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

FROM: County Counsel **SUBMITTAL DATE:** July 20, 2006

SUBJECT: Environmental Assessment No. 38790, Change of Zone No. 6899 and Tentative Tract Map No. 30881 (McCall Senior Project).

RECOMMENDED MOTION: That the Board of Supervisors vacate, set aside and rescind the following actions taken with respect to the above-referenced project:

1. Adoption of the Mitigated Negative Declaration for Environmental Assessment No. 38790; and

2. Adoption of Ordinance No. 348.4261 an Ordinance of the County of Riverside Amending Ordinance No. 348 relating to Zoning; and

3. Approval of Tentative Tract map No. 30881.

BACKGROUND: On May 1, 2006, judgment was entered against the County in Sharon Edmons, Menifee Valley Residents Against Poor Planning v. County of Riverside, Riverside County Superior Court Case No. RIC 425260. The judgment directs the County to take the above-referenced actions. The County has decided not to appeal this judgment.

JOE RANK
COUNTY COUNSEL

C.E.O. RECOMMENDATION: APPROVE

County Executive Office Signature

Department Recommendation: ☐ Policy ☐ Consent

Per Executive Office: ☐ Policy ☐ Consent

FORM 11A (Rev. 7/93)

ATTACHMENTS FILED WITH THE CLERK OF THE BOARD

3.60

JOHNSON & SEDLACK
RAYMOND W. JOHNSON SBN 192708
ABIGAIL A. BROEDLING SBN 228087
26785 Camino Seco
Temecula, CA 92590
Telephone: (951) 506-9925
Fax: (951) 506-9725

Attorneys for Petitioners

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF RIVERSIDE

SHARON EDMONS, an individual; MENIFEE VALLEY RESIDENTS AGAINST POOR PLANNING, an unincorporated association,

Petitioners,

vs.

COUNTY OF RIVERSIDE; BOARD OF SUPERVISORS OF RIVERSIDE COUNTY; DOES 1 through 20, inclusive,

Respondents,

MCCALL SENIOR 37, LLP; and DOES 21 through 40 inclusive,

Real Parties in Interest.

CASE NO.: **RIC 425260**
ASSIGNED FOR ALL PURPOSES TO:
JUDGE: Hon. Stephen D. Cunnison
DEPARTMENT: 01
ACTION FILED: February 3, 2005

JUDGMENT [PROPOSED] GRANTING WRIT OF MANDATE

(Code Civ. Proc. § 1094.5, Pub. Res. C. § 21000, et seq.)

CEQA

Hearing on Petition: January 13, 2006

On January 13, 2005, at 9:30 a.m. in Department 1 of the above-entitled court, the Honorable Stephen D. Cunnison presiding, a hearing was held on the First Amended Petition for Writ of Mandate filed by Petitioners SHARON EDMONS and MENIFEE VALLEY RESIDENTS AGAINST POOR PLANNING ("MVRAPP"), challenging the adoption and certification of a Mitigated Negative Declaration and the approval of Tract Map No. 30881, Change of Zone No. 06899 and all associated approvals (the "Project").

Raymond W. Johnson of Johnson & Sedlack appeared on behalf of Petitioners SHARON EDMONS and MVRAPP. Whitman F. Manley of Remy, Thomas, Moose and Manley, LLP appeared on behalf of Respondent RIVERSIDE COUNTY and Real Party in Interest MCCALL SENIOR 37, LLP.

After hearing the evidence, the arguments of counsel, and after considering all papers filed with the Court, and the cause having been argued and submitted for decision; and the Court having on March 2, 2006 issued its Tentative Decision,

IT IS SO ORDERED, that:

1. For the reasons set forth in this Court's March 2, 2006, Tentative Decision, which is attached hereto as Exhibit "A" and incorporated by reference herein, let a writ of mandate issue requiring Respondent County to set aside its approval of the Project, including, without limitation, its adoption of a Mitigated Negative Declaration, and to proceed consistent with this Court's Tentative decision, attached as Exhibit "A", in connection with any reconsideration or reapproval of the Project.

2. The Court shall retain jurisdiction over the proceedings pursuant to Public Resources Code section 21168.9, subsection (b). Nevertheless, the Court intends this to be a final, appealable judgment. Under Public Resources Code section 21168.9, subsection (c), the Court does not direct Respondent County 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 in Interest to go forward with the Project, to reapprove the Project, or to take any particular action other than as specifically set forth herein.

3. Respondent County shall file an initial return to the peremptory writ of mandate 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.

4. Petitioners SHARON EDMONS and MVRAPP are the prevailing parties and may recover their costs. Petitioners may also apply to recover their attorney's fees.

DATED: MAY 1 2006, 2006

Honorable Stephen D. Cunnison
Judge of the Superior Court

EXHIBIT "A"

EXHIBIT "A"

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

TITLE: EDMONS v. COUNTY OF RIVERSIDE	DATE & DEPT. January 13, 2006 Dept. 1	NUMBER: RIC 425260
COUNSEL: None present	REPORTER: None	

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE
MAR 02 2006

PROCEEDING: Tentative decision on Petition for administrative mandate.

Tentative decision on Petition for administrative mandate (CCP §1094.5).

The matter came on for hearing on January 13, 2006. Petitioners Sharon Edmons and Menifee Valley Residents Against Poor Planning (collectively "MVRAPP") appeared by their attorneys, Raymond W. Johnson and Abigail A. Broedling of Johnson & Sedlack. Respondent County of Riverside ("the County") and real party in interest McCall Senior 37 LLP ("McCall") appeared by their attorney Whitman F. Manley of Remy, Thomas, Moose & Manley LLP. The court, having reviewed the administrative record, and having considered the oral and written arguments of counsel, decides as follows.

The Pleadings

The first amended petition alleges in substance that the County approved General Plan Amendment No. 00682, Change of Zone No. 06899, and Tentative Tract Map No. 30881, and adopted a Mitigated Negative Declaration, thereby approving the project. The project comprises 62 duplex residential units on 31 residential lots totaling 13.24 acres. In its first cause of action, MVRAPP alleges that the County failed to provide proper notice of its intent to adopt a Mitigated Negative Declaration to the public, trustee agencies, and the State Clearinghouse; that the County improperly deferred mitigation measures in approving the Mitigated Negative Declaration; that the mitigation measures adopted by the County are uncertain; and that findings relative to significance of impacts and feasibility of mitigation are not supported by facts in the record.

In its second cause of action, MVRAPP alleges that the County improperly adopted a negative declaration when substantial evidence in the record supported a conclusion that the project would cause significant impacts; the County improperly adopted a negative declaration without considering cumulative impacts; and the County failed to adopt feasible mitigation.

In its third cause of action, MVRAPP alleges that the project is inconsistent with the Sun City/Moreno Valley Area Plan and the County General Plan.

In its fourth cause of action, MVRAPP alleges that the project is inconsistent with the Western Riverside County Multiple Species Habitat Conservation Plan as it relates to the California coastal gnatcatcher. MVRAPP has not pursued this cause of action in its briefing.

In their answer, the County and McCall have denied the material allegations of the petition.

CEQA Procedural Issues

Project description

MVRAPP contends that the project approval must be set aside because of an inadequate project description.

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The initial public notice of a hearing before the Planning Commission describes the project as a proposal "to subdivide 13.4 acres into 44 single-family residential lots with a minimum lot size of 7200 square feet." AR 3:663. The Notice of Intent to Adopt a Negative Declaration for a hearing before the Board of Supervisors described the project as comprising 31 residential lots, but did not disclose that it proposed 62 dwelling units.

McCall contends that MVRAPP failed to exhaust its administrative remedies. It is true that an incomplete or inaccurate project description may render notice completely ineffective. However, after the project is sufficiently clarified, objections to the project description must be raised and administrative remedies exhausted. Temecula Band of Luiseno Mission Indians v. Rancho California Water District (1996) 43 Cal.App.4th, 425, 434.

McCall correctly points out that MVRAPP (through Dan Phillips) was present at the June, July, and October, 2004, hearings in which the true size and nature of the project was discussed. The environmental documents such as the Initial Study which supported the negative declaration correctly described the project as 62 units on 31 lots. AR 3:753. MVRAPP's own comment letter discloses that it was aware of the 62 units. AR 3:1037-1042. While MVRAPP objected to the timeliness of the notices, it never objected to the adequacy of the project description.

MVRAPP contends that remedies may be exhausted by any person, and points to comments by William Zedlick at the October, 2004, hearing before the Board of Supervisors, at which he said: "This is not 31 units, it's 62 units no matter what you say. It's not sixty-two 7,200 square foot lots though." AR 5:1620-1621. However, Mr. Zedlick did not articulate any problem with the project description. His comments were addressed to the land use issues discussed below.

MVRAPP also objects to the project description in the Notice of Determination. However, the sole purpose of the Notice of Determination is to commence the limitations period for seeking judicial review. CEQA Guidelines §15112(c). No statute of limitation issue is presented in this case.

Notices to trustee agencies and the State Clearinghouse.

MVRAPP contends that the County failed to send notice to the Regional Water Quality Control Board, the Department of Fish & Game and the Office of Historical Preservation.

CEQA requires that a proposed negative declaration be submitted to responsible or trustee agencies for review and comment. CEQA Guidelines §15072. If the proposed negative declaration must be sent to a trustee agency, it must also be sent to the State Clearinghouse. CEQA Guidelines §15073(d).

The parties agree that if the only impact disclosed by the Initial Study is water erosion (as distinguished from water quality), the Regional Water Quality Control Board has no jurisdiction. Here, the Initial Study shows that the project will "alter the existing drainage pattern of the site" and "contribute runoff water which would exceed the capacity of . . . stormwater drainage systems." AR 3:770. The study then finds that the project may have an impact on "flood control, water quality, and drainage issues." AR 3:771. Read in context, however, it appears that only erosion and flood control issues are presented. Notice to the Regional Water Quality Control Board was not required.

The Initial Study found no impacts on cultural or historical artifacts. AR 3:762. MVRAPP contends that a letter in the record (AR 1:110) supports a fair argument that there will be such impacts. The court will find that the record does not support such an argument, and notice to the Office of Historical Preservation was not

required.

McCall concedes that the County was required to send the proposed negative declaration to the Department of Fish & Game, and contends that it did so. However, the record shows that the proposed negative declaration was sent to the Department of Fish & Game on October 4, well short of the required 20 days before the October 19 hearing. McCall concedes that the County did not send the proposed negative declaration to the State Clearinghouse.

There is no presumption that an error is prejudicial. CEQA Guidelines §21005(b). The petitioner bears the burden of establishing that the agency's error resulted in the omission of relevant information. Neighbors of Cavitt Ranch v. County of Placer (2003) 106 Cal.App.4th 1092, 1100. MVRAPP has made no effort to sustain its burden. The County's error alone is not sufficient ground to invalidate the negative declaration and project approval.

Timeliness of notices.

MVRAPP contends that the County failed to give timely notice of its intent to adopt the negative declaration. Such notice is required to be given at least 20 days before the hearing. Despite McCall's attempts to show otherwise, the notice was not timely. The project was approved and the negative declaration adopted by the Board of Supervisors on October 19. The public notice was posted by the County Clerk on October 6. AR 3:975. Notice was mailed to nearby property owners and the trustee agencies on October 4. AR 3:966-974. The notice was published on October 8. AR 3:990. Thus every form of notice fell short of the 20-day requirement.

However, MVRAPP has again failed to produce any evidence that these procedural irregularities resulted in the omission of any relevant information. The error standing by itself is not sufficient ground to invalidate the negative declaration.

CEQA Substantive Issues

The standard of review is whether substantial evidence in the record will support a fair argument that the project will have a significant impact on the environment. No Oil, Inc. v. City of Los Angeles (1974) 13 C.3d 68.

Land use.

MVRAPP contends that the project will have a significant environmental impact because it does not conform to the zoning ordinance, in that two single family residences will be sited on one lot.

Even if the court did not decide against MVRAPP on this question as a zoning issue, MVRAPP would not succeed by framing it as a CEQA issue. MVRAPP makes no attempt to show how the County's failure to require compliance with a zoning ordinance would result in "a substantial, or potentially substantial, adverse change in the physical conditions within the area affected by the project . . . ." CEQA Guidelines §15382.

Parks and recreation – cumulative impacts.

MVRAPP contends, and the County and McCall concede, that there is a shortage of parks in the area. McCall contends that the park shortage is a pre-existing problem which it should not be called upon to remedy if its

development will contribute a negligible part of the ongoing shortage.

"Cumulative impacts" is defined as:

> . . . two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts.
>
> (a) The individual effects may be changes resulting from a single project or a number of separate projects.
>
> (b) The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project *when added to other closely related past, present, and reasonably foreseeable probable future projects*. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time. [Emphasis added.]

CEQA Guidelines, §15355.

McCall contends that the personal observations of MVRAPP's representatives focused exclusively on the regional park shortage. However, they also pointed out a number of other proposed residential developments in the immediate area. (AR 1035, 1041-1042.) There is no indication in the record that MVRAPP's evidence of other proposed residential development was incorrect or unreliable. Evidence of an existing shortage of parks in combination with considerable planned residential development supports a fair argument that the project will have significant cumulative impacts.

The Initial Study relies on Quimby Act fees to support its conclusion that impacts after mitigation will be less than significant. (AR 4:1258). Although payment of mitigation fees is an accepted method of mitigating cumulative impacts (Save Our Peninsula Committee v. Monterey County Board of Supervisors (2001) 87 Cal.App.4th 99), a commitment to pay fees without any evidence that mitigation will actually occur is inadequate. *Id.*, p. 140. Quimby Act fees are collected and used over the entire county. Although the park shortage exists, and will continue to exist, in the area of southwest Riverside County where the development is planned, there is no evidence that the fees will be devoted to establishment of parks in that area. There is, therefore, no evidence that mitigation will actually occur.

McCall contends that the two open space lots it has provided in its development plan "will meet the recreational needs of the Project's residents." Perhaps so, but the Initial Study relies solely on fees for mitigation. (AR 3:778.)

Air quality.

MVRAPP argues that there is no evidence or study that supports the County's finding that the project will not result an adverse impact on air quality.

The Initial Study relies on the South Coast Air Quality Management District's CEQA Handbook. After comparing the project to the thresholds outlined in the Handbook, the County concluded that the project was far below the level of potentially significant impacts and that the it would not result in a cumulatively considerable net increase in any listed pollutant. AR 3:761.

MVRAPP criticizes the County's methodology, but makes no attempt to fashion a fair argument for the

existence of air quality impacts.

Traffic and circulation.

The Initial Study includes a finding that the project "may have an impact on traffic and circulation in the project vicinity." AR 3:778-779. The findings related to traffic did not change during the comment period, and remain in the negative declaration. AR 4:1258-1259. McCall discounts MVRAPP's estimates of additional traffic to be generated by the project as "anecdotal," but there does not appear to be any evidence in the record for the conclusions expressed in the Initial Study. Nothing in the record identifies the nature and extent of the traffic impacts. There is no evidence of which roads or intersections would be affected.

The Initial Study again relies on mitigation fees to support its conclusion that impacts after mitigation will be less than significant. AR 4:1258-1259, 1457. Although payment of mitigation fees is an accepted method of mitigating *cumulative* impacts (Save Our Peninsula Committee v. Monterey County Board of Supervisors, *supra*), it appears that the traffic impacts referred to in the Initial Study include direct impacts. In addition, *Save Our Peninsula* holds that a commitment to pay fees without any evidence that mitigation will actually occur is inadequate. *Id.*, p. 140.

Because the Initial Study fails to identify the roads or intersections that will be impacted, nothing in the record does, or can, show that payment of fees will actually mitigate the impacts. There is, accordingly, a fair argument that the project will result in a significant, unmitigated impact.

Noise.

MVRAPP argues that no cumulative noise analysis was undertaken, but directs the court to nothing in the record showing the existence or prospect of a significant noise problem. There is no basis for finding that the project's contribution to noise would be cumulatively considerable.

Public services.

The record contains no substantial evidence that the fees imposed would not mitigate the direct and cumulative impacts on public services.

Cultural and historical.

A form letter from UC Riverside with a checked box indicating the project site's potential to contain cultural resources and recommending a "Phase I study" fails to identify the particular resource of concern, does not constitute substantial evidence, and does not support a fair argument that such resources will be adversely affected.

Biological

Although MVRAPP points out an error in the initial study and criticizes the biological resource analysis relied on by the County as outdated, it points to no evidence to support a fair argument for biological impacts.

Aesthetic

MVRAPP relies on its own comment letter stating that the view from an adjoining subdivision will be

blocked. CEQA is not intended to protect the views of a few private individuals. Bowman v. City of Berkeley (2004) 122 Cal.App.4th 572, 586-587.

Mitigation measures.

MVRAPP contends the County failed to make the findings required by CEQA Guidelines §15091. Such findings are required only in an EIR.

MVRAPP also contends that there is no mitigation monitoring program. MVRAPP failed to raise this issue at the administrative hearing, and may not raise it for the first time here.

The Zoning and General Plan Issues

MVRAPP contends that the project violates the minimum lot size prescribed for the R-2 zone. It correctly points out that there are two dwelling units on each lot, and that the dwelling units are not contiguous. It contends that the dwelling units are single family residences, only one of which is permitted on a lot. Since the lots are each 7,200 square feet, or only slightly in excess of that area, each single family residence has less than the required lot area.

McCall contends that MVRAPP failed to raise the issue at any public hearing, and has thus failed to exhaust its administrative remedies. However, the record shows the contrary. AR 3:1034-1035.

In Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors (1998) 62 Cal.App.4th 1332, 1338, the standard of review is whether, "based on evidence before the local governing body, . . . a reasonable person could . . . have reached the same conclusion." That case decided that a county zoning ordinance was inconsistent with the county's draft general plan and was, therefore, invalid. Although the parties cite authorities for the standard of review in cases involving consistency of zoning with the general plan and consistency of a tentative map with the general plan, neither cites any case where the issue is whether the project approved is consistent with the applicable zoning, nor has the court found any such case. However, it would appear that the County's interpretation of its existing ordinance is entitled to at least the deference to which its determination that a zoning ordinance is consistent with the general plan would be entitled.

Here the issue turns on the County's interpretation of the word "duplex" in its ordinance permitting duplexes on lots of at least 7,200 square feet. The County's Ordinance 348 does not define "duplex," but it defines "multiple-family dwelling" as " a building or portion thereof used to house two or more families . . . living independently of one another, and doing their own cooking." If the dwelling units in the proposed project shared a common wall, there would be no question that they were duplexes. Owners of the proposed dwelling units will own the land in common, and only the buildings will be separately owned. The County contends that they are "detached duplexes." Given the common ownership of each lot, that contention is not unreasonable. The court defers to the County's determination of what constitutes a "duplex."

MVRAPP further contends that the project, involving two-family dwellings, lacks an approved plot plan in violation of Ordinance 348, Article VII, §7.1(b)(1); that the dwelling units violate the minimum building separation requirements of Article VII, §7.9; and that the project violates the Sun City/Menifee Area Plan density limits, design guidelines and requirements concerning cultural resources. These contentions were not raised by MVRAPP at the public hearings. MVRAPP has failed to exhaust its administrative remedies as to them.

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Findings and Orders

1. MVRAPP has failed to sustain its burden of proof on the first cause of action.

2. On its second cause of action, MVRAPP has established that there is substantial evidence in the record supporting a fair argument that the project will have significant cumulative environmental impacts on parks and recreation and significant direct and cumulative environmental impacts on traffic, and that none of those impacts will be mitigated below the level of significance. It has failed to establish that there may be other significant unmitigated impacts.

3. On its third and fourth causes of action, MVRAPP has failed to establish that the County abused its discretion.

Sharon Edmons and MVRAPP shall have judgment as follows:

1. A writ of mandate shall issue commanding the County to set aside its approval of the project, including, without limitation, its adoption of a mitigated negative declaration, and to proceed consistent with this decision in connection with any reconsideration or reapproval of the project.

2. Edmons and MVRAPP are the prevailing parties and may recover their costs. They may apply to recover their attorneys' fees.

3. Edmonds and MVRAPP are directed to submit and serve a proposed judgment and a proposed peremptory writ of mandate. Any objections thereto may be filed and served within 10 days of service.

Stephen D. Cunnison, Judge

M. Martinez (vm), Clerk

MINUTES OF SUPERIOR COURT