

**SUBMITTAL TO THE BOARD OF SUPERVISORS
COUNTY OF RIVERSIDE, STATE OF CALIFORNIA**



FROM: Supervisor Buster

SUBMITTAL DATE: March 27, 2003

SUBJECT: County Selection & Hiring of Development Environmental Consultants

RECOMMENDED MOTION:

1. That the Board direct that the County, not the development project applicant, select, hire, pay, and oversee the consultant(s) necessary for environmental assessments or reports for private projects and any special studies stemming from such reviews.
2. That the Board direct planning and legal staff to return in 30 days, amending the planning rules which now allow developers to directly hire consultants, and providing a plan to fully implement a new County-hiring process concurrent with the approval of the new General Plan.

BACKGROUND:

The County's 1982 planning rules allow either the developer or the County to select, hire and pay for such consultant work. In practice, however, project proponents have been doing it all.

This results in biased and/or insufficient analysis for many important projects, undermining public confidence not just in the objectivity and thoroughness of information presented for any project, but in the entire planning process itself.

These studies belong to the public, not to the developer, even though they are done at the applicant's cost. It is the County, moreover, and the Board of Supervisors which is responsible for them.

The Board has already tacitly acknowledged the potential conflict inherent in the existing process, the resulting inadequacy of the information generated and the significant risk this poses to the taxpayers and public by requiring that the developers of several large controversial projects indemnify and defend the County against lawsuits challenging their environmental reports.

Bob Buster
Supervisor, 1st District

BB:ds

Prev. Agn. ref. **3.24** AGENDA NO.

BACKGROUND (Continued)

The County should take no satisfaction in protecting itself from bare case-by-case legal costs while knowingly tolerating a debased process that throws into question the overall integrity of planning and growth decisions. That the indemnification provision had to be invoked on several major recent development approvals because they were challenged on the adequacy of the environmental work certainly did not protect the County or Board from the extremely damaging court rulings and resulting news stories to our planning "reputation" which appeared at the time when the County was heralding the RCIP as an exemplar of better planning.

For example, Superior Court Judge E. Michael Kaiser found that the traffic congestion and road improvement mitigation analysis in the 4,600 unit Domenigoni Specific Plan environmental review "involves the very sort of 'trust us, we'll conduct studies and fix the problem later' approach.." [Emphasis mine.] His ruling sided with plaintiff City of Temecula and threw out the faulty environmental work and the project approval.

Two other recent development cases (Redhawk and Tusalota) in front of two other judges came to similar results, with faulty environmental work and inadequate mitigation overturned or corrected through settlement.

There can be no doubt that the major factor causing such consistent problems with the vital information the public and board need to reach good planning decisions is the lack of separation between the developers and the expert consultants who do this critical work.

The dependency created by having the applicant select, hire and pay the consultant results in fundamental bias from the outset that is hard to overcome after the report has been drafted. By the time Planning staff review the draft, it is an uphill battle to rework the assumptions, methodology and scope of the report where needed, and obviously much more expensive for both parties.

No incentive exists under the present process for the consultant to seek better alternatives to the proposed project and to fairly consider them. The analysis then becomes a self-serving exercise maximizing the number of housing units and the minimizing set-asides for open-space, parklands or public facilities. The alternatives that are advanced to the main proposal are usually no more than unappealing "straw-men." proposed only because they reconfirm the wisdom of selecting the pre-ordained result most favorable to developer profits.

Often, too, such slanted reports attempt to justify the avoidance or postponement of critical improvements or mitigation, such as road widening or park development, or to shift the developer's fair share of the responsibility and cost to the public at large.

Having the County take over the job will result in better growth decisions and lower public costs.

There is also a second level of potential conflict in the consultant selection process which sometimes occurs in addition to the more obvious problem resulting from the project proponent influencing the environmental work through holding the paymaster status. This other type of conflict could continue to exist even if the County is in charge of the process. What I am referring to is the fairly frequent situation (the IDI warehouse case on our last agenda, for example) wherein the same firm doing the environmental work also does the engineering, design, finance, or other work on the project or on the surrounding public improvements it affects.

As part of this proposal for change, therefore, I am also asking that staff recommend a method to assure that, when the County runs the process, the environmental consultant's work is in no way influenced by their expectation of creating more business for other arms of their parent firm in the same project or related public improvements.

With the RCIP and ever more intense growth pressures and conflicts this issue is ripe now for change and improvement. It can't be swept aside anymore. Other counties are doing it the right way and some like Riverside are still running afoul of court decisions and public outcry (see attached Los Angeles Times editorial from last Tuesday contrasting Ventura and L.A. counties' handling of this issue). If Riverside County is to truly be the planning leader it claims to be, the Board needs to change this now and not wait for State legislation (see last paragraph of editorial) or court rulings to do it for the County.

L.A. Times, 3-25-03

A Bulldozer-Sized Loophole

No bigger than a dime, the San Fernando Valley spineflower has gained notoriety beyond its diminutive size for its role in stalling two multibillion-dollar housing developments. Now it is helping uncover a hole the size of a giant sequoia in the way Los Angeles County handles environmental reviews.

The tiny wildflower, once thought to be extinct, was rediscovered in 1999 on the oak-covered hills of Ahmanson Ranch, site of a proposed 3,050-home subdivision in Ventura County just west of West Hills. Say what you will about the planned development — and its well-heeled opponents say plenty — the developer, Ahmanson Land Co., was upfront about the discovery and set about finding ways to preserve the plant and still build its houses.

Not so 18 miles north at Newhall Ranch, site of a proposed 21,600-home development in Los Angeles County, just west of the Santa Clarita Valley. State and local regulators had to resort to aerial surveillance and search warrants to determine whether the property held more spineflowers than the single patch an environmental consultant identified in 2000.

The Times, using court records and interviews, reported last fall that investigators found evidence that the land company had crushed additional stands when it graded a mesa and had spread alfalfa through other spineflower areas, allegedly to entice cattle to graze on the plants.

Last month Los Angeles County Dist. Atty. Steve Cooley, showing no spine for prosecuting a company known for generous political donations, dropped a criminal investigation in exchange for Newhall agreeing to do what the Ahmanson developer had done from the beginning: create a preserve for the flowers that remain.

That would be the end of this sorry story — except that the search for the missing spineflowers also turned up some missing safeguards in Los Angeles County's review process. In Ventura County, local governments select consultants to do environmental reports, then bill the developer.

Astoundingly, in Los Angeles County the developer not only pays but chooses the consultant. This cozy arrangement might have gone on for years had not Newhall made it even more incestuous by requiring its consultants to sign a confidentiality agreement. Local and state regulators had so much trouble investigating the case because the consultants refused to answer their questions.

California Assemblywoman Hannah-Beth Jackson (D-Santa Barbara) has introduced legislation that would prohibit developers statewide from directly hiring consultants to do the required environmental reports. Newhall and other builders plan to fight it. Los Angeles County supervisors don't have to wait for the skirmish to play out. They can and should put the county, not the developer, in charge of environmental reviews.

Respondent County claims that Temecula's General Plan inconsistency claim is time-barred. Respondent contends that Temecula's arguments are not actually challenges to the Domenigoni-Barton Specific Plan, but rather a disguised attack on the County's General Plan itself. The County argues that Gov. C. §65009(c)(1) requires that an action challenging a General Plan be brought within 90 days. (Napa Citizens for Honest Government v. Napa Bd. Of Supervisors (2001) 91 Cal.App.4th 342) Since the General Plan was adopted in 1984, respondent concludes that petitioner's action is 18 years too late.

However, it appears that Temecula's challenge is actually directed against the Domenigoni-Barton Specific Plan and project's General Plan amendments approved on Jan. 18, 2002. While petitioner does contend that there are inadequacies in the County's General Plan, the gravamen of its claim is that, because of those inadequacies, respondent cannot find that the amendments and the specific plan are consistent with the General Plan as required by Gov. C. §65454. (Save El Toro Assn. v. Days (1977) 74 Cal.App.3d 64.) To the extent that petitioner's attack is directed primarily at the specific plan and the General Plan amendments which comprise the project, its claim is not time-barred.

3. Standing:

Real Party Domenigoni-Barton Properties argues that petitioner must have a "geographical nexus" to challenge the project based on noncompliance with CEQA or General Plan inconsistency. (Waste Mgmt. of Alameda County, Inc. v. County of Alameda (2000) 79 Cal.App.4th 1223; City of Irvine v. Irvine Citizens Against Overdevelopment (1994) 25 Cal.App.4th 868.) Real party concludes that Temecula cannot satisfy such nexus because the project is not within the City's sphere of influence.

However, the cases cited by real party do not support the "nexus" argument. Instead, the appropriate test is whether petitioner is threatened with injury by the challenged action or whether petitioner may be harmed by the environmental effects of the project. (City of Irvine v. Irvine Citizens Against Overdevelopment, supra, 25 Cal.App.4th at 874; Bozung v. LAFCO (1975) 13 Cal.3d 263.) The subject project is located several miles from Temecula and the roadways impacted by the project run through Temecula. The EIR itself recognized the traffic impacts on Temecula by analyzing intersections within the City's sphere of influence. (25 AR T165:9063, 9299)

B. The Merits of Temecula's Petition:

The court grants Temecula's petition for writ of mandate as to its first cause of action asserting violation of CEQA. The court denies as to the second cause of action.

1. CEQA:

Petitioner claims that the EIR's analysis of the project's traffic impacts is inadequate and the County failed to mitigate significant adverse traffic impacts. Petitioner contends that the traffic study is based on proposed highways and local street systems that are non-existent or only dirt roads. Petitioner complains that the traffic study distributes project traffic onto these non-existent "paper roads" to come to the conclusion that the traffic impacts will be less than significant. Petitioner also

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criticizes respondent County's failure to make completion of the "paper roads" a condition of project approval or mitigation measures enforceable through a mitigation monitoring program.

Petitioner also argues that the EIR fails to disclose the project's cumulative impacts. Specifically, petitioner contends that the cumulative impact analysis failed to include and consider the impacts from other residential projects which were approved or are planned in the general vicinity of the subject project.

Petitioner also accuses respondent County of engaging in improper segmentation or "piecemealing." Petitioner contends that all the projects in the area should have been considered together as one whole project; i.e., respondent should not have allowed the project proponents for the Domenigoni-Barton Specific Plan and the other nearby projects to prepare separate EIRs.

While the court rejects petitioner's piecemealing argument, the court finds that respondent performed an inadequate analysis of traffic impacts, improperly deferred mitigation measures, and failed to undertake an adequate cumulative impact analysis. With respect to the piecemealing claim, it is true that CEQA prohibits segmenting or chopping a large project into smaller ones, each with less potential impact on the environment, such that assessment of impacts is hindered or prevented. (*Bozung v. LAFCO, supra*, 13 Cal.3d 263) But petitioner has no authority that respondent is required to somehow "consolidate" separate development projects submitted by different proponents simply because the projects are in the same area. Instead, where there are a number of similar but separate projects, what CEQA requires is an adequate cumulative impacts analysis to determine the combined impacts of all projects. (CEQA Guidelines §15130.)

Otherwise, Temecula's objections to the traffic analysis in the EIR have substantial merit. It is undisputed that the EIR's traffic studies distributed traffic through planned, but as yet non-existent roadways, and assumed the completion of planned, but as yet non-existent upgrades of existing roads. The problem is not so much that the EIR failed to analyze the project in terms of existing conditions. As both oppositions point out, the EIR admits that the project, and other development, cannot be accommodated by the existing circulation system. The traffic studies admit that significant off-site improvements and upgrades will be necessary to meet the County's Level of Service ("LOS") standards.

The problem is the EIR purports to conclude that traffic impacts will not be significant because of mitigation, but does not properly provide for such mitigation. None of the measures to mitigate the very significant traffic impacts actually require the construction of the necessary improvements. Instead, the EIR calls for further traffic studies for phases of the project. (AR 9361.) It calls for (but does not require) the developer to establish an area-wide fee program to implement necessary traffic improvements called for by the future studies. It calls for the County to monitor and administer compliance with standards. (AR 9361-63.) It does not call for any supplemental EIRs after any traffic study or after phases of the project are constructed.

Respondent and real party argue that a similar mitigation plan was approved in *Save Our Peninsula Comm. v. Monterey City Bd. Of Supervisors* (2001) 87 Cal.App.4th 99. But their reliance on that case is misplaced. That case involved specifically identified and required traffic mitigation. This case on the other hand, involves the very sort of "trust us, we'll conduct studies and fix the

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problem later approach disapproved in cases such as Sundstrom v. County of Mendocino (1988) 202 Cal.App.3d 296 and Stanislaus Natural Heritage Project v. County of Stanislaus (1996) 48 Cal.App.4th 182. The situation here presents a case of improper deferral of analysis and deferral of mitigation.

It also appears that respondent did not adequately analyze cumulative impacts. The EIR does identify other projects planned in the area. (21 AR T165:7907-09.) But the listing omits a number of projects that will generate over 6,800 new residential units and over 17,700 new residents. The oppositions point out that there is no requirement that the EIR specifically list by name every project in the area which may be approved. (CEQA Guidelines §15130.) They argue that the EIR properly used the Comprehensive Transportation Plan ("CTP") model maintained and administered by the Southern California Association of Governments ("SCAG") to make traffic projections. (22 AR T165:8252-54.)

It is true that Guidelines §15130 prescribes two methods to conduct a cumulative analysis. The first is the more common "list method" advocated by petitioners where a list of past, present, and probable projects is used in the analysis. (Guidelines §15130(a)(1).) The second is the "summary of projections" method. Guidelines §15130(a)(2) allows the lead agency to use for its discussion of cumulative impacts a "summary of projections contained in an adopted general plan or related planning document, or a prior EIR which described or evaluated regional conditions contributing to the cumulative impact." However, it does not appear that the so-called CTP method used by respondent is a "summary of projections contained in an adopted general plan or related planning document" within the meaning of §15130(a)(2).

2. General Plan Inconsistency:

Petitioner's General Plan inconsistency argument is somewhat convoluted, but essentially, petitioner's claim is premised on the fact that a Specific Plan cannot be adopted unless it is consistent with the General Plan. (Gov. C. §65454.) Petitioner contends that Riverside's General Plan has an inadequate Land Use Element ("LUE") such that it is impossible to determine the type of uses that are or are not authorized on the project site. Petitioner argues that it simply cannot be determined that the Domenigoni-Barton Specific Plan is consistent with the General Plan as required by Gov. C. §65454. As such, petitioner concludes that the Specific Plan is void. (Leshner Communications v. City of Walnut Creek, *supra*, 52 Cal.3d 531; Save El Toro Assn. v. Days, *supra*, 74 Cal.App.3d 64; Camp v. Bd. Of Supervisors (1981) 123 Cal.App.3d 334.)

Respondent argues that the General Plan appropriately designates permitted land uses and densities based on long-term goals, objectives and land use policies and standards. Respondent contends that for undesignated areas (such as the project site) the County has a Land Use Determination System ("LUDS") to identify permitted land uses. (30 AR T254:10722-25.) More importantly, the project does not only involve the Domenigoni-Barton Specific Plan. The project also involves not one, but two General Plan Amendments to ensure that the project is consistent with the General Plan. These General Plan amendments support the finding of the project's consistency with the General Plan. In Leshner, *supra*, 52 Cal.3d 531, the Supreme Court found that a ballot initiative was inconsistent with the General Plan and could not be construed as an amendment to the General Plan. However, if the initiative could have been deemed an amendment to the General Plan, the

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The finding of the infeasibility of Alternative "B" does not meet the requirements of Citizens of Goleta v. Bd. Of Supervisors (1988) 197 Cal.App.3d 1167. The fact that an alternative may be more expensive or less profitable is not sufficient to show the alternative is financially infeasible. What is required is evidence that the additional costs are sufficiently severe as to render the alternative impractical. The record contains no data or analysis of the costs or the economic benefits of the Boulder Creek Plan alternative.

For the foregoing reasons, both the petition are granted. It is ordered that peremptory writs of mandate issue directing that respondent set aside its approval of the project and certification of the EIR.

Petitioners are hereby directed to submit and serve proposed judgments and proposed peremptory writs of mandate. Unless good cause is shown, the judgments shall contain the following language:

The court shall retain jurisdiction over the proceedings pursuant to Pub. Res. C. § 21168.9(b). Nevertheless, the court intends this to be a final, appealable judgment. Costs and attorney fees, if any, may be claimed pursuant to CRC 870, 870.2. Under Pub. Res. C. §21168.9(c), the Court does not direct respondent to exercise its lawful discretion in any particular way. Nothing in the judgment or peremptory writ should be construed as requiring respondent or real party to go forward with the project, or to re-approve the project, or to take any particular action other than as specifically set forth herein.

Respondent shall file a return to the peremptory writ no later than 90 days after the date of the issuance of the peremptory writ which shall state that an appeal from the judgment has or will be filed or that it has complied with the order to set aside its approval of the project.

This statement of intended decision shall be the statement of decision unless within ten days either party specifies controverted issues or makes proposals not covered in the intended decision. (CRC 232 (a))

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