] If there is substantial evidence of such impact, contrary evidence is not adequate to support a decision to dispense with an EIR. [Citations.] Section 21151 creates a low threshold requirement for initial preparation of an EIR and reflects a preference for resolving doubts in favor of environmental review when the question is whether any such review is warranted. [Citations.] For example, if there is a disagreement among experts over the significance of an effect, the agency is to treat the effect as significant and prepare an EIR. [Citations.]" Sierra Club v. County of Sonoma, supra. 6 Cal.App.4th at pp. 1316–1317.

Petitioner contends, among other things, that there is a fair argument that the development approved by the City on the Project Site may have a significant impact on the environment: fire emergency access/evacuation impacts; truck traffic impacts; and truck noise impacts. For purposes of this motion, the Court finds that Petitioner has advanced sufficient evidence to establish a fair argument that the project will have a significant impact on the environment through increased truck traffic.[3] Thus, Petitioner has shown that an EIR should have been prepared.

[3] The other arguments advanced by Petitioner in this motion are not persuasive. Petitioner also does not argue that WPG violated, or is about to violate, Los Angeles Municipal Code section 91.70067.7.4(5).

Here, Petitioner submitted an expert report prepared by RK Engineering ("RK") on August 22, 2014, to support its claim that the haul plan will have a significant adverse effect on traffic conditions in the area. (Zeilenga Declaration, Exhibit H, p. 10). RK measured the traffic at certain points along the proposed haul route and found that the level of truck traffic along those routes was already high for a residential area, particularly because these streets were not of an adequate size to handle large trucks. (Id., p. 4-5, 8.) Based on an analysis of the proposed route, RK concluded that even with the mitigation measures the traffic along the road would increase by between 10.9% and 49.1%. (Id., pp. 5, 7.) The report explicitly considered each proposed mitigation measure, but concluded that none of them would alleviate the traffic problems because the total number of truck trips would be the same regardless of the measures. (Id., p. 8-10.) While WPG criticizes this report as being premised on an incorrect calculation of the total amount of dirt that will be removed, the discrepancy between RK's assumption (29,474 cubic yards) is not significantly different from WPG's admitted needs (approximately 25,000 cubic yards). (Compare Id., p. 1 to Hallo Declaration, ¶ 12.)

In sum, Petitioner has shown some likelihood that it will prevail on the merits of its CEQA cause of action. This finding, however, has no bearing on the upcoming writ trial. Indeed, evidence that, if viewed in isolation, might seem to give rise to a fair argument may ultimately prove insubstantial after all if other information in the record shows that the evidence is merely speculation, unsubstantiated opinion, or is inaccurate or misleading. See Apt. Ass'n of Greater L.A. v. City of L.A., (2001) 90 Cal. App. 4th 1162, 1176.

2. *Balance of Interim Harm*

Each side claims that the balance of interim harm tips sharply in its favor.

Petitioner argues that in the absence of preliminary relief it will lose its ability to require the City to conduct an EIR before allowing the hauling to occur; if no preliminary relief is issued, the dirt will be hauled away by time of trial and the issue will be moot. Petitioner also argues that significant traffic, fire safety, and noise issues will be exacerbated if the hauling is permitted to go forward. In turn, WPG argues that the Property Site's current condition poses a risk to public safety and adjacent homeowners. WPG also argues that it will suffer significant financial losses if it is enjoined from hauling dirt for approximately four months. Considering the relative interim harm to the parties, the Court finds that the balance of harm weighs against injunctive relief at this time.

First, although the dirt hauling will be allowed to occur, this lawsuit will not be moot if the injunction is denied because the construction of the home will not be completed until 2017 and the trial on the writ is scheduled in several months. Certainly, WPG will proceed at its peril with continued development of the Project Site if it turns out that Petitioner is ultimately successful.

Second, and most importantly, the public is at substantial risk unless WPG is able to remove the 25,000 cubic yards of dirt from the Project Site. Here, there is evidence that the Project Site continues to be unstable in its current condition and may result in a massive landslide unless the dirt is removed. (Hallo Declaration, ¶¶ 9-10, 12, 14; Fishburn Declaration, ¶¶ 11-14). Petitioner's own declarant, Robert Herscu, states that in the Project Site's current condition, "dirt

was blown everywhere and there was a thin layer of dirt over [his] house." (Herscu Declaration, ¶ 7). No evidence was presented that WPG can prevent 25,000 cubic yards of dirt from moving or blowing by any means other than by removing the dirt from the Project Site.

Third, WPG submitted evidence that it will suffer substantial financial losses if the project is stopped for several months. (Hallo Declaration, ¶¶ 16, 19).

Fourth, while there is always the danger, as in any construction project, that one of the hauling trucks will hit a pedestrian or that a fire truck may encounter some delays if a fire broke out near the Project Site, the City imposed significant mitigation requirements in the MND. For example, trucks may operate only during the week and only during school hours, from 9 a.m. to 3 p.m. WPG is also limited to one truck at a time and must have flag men or flag women with two-way radios during hauling hours. While Petitioner also alleges that if the dirt hauling is allowed, "the neighborhood children will have to cease" playing in the street (Chapman Declaration, ¶ 2), Petitioner does not explain why children will be playing in the street between 9:00 a.m. and 3:00 p.m. during the week without supervision.

Fifth, it is significant that another Bel Air homeowners' organization, the Bel-Air Association, supports the project in return for WPG agreeing to certain terms and conditions. (Exhibit A to the Fisk Declaration). For example, WPG agreed that no construction truck or dirty hauling vehicle will leave the Project Site after 3:00 p.m., and the "Dirt Haul Trucks must be staggered to a minimum of 10 minutes between the departures of each Dirt Haul Truck leaving the project site." (Id.). While Petitioner questions the Bel-Air Association's motives, it has not advanced any competent evidence to undermine the fact that another group of residents in the same neighborhood supports the project and, presumably, can live with the additional noise and traffic generated by the project.[4]

Certainly, the Court appreciates that as a matter of common sense, there will be more noise and more traffic as a result of the hauling of dirt on trucks from the Project Site. The additional noise and traffic, while inconvenient, unpleasant, and even significant for some of Petitioner's members, do not constitute irreparable harm to justify the issuance of a preliminary injunction on this record. Here, there is no specific and competent evidence that any of Petitioner's members will be unable to leave their homes as a result of the truck hauling traffic, or that these trucks will be so loud that Petitioner's members will be unable to work from their homes or otherwise enjoy the comfort of their homes. Put another way, a fair argument that the dirt removal plan will have an adverse effect on traffic conditions in the area does not mean that Petitioner has shown that its members will suffer irreparable harm unless an injunction is issued. While everyone wants less noise and less traffic, Petitioner's members, like the members of the Bel-Air Association, live in the second largest city in the country. Noise and traffic are part of the fabric of Los Angeles.

[4] In his reply declaration, Dan Fisk, Petitioner's chairman, contends that it has been unable to obtain records from the Bel-Air Association. (Fisk Declaration, ¶ 9). However, this lawsuit was filed in October 2014 and no motion to compel is pending against anyone, including any third-party. There is no evidentiary basis to support Fisk's contention that the Bel-Air Association is not a typical homeowner's association, or the inference that it is biased towards developers.

3. *Stay under CCP § 1094.5(g)*

Finally, Petitioner requests a stay of the haul permit under Code of Civil Procedure section 1094.5(g). That section allows the Court to stay an administrative decision that is being challenged unless it is against the public interest. For the reasons discussed above, it is against the public interest to stop the removal of the dirt from the Project Site.

Disposition

Petitioner's motion for a preliminary injunction and/or a stay is denied. Although Petitioner has shown some likelihood it will prevail on the merits, the comparative harm to be suffered by Petitioner if the injunction does not issue against the harm to be suffered by WPG and the public if it does, does not support an injunction or a stay.

The clerk shall provide notice to counsel of record.

IT IS SO ORDERED.

March 23, 2015

Luis A. Lavin
Judge of the Superior Court of California