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August 27, 2009—*Tracy First v. City of Tracy*: Third Appellate District (Certified for full publication on September 18, 2009*)

Court of Appeal holds that compliance with California Energy Efficiency Standards would result in less-than-significant impacts.

OVERVIEW · The decision in Tracy First v. City of Tracy was recently certified for full publication, and is an important decision in several respects. Perhaps most importantly, the Court found that an EIR may properly rely on California Building Energy Efficiency Standards in determining whether an energy impact is significant. This case also provides clarification on when an EIR must be sent back to a Planning Commission or similar decision-making body for review after amendment; when a reduced-size alternative must be analyzed in an EIR; and responsibility for mitigation of impacts that occur outside a City's jurisdiction where there is no enforceable plan for the payment of mitigation fees.

I. PLANNING COMMISSION AND CITY COUNCIL ACTION.

In 2006, the City of Tracy ("City") Planning Commission considered and recommended certification of an EIR for a proposed specific plan amendment and a conditional use permit to build a 95,900 square foot WinCo Foods store ("Project"). However, the City Council directed staff to amend the EIR by adding additional information regarding land use and economics (urban decay); traffic impacts; air quality impacts; and energy conservation.

In April 2007 the City Council certified the EIR, as amended, without sending it back to the Planning Commission to consider the amendment. Tracy First argued that the City failed to proceed in the manner required by law because the City Council certified the amended EIR without first obtaining the Planning Commission's recommendation concerning the amendment.

The Court upheld the certification of the EIR, concluding that the CEQA Guidelines and the City's municipal ordinances did not require the Planning Commission to make a new recommendation to the City Council. Further, the City's actions simply amounted to a continuance of the hearing, rather than a denial of the application, as was asserted by Tracy First.

The heart of the Court's decision was based on whether the City complied with the following CEQA Guideline when it based its approval of the Project on the amended EIR, even though the Planning Commission did not have the amendments to the EIR when it made its recommendation in 2006:

> "Where an advisory body such as a planning commission is required to make a recommendation on a project to the decision-making body, the advisory body shall also review and consider the EIR or negative declaration in draft or final form."[1]

Here, the EIR considered by the Planning Commission was a draft of the EIR ultimately used by the City Council when it granted the Project application. Thus, the Planning Commission did review and consider the EIR "in draft or final form" before making its recommendation to the City Council, in accordance with § 15025(c).

Also, while remand to the planning commission would have been required if a change were made to the proposed Project[2], there is no statute or guideline requiring a city council to remand a project application to the Planning Commission when amendments are only made to the EIR, and not to the project: "The difference between modifying a project and modifying the EIR is substantial. A modification in the project application effects changes in the ultimate land use, while a modification of the EIR does not change the end result sought by the project application."[3]

II. REASONABLE RANGE OF ALTERNATIVES.

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[1] 14 CCR § 15025(c)(emphasis added)).
[2] See California Government Code §§ 65356; 65453; 65857. The Government Code explicitly requires a remand to the planning commission when there are substantial modifications in general plan amendments, specific plan amendments, and zoning changes. However, neither the Government Code, the Public Resources Code, nor the CEQA Guidelines explicitly require a remand to the planning commission when modifications are made to the EIR.
[3] Tracy First v. City of Tracy (2009) Cal. App. LEXIS 1429, at 19.

CEQA requires that an EIR must describe a range of reasonable alternatives to a project which would feasibly attain most of the basic project objectives, but would avoid or substantially lessen any of the significant environmental effects.[4] Tracy First argued that the EIR included alternatives that did not reduce the environmental impacts, and omitted a reduced store-size alternative. The Court addressed the second issue[5] (reduced-size alternative) and found that Tracy First's argument failed on the merits.

The record did not establish that a reduced-size alternative would substantially diminish any of the significant environmental impacts of the Project to air quality and traffic. Notably, the Court found that there was no significant evidence in the record that fewer customers would patronize a smaller WinCo store, and thus declined to speculate or presume that traffic would be lighter and that air quality would be improved over the Project as planned.

In so holding, the Court distinguished Preservation Action Council v. City of San Jose[6], in which a reduced-size alternative would have actually prevented the demolition of a historic building. Here, there was no such "clear-cut reason to require a reduced-size alternative." In the absence of any such evidence, the City Council acted reasonably in certifying the EIR without a reduced-size alternative.

III. ENERGY IMPACTS.

In response to Tracy First's contention that the EIR failed to "consider the whole of the action", the Court held that there was not improper segmentation of the Project simply because the EIR did not include detailed discussion of one parcel in the energy analysis, where there were no specific buildings planned and no application had been submitted to build on that parcel. The Court concluded that CEQA does not require an EIR to analyze specific energy impacts when no specific building project is planned. Thus, it was proper to include a general discussion of energy conservation measures as to the entire Project, with a more specific discussion of energy impacts only as to the parcel for which immediate development was proposed.

An EIR must include a statement concerning "[m]itigation measures proposed to minimize significant effects on the environment, including, but not limited to, measures to reduce the wasteful, inefficient, and unnecessary consumption of energy."[7] The CEQA Guidelines provide that: "Energy conservation measures, as well as other appropriate mitigation measures, shall be discussed when relevant. Examples of energy conservation measures are provided in Appendix F."[8] Appendix F states: "Potentially significant energy implications of a project should be considered in an EIR. The following list of energy impact possibilities and potential conservation measures is designed to assist in the preparation of an EIR. In many instances, specific items may not apply or additional items may be needed." In list form, Appendix F discusses how energy consumption and conservation may be analyzed in the EIR.

Among other things, Tracy First argued that the City failed to proceed in the manner required by law because it relied on state building energy efficiency standards in concluding that there would be no significant energy impacts, and because the EIR did not follow the energy consumption disclosure standards of Appendix F of the CEQA Guidelines.

In its discussion concerning energy conservation, the EIR stated that "the proposed project would exceed the Code required energy efficiency standards detailed in the California 2005 Building Energy Efficiency Standards by more than 25 percent." In other words, the energy efficiency of the project is 25 percent better than what is required by the state standards. Based on this assessment, the EIR concluded: "As a result of the proposed project's compliance to and exceedance of the 2005 California Building Energy Efficiency Standards, direct energy consumption by the proposed project would not result in a significant impact." The EIR therefore did not propose mitigation measures with respect to energy.

Although Tracy First asserted that "Title 24 compliance does not excuse [the City's] failure to address energy as required by CEQA", the Court disagreed, holding that the California Building Energy Efficiency Standards are meant to promote energy efficiency, as the name implies. In other words, they "reduce the wasteful, inefficient, and unnecessary consumption of energy." Thus, the City did not fail to proceed in the manner required by law when it relied on the California Building Energy Efficiency Standards in determining that the Project would not have a significant energy impact. This is significant because the Court essentially established a meaningful standard for analysis of energy impacts where none previously existed.

In addition, the Court held that neither Appendix F itself, nor any other authority requires an EIR to discuss every possible energy impact or conservation measure listed in Appendix F. Because the EIR discussed many of the issues listed in Appendix F, and because Tracy First did not

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[4] 14 CCR § 15126.6.

[5] Tracy First failed to exhaust its administrative remedies with regard to alternatives not reducing impacts.

[6] Preservation Action Council (2006) 141 Cal.App.4th 1336.

[7] Cal. Pub. Res. Code, § 21100(b)(3).

[8] 14 CCR § 15126.4 (a)(1)(C).

identify any particular energy issue listed in Appendix F that was not adequately addressed in the EIR, the Court found that the City had not abused its discretion, and that its conclusion that the Project would not have a significant environmental impact with respect to energy was supported by substantial evidence.

IV. MITIGATION OF EXTRATERRITORIAL IMPACTS.

Tracy First also asserted that the City erred because the EIR found that the Project would substantially impact two intersections outside the City's jurisdiction, but did not provide for funding of improvement of the intersections. The Court distinguished City of Marina v. Board of Trustees of California State University[9], concluding that the City was not required to provide for funding of the improvements to the intersections, because the intersections were not under the control of the City, and San Joaquin County had no existing plan to improve the intersections, nor any financing plan in place to fund the improvements.

The Court reaffirmed the holding in City of Marina that "a commitment to pay fees without any evidence that mitigation will actually occur is inadequate."[10] The City had no enforceable plan to insure that required mitigation funds would actually go toward mitigation. Thus, although necessary, this mitigation was not feasible or enforceable.[11] The Court flatly rejected Tracy First's assertion that in the absence of a reasonable, enforceable plan, a developer must pay the mitigation fee and the public agency must prepare a sufficient plan to assure actual mitigation. To do so in this case would have required the City to impose a plan upon the County for improvement of the intersections, which is not required by CEQA.

CONCLUSION · This case is favorable to developers and commercial retail developments for several reasons. First, and most importantly, this case establishes a threshold of significance for energy impacts, an area where there has previously been little clear-cut guidance. Second, this case encourages expeditious review processes by affirming that a city council is not required to remand an EIR back to the planning commission for reconsideration after amendment, where the amendments are made only to the environmental analysis in the document, and not to the project itself. Third, it is not enough that a reduced-size alternative would "presumably" reduce the significance of certain impacts. In the absence of evidence that a reduced-size alternative would mitigate significant environmental impacts, it need not be analyzed within an EIR. Lastly, the decision clarifies the responsibility for mitigation of impacts occurring outside the jurisdiction of the lead agency, by holding that fees for "fair share" costs of improvements need not be paid where there is no plan or funding mechanism in place.

This Alert was authored by Tracy M. Owens and the Real Estate/Land Use Department Publication Committee, chaired by Matthew Wm. Nelson. If you have any question about this article or would like to be included on the Real Estate/Land Use Law Newsletter email list, please email matthew.nelson@greshamsavage.com. The Real Estate/Land Use Practice Group handles all aspects of real estate and land use, including title, purchase and sale transactions, leasing, entitlement and governmental approvals, and environmental remediation.

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[9] City of Marina (2006) 39 Cal.4th 341, 359.

[10] Id. at 365.

[11] See Cal. Pub. Res. Code §§ 21081.6(b); 21002.1(b).