Canyon Crest Conservancy,

v.

County of Los Angeles, et al.

BS167311

Judge Mary Strobel
Hearing: May 9, 2017

Tentative Decision on Motion to Stay Administrative Order

Petitioners Canyon Crest Conservancy ("Petitioners") move for a preliminary injunction or stay of the approval by Respondent County of Los Angeles ("Respondent" or "County") of a single family residential project in Altadena, CA. Real Party in Interest Stephen Kuhn ("Real Party") and Respondent oppose the motion.

Evidentiary Objections to Supplemental Declaration of Mitchell Tsai

Respondent objects to the supplemental declaration of Mitchell Tsai on the basis that it was submitted for the first time in reply. Exhibit A responds to the argument, first made in the oppositions, that the Project is categorically exempt under Class 3. Therefore, Exhibit A is proper rebuttal evidence. Exhibit B is a letter from Rebecca Latta dated March 20, 2017 to attorney Tsai. Petitioners do not explain why they did not submit this letter earlier, or how this letter responds to the oppositions. Accordingly, Exhibit B is improper reply evidence and is disregarded. (See *Regency Outdoor Advertising v. Carolina Lances, Inc.* (1995) 31 Cal.App.4th 1323, 1333.)

Specific objections:

(1) Overruled as to Exhibit A; Sustained as to Exhibit B.
(2) Overruled.
(3) Sustained.
(4) Overruled.
(5) Sustained.

On May 8, 2017, Petitioners filed an opposition to Respondent's evidentiary objections and a second supplemental declaration of Mitchell Tsai. The court disregards both documents because they were untimely and not authorized by the court. Also, the May 8 Tsai declaration would not change the court's evidentiary rulings.

Statement of the Case

The challenged project is the construction of a new single-family residence with an attached garage on a vacant parcel of land located on Canyon Crest Road in Altadena (hereafter "the Project"). The Project site is 1.04 acres in size, consists of one legal lot, and is located in a hillside management area of the Altadena Community

Standards District (CSD). The proposed square footage for the habitable area of the residence is 1,436 square feet. (Kuhn Decl. Exh. A at 3-4; see Exh. C at 42-43 [initial study]; Exh. H at 182 [illustration].)

The Project site is located in an oak woodland that extends off site for some distance in all directions, and is represented on the site in two locations – on the east end near Canyon Crest Road where development is proposed, and on the west end at the bottom of a ravine. (Kuhn Decl. Exh. F at 143-153.) According to Respondent's findings, the Project requires removal of one oak tree and would encroach within the protected zone of nine other oak trees. (Id. Exh. A at 3.) In one document, the County characterized the stand of oak woodland at the eastern edge of the Project site as "highly disturbed" and in a transcript, the Respondent's biologist characterized it as "[inaudible] disturbed." (Id. Exh. I at 229; Exh. O at 336.) The final approval did not make any findings with respect to the condition of oak woodland. The conditions of approval for the Project imposed various conditions to help protect oak trees on the site, including replacement of all removed trees in a 2:1 ratio. (Id. Exh. B at 19-28.)

Respondent conducted an initial study, concluded that the Project as conditioned would not result in a significant impact on the environment, and issued a negative declaration. As relevant to conversion of oak woodlands, Respondent concluded as follows: "The proposed development is sited at the edge of a disturbed oak woodland community, and would include the removal of one coast live oak (*Quercus agrifolia*) tree from the community .... The applicant will plant two oak trees on the subject property.... Compliance with the conditions of the oak tree permit, through the planting of replacement oaks on site in appropriate habitat areas will ensure that impacts to oak woodlands are less than significant." (Kuhn Decl. Exh. C at 54; see Exh. A at 5, ¶ 18.)

In April 2016, the Regional Planning department conducted hearings on the Project's application and approved the application. Petitioners appealed the approval. On September 7, 2016, the Regional Planning Commission conducted a public hearing and approved the application. Petitioners appealed this decision. In November and December 2016, the County Board of Supervisors heard Petitioners' appeal, and adopted the negative declaration for the Project. On March 21, 2017, the Board of Supervisors issued written findings approving the Project and the negative declaration. (First Amended Petition (FAP) ¶¶ 49-56; Kuhn Decl. Exh. A.)

Procedural History

On January 5, 2017, Petitioners filed a verified petition for writ of mandate and complaint for declaratory and injunctive relief. On February 17, 2017, the court entered the parties' stipulation to stay the action until March 30, 2017.

On April 17, 2017, Petitioners filed a noticed motion for preliminary injunction or administrative stay. Petitioners also filed a first amended verified petition for writ of mandate and complaint for declaratory and injunctive relief on that date. On April 26,

2017, Respondent and Real Party filed opposition briefs. On May 2, 2017, Petitioners filed a reply.

Summary of Applicable Law

Stay of Administrative Order

Code of Civil Procedure section 1094.5(g) provides, in pertinent part:

> (g) Except as provided in subdivision (h), the court in which proceedings under this section are instituted may stay the operation of the administrative order or decision pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing the notice, whichever occurs first. However, no such stay shall be imposed or continued if the court is satisfied that it is against the public interest.

The administrative stay provision of Section 1094.5(g) "requires the superior court to weigh the public interest in each individual case."[1] (*Sterling v. Santa Monica Rent Control Bd.* (1985) 168 Cal.App.3d 176, 187.)

CEQA

In an action challenging an agency's decision under CEQA, the trial court reviews the agency's decision for a prejudicial abuse of discretion. (Pub. Res. Code, § 21168.5.) "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (Ibid.; see also *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.)

Substantial evidence is defined as "enough relevant evidence 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." (Title 14 Cal. Code Regs. ("CEQA Guidelines") § 15384(a).) An agency is presumed to have regularly performed its official duties. (Evidence Code § 664.) "The reviewing court must resolve reasonable doubts in favor of the administrative finding and decision." (*Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 393.)

---

[1] CCP section 1094.5 provides two different standards for a stay. Section 1094.5(h) applies to administrative orders of certain state agencies and requires the petitioner to show that (1) "... the public interest will not suffer ..." and (2) the "... agency is unlikely to prevail ... on the merits ...." (*Medical Bd. of California v. Sup. Ct.* (1991) 227 Cal.App.3d 1458, 1461.) Subdivision (g), which applies to the administrative order at issue, does not require the petitioner to show that the agency is unlikely to prevail on the merits.

CEQA uses a three-tiered process. The first tier is jurisdictional and concerns whether the activity is a "project." (*Muzzy Ranch Co. v. Solano County Airport Land Use Com'n* (2007) 41 Cal.4th 372, 380.) "The second tier concerns exemptions from CEQA review." (Ibid.) If a public agency properly finds that a project is exempt from CEQA, no further environmental review is necessary and the agency need only prepare and file a notice of exemption. (Ibid.) If a project does not fall within an exemption, the agency must "conduct an initial study to determine if the project may have a significant effect on the environment." (Ibid.) "CEQA's third tier applies if the agency determines substantial evidence exists that an aspect of the project may cause a significant effect on the environment. In that event, the agency must ensure that a full environmental impact report is prepared on the proposed project." (Id. at 381.)

"A public agency pursuing or approving a project need not prepare an EIR unless the project may result in a 'significant effect on the environment' (§§ 21100, subd. (a), 21151, subd. (a)), defined as a 'substantial, or potentially substantial, adverse change in the environment' (§ 21068)." (*Communities for a Better Environment v. SCAQMD* (2010) 48 Cal.4th 310, 319, citing to the Public Resources Code.) "If the initial study instead indicates the project will have no significant environmental effects, the agency may ... so state in a negative declaration." (Id. at 319.) "If no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR." (Id. at 319-320.)

ANALYSIS

Is a Stay Against the Public Interest?

Petitioners identify a public interest in granting the stay. The oak woodland and natural interests identified by Petitioners could be irreparably harmed if the approval of the Project is not stayed. It appears that if the project moves forward without a stay, one or more oak trees may be removed or damaged before the petition is heard on the merits.

In his declaration, Real Party states that he and his wife have spent $40,000 in rent and sunk housing costs since July 2015, when the minor CUP was noticed. (Kuhn Decl. ¶ 12.) He estimates that they will spend another $19,000 to $26,000 in rent and housing costs in the 9-12 months before this case is adjudicated. He estimates that they will also incur at least $9,000 in professional costs for updating and resubmitting documentation due to the expiration of the building permit application, and another $3,735.70 for building permit applications and associated plan check fees. (Id. ¶¶ 13-14.) Real Party also declares that construction financing costs have increased from historically low interest rates and could continue to increase during the pendency of this action, resulting in "tens of thousands of dollars in increased costs." (Id. ¶ 16.) Finally, beyond pecuniary damage, the delay in building their "dream" home could impact the quality of life of Real Party and his wife. (Id. ¶ 17.)

Section 1094.5(g) requires the court to consider whether a stay would be against the public interest. The harm to Real Party from additional project delay does not show that granting a stay would be against the public interest. While the court has considered the delay to Real Party's plans to construct the new residence, the court is not persuaded that this impact outweighs the potential for irreparable harm identified by Petitioners.

Real Party also argues that "the public interest is served by responsible infill development that helps housing supply meet ever growing demand in one of the most expensive housing markets in the world." Respondent makes a similar argument in its opposition brief. (Real Party Oppo. 15; Resp. Oppo. 15.) However, no evidence has been presented that a stay of the Project approval would have a meaningful impact on the availability of housing.

While section 1094.5(g) appears to govern, the legal standard for a preliminary injunction is also instructive in assessing whether a stay of an administrative order should be granted. (See Mot. 3; Respondent Oppo. 5; Real Party Oppo. 13.) The purpose of a preliminary injunction is to preserve the status quo pending a decision on the merits. (*Major v. Miraverde Homeowners Ass'n.* (1992) 7 Cal. App. 4th 618, 623.) In deciding whether or not to grant a preliminary injunction, the court looks to two factors, including "(1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief." (*White v. Davis* (2003) 30 Cal.4th 528, 553-54.) The factors are interrelated, with a greater showing on one permitting a lesser showing on the other. (*Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1420.)

Petitioner's Likelihood of Prevailing

Petitioners contend that they have a reasonable probability of establishing that there is substantial evidence supporting a fair argument that the Project will have a significant impact on oak woodlands on the project site, and that Respondent therefore should have prepared an environmental impact report ("EIR"). In opposition, Respondent and Real Parties dispute this argument. They also contend that the Project is categorically exempt from CEQA under "Class 3" as a single-family residence.

Class 3 Exemption

Construction of a single-family residence is categorically exempt from CEQA, except where (1) "the project may impact on an environmental resource of hazardous or critical concern where designated, precisely mapped, and officially adopted pursuant to law by federal, state, or local agencies"; (2) "when the cumulative impact of successive projects of the same type in the same place, over time is significant"; and (3) "where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." (CEQA Guidelines § 15300.2; § 15303.)

Respondent conducted an initial study and issued a negative declaration. If the Project was exempt under Class 3, it was unnecessary for Respondent to conduct an initial study. (*Muzzy Ranch, supra,* 41 Cal.4th at 380; CEQA Guidelines § 15061.)

In its findings, the Board of Supervisors stated as follows: "Regional Planning determined that the Project could qualify for a CEQA Class 3 categorical exemption ... but determined to perform an Initial Study to provide a mechanism for other local and state agencies to assess and provide comment on the Project and to formally analyze impacts to the riparian environment bisecting the Project Site. Regional Planning's decision to conduct an Initial Study was not based on a conclusion that 'unusual circumstances' as referenced in CEQA Guidelines section 15300.2(c) exist because, in part, the Project would not lead to any impacts different from the development on neighboring properties." (Kuhn Decl. Exh. A at 5-6, ¶ 19.)

Waiver or Estoppel

In opposition, Respondent argues that the preparation of a negative declaration does not preclude Respondent from asserting that the Project is categorically exempt. (Resp. Oppo. 6, citing *Del Cerro Mobile Estates v. City of Placentia* (2011) 197 Cal.App.4th 173, 183-84.) In reply, Petitioners contend that Respondent "is not allowed ... to apply a categorical exemption for single-family homes after already preparing and adopting an environmental document as the basis for its decision." (Reply 3-4.)

In *Del Cerro*, the Court of Appeal held that a city's act in preparing and certifying an EIR as if CEQA applied did not estop the city from later invoking a statutory CEQA exemption for a planned railroad grade separation project. The Orange County Transportation Authority had intervened in the lawsuit "to point out that grade separation projects that eliminate railway crossings are expressly exempt from CEQA requirements (§ 21080.13)." (Id. at 177.) The facts were undisputed; the scope of the statutory exemption presented a question of law, not fact; and nothing suggested that the city prevented the petitioner from becoming aware of the exemption. (Id. at 179-180.)

Here, the circumstances are different than those in *Del Cerro*. As a preliminary matter, *Del Cerro* dealt with a statutory exemption, the application of which involved no factual dispute, not a categorical exemption. Petitioners do not dispute that the Class 3 exemption applies generally to single-family residences. Rather, they contend that an exception to the Class 3 exemption should apply. (Reply 1-3.) However, whether an exception applies is a question of fact that was apparently not addressed in the administrative proceedings.

"An agency's determination that the project falls within a categorical exemption includes an implied finding that none of the exceptions identified in the Guidelines is applicable. The burden then shifts to the challenging party to produce evidence showing that one of the exceptions applies to take the project out of the exempt category. The question whether an exception applies is a question of fact, which is subject on appeal

to review for substantial evidence. Some courts apply the 'fair argument' test, holding that an exemption cannot stand if the challengers present a fair argument that an exception applies. Other courts apply an ordinary substantial evidence test." (*Save Our Carmel River v. Monterey Peninsula Water Management Dist.* (2006) 141 Cal.App.4th 677, 694 [citations omitted]; see also *North Coast Rivers Alliance v. Westlands Water District* (2014) 227 Cal.App.4th 832, 851-852.)

Because Respondent certified a negative declaration, rather than finding the Project categorically exempt (see Kuhn Decl. Exh. A at 14), there is at least a colorable argument for waiver or estoppel. Arguably, Petitioners did not have the burden, given the use of a negative declaration, to develop a record on the *factual* question of whether an exception to the Class 3 exemption applies. [2]

Exceptions to Categorical Exemptions

In its opposition, Respondent argues that the Project is categorically exempt, but it does not discuss the exceptions that could apply. (Resp. Oppo. 6-7.) Real Party, in his opposition, argues that "Petitioner presents no substantial evidence" to support the exceptions in CEQA Guidelines section 15300.2(a)-(c). (Real Party Oppo. 8-10.) Real Party does not explain why Petitioners would have had the burden to present evidence on these exceptions where Respondent prepared a negative declaration and did not rely on the Class 3 exemption. Also, Real Party does not explain why the court would review this issue where Respondent did not make express or implied findings on the Class 3 exemption. (Kuhn Decl. Exh. A at 5-6; see CCP § 1094.5(b) and *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 515 [" implicit in section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order"].)

On that basis, the court considers whether Petitioner has a reasonable probability of succeeding on its claim that an EIR, rather than a mitigated negative declaration should have been prepared.

Fair Argument that Project will have Significant Environmental Impact

"A public agency pursuing or approving a project need not prepare an EIR unless the project may result in a 'significant effect on the environment' (§§ 21100, subd. (a), 21151, subd. (a)), defined as a 'substantial, or potentially substantial, adverse change in the environment' (§ 21068)." (*Communities for a Better Environment v. SCAQMD* (2010) 48 Cal.4th 310, 319, citing to the Public Resources Code.) "If no EIR has been prepared for a nonexempt project, but substantial evidence in the record

[2] These facts also might support an argument that the proceedings were unfair, because Petitioners did not have sufficient opportunity to develop a record on the exceptions. The parties have not briefed that fair hearing argument.

supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR." (Id. at 319-320.)

Relevant Law regarding Oak Woodlands

Under CEQA, when preparing an EIR or negative declaration, "a county shall determine whether a project within its jurisdiction may result in a conversion of oak woodlands that will have a significant effect on the environment." (Pub. Res. Code § 21083.4(b).) " If a county determines that there may be a significant effect to oak woodlands, the county shall require one or more of the following oak woodlands mitigation alternatives to mitigate the significant effect of the conversion of oak woodlands: (1) Conserve oak woodlands, through the use of conservation easements. (2)(A) Plant an appropriate number of trees, including maintaining plantings and replacing dead or diseased trees.... (3) Contribute funds to the Oak Woodlands Conservation Fund.... (4) Other mitigation measures developed by the county." (Ibid.)

In 2001, the Governor approved the California Oak Woodlands Conservation Act, which requires counties to develop an Oak Woodlands Conservation Management Plan to qualify for funding to preserve oak woodlands through the state's Oak Woodlands Conservation Fund. (Fish & Game Code §§ 1360-1372; see Tsai Decl. Exh. B at 2.) With the moving papers, Petitioners' attorney submits a copy of the Los Angeles County Oak Woodlands Conservation Management Plan, adopted March 18, 2014.[3] (Tsai Decl. ¶ 3, Exh. B.)

While Respondent states in opposition that the County's Oak Woodlands Plan was not adopted into the 2035 General Plan until October 6, 2015, after the initial study was completed, it does not explain how this is relevant or dispositive to the analysis under CEQA.[4] (Oppo. 7-8.) The Plan submitted by Petitioners includes significance thresholds with regard to oak woodlands that were apparently in existence and adopted by County at the time of the initial study. (See Tsai Decl. Exh. B at 11-14.)

Under the County Code, an oak tree permit is required prior to cutting, destroying, removing, relocating, inflicting damage, or encroaching into the protected zone of any tree of the oak genus, which is 8 inches or more in diameter for a single trucked-tree, or whose two largest combined trunks are at least 12 inches in diameter as measured 4 ½ feet above mean natural grade. (County Code § 22.56.2060; see Tsai Decl. Exh. D at 2.) The record includes an oak tree report prepared for the Project on August 2, 2014. (Tsai Decl. Exh. D.)

Number of Oak Trees to be Removed

[3] No evidentiary objection has been received to this statement.
[4] The court also notes that the Board approved the negative declaration on March 21, 2017.

Petitioners contend that the comments of certified arborist Rebecca Latta are substantial evidence of a fair argument that the project will have a substantial impact on oak woodlands on the project site. Petitioners base this contention in part on Latta's opinion that the Project would likely require removal of more than one protected oak tree.[5]

Respondent found that the Project requires removal of one oak tree and would encroach within the protected zone of nine other oak trees. (Kuhn Decl. Exh. A at 3.) Latta opined that the Respondent underestimated the number of trees that would need to be removed. She estimated impacts of 35-65% to the roots of trees 4, 5, and 7 due to encroachment, and impacts of 45-55% to the canopies of those trees. (Tsai Decl. Exh. C at 20-21.) In addition to removal of tree 6 (which is undisputed), Latta opined that removal of up to 3 other protected trees could be required and that this would constitute "significant impact to contiguous woodland."[6] (Id. at 7, 11-12, 20-21.)

An April 18, 2016 letter of arborist Scott McAllaster, who prepared the August 2, 2014 oak tree report, provides some support for Latta's opinion that removal of tree 4 and 7 could be required: "The level of impacts to these trees [#4 and #7] are significant.... Yes, trees #4 and #7 could be removed as a result of the impacts. However, the amount of impacts does not guarantee that these trees will decline and die." (Tsai Decl. Exh. E at 8.)

In opposition, Respondent states that "primary visual evidence demonstrates that [Latta's] ranges of estimates [of impacts from encroachment] are not factually accurate, by a significant margin." (Resp. Oppo. 10.) Respondent cites to pages 92 of 139 of Exhibit E of the Kuhn declaration, which include visual portrayals of the encroachments on the oak trees. Respondent does not cite any testimony or expert opinion describing these images. While perhaps Respondent could elaborate in subsequent proceedings, this "visual evidence" does not necessarily undermine Latta's expert opinion.[7]

Respondent contends that it "should be afforded deference in its rejection of Latta's comments." At paragraph 44 of its findings, Respondent found that "the allegations by Project opponents concerning the extent of encroachment of some oak trees to remain are not supported by credible, substantial evidence." (Kuhn Decl. Exh.

---

[5] Petitioners also contend that the Project will result in the removal of one "heritage" sized oak. (Mot. 9.) Under the County Code, "heritage oak trees" must either have a diameter of 36 inches or more or have "significant historical or cultural importance." (County Code § 22.56.2060.) It appears undisputed that none of the affected oak trees would be considered "heritage" oaks under this definition. (See Tsai Decl. Exh. D at 2.)

[6] It appears that trees 10 and 11, which are not protected by the County Code, could also be removed. (See Id. Exh. C at 15; Oppo. 10:4-5.)

[7] Respondent also cites to Exhibit J of the Kuhn declaration, which appears to be argument in response to Latta's opinion submitted in the administrative proceedings. (Resp. Oppo. 10.) Respondent provides no context for this Exhibit, such as the author or qualifications of the author. Thus this argument is not persuasive

A at 11-12.) Respondent has not shown that the Latta opinion is so speculative or lacking in foundation that, on a motion for stay, it does not support a reasonable probability of prevailing on Petitioners' fair argument claim.

Respondent also misconstrues the legal effect of the agency's credibility determinations in issuing a negative declaration. "Whether a fair argument can be made on this point is a legal question" on which the court does not defer. (*Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 930.) "It is the function of an EIR, not a negative declaration, to resolve conflicting claims, based on substantial evidence, as to the environmental effects of a project." (Id. at 935.)

Petitioners have presented a colorable argument that Latta's expert opinion is substantial evidence of a fair argument that the Project would require removal of additional protected trees.

Latta states that she is a certified arborist with more than 26 years of experience. (Tsai Decl. Exh. C at 4.) In preparing her opinion, she reviewed the site plans dated April 25, 2016, the response to her Independent Arborist Review dated April 18, 2016, the original arborist report dated August 2, 2014 and the April 19, 2016 letter from Los Angeles Regional Planning. (Ibid.) While the court does not adjudicate the issue on a motion for stay, Petitioners have made some showing that the Latta opinion is substantial evidence that the Project could have the impacts as stated above.

Significance of Impacts

Respondent states that removal of 4-6 trees from a woodland of hundreds of oak trees is not a significant impact. (Resp. Oppo. 10, fn. 5.) Later, Respondent argues that Latta found significant impacts by improperly applying different spatial scales in assessing existing conditions and impact severity. (Id. at 11-13.) Real Party concurs in these arguments about significance. (Real Party Oppo. 11-12.)

As a certified arborist, Latta appears qualified to give an opinion as to whether the oak woodland should be considered moderately or severely degraded. Under the Plan, a significant impact to a moderately degraded woodland includes: "regeneration potential is being marginalized; developed areas expand into previously undeveloped areas." (Tsai Decl. Exh. B at 12.) There is some foundation for Latta's expert opinion that the removal of additional protected trees, and other impacts, would be a "moderate impact" under the Plan and therefore significant. (Id. Exh. C at 8.)

Respondent contends that "conflicting assertions do not *ipso facto* give rise to substantial 'fair argument' evidence." (Resp. Oppo. 10, citing *Citizen Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 755.) "The standard to be employed by the agency is not whether *any* argument can be made that a project might have a significant environmental impact, but rather whether such an argument can *fairly* be made." (*Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1003

[cited in *Citizen Action, supra*].) Petitioners' have a reasonable argument that Latta's opinion about significance is the type of evidence that could satisfy this standard.

Mitigation Measures

Respondent contends that even if the Project may cause significant impacts on oak woodlands, Respondent has required mitigations to address such impacts. Real Party concurs, and also argues that the court could compel additional mitigation. (Resp. 14-15; Real Party Oppo. 12-13.)

Latta considered some of the mitigation measures in her opinion. For instance, she stated that "even if dug by hand in protected root zones, damage will still occur" and the cumulative encroachment would most likely require roots to be cut. (Tsai Decl. Exh. C at 5.) Her opinion is fairly interpreted as finding significant impacts despite the proposed mitigation. Thus, on a motion for stay, the court cannot conclude that the mitigation included in the Project approval is sufficient to rebut Petitioners' argument that an EIR should have been prepared.

Based on the foregoing, Petitioner has shown a reasonable probability of succeeding on its claim that Latta's opinion is substantial evidence supporting a fair argument that the Project would have a significant impact on the oak woodland in which the Project site is located.

Bond

While a bond is not required to issue a stay under CCP section 1094.5(g), the trial court has the inherent authority to require a bond in the interest of justice and to prevent unfair results. (See *Venice Canals Resident Home Owners Assn. v. Sup. Ct.* (1977) 72 Cal.App.3d 675, 679-680; CCP § 128.)

Based on the evidence discussed above about the potential financial costs to Real Party from a stay, the court finds that it would be equitable to impose some bond on Petitioners, as the parties requesting the stay. Real Party appears to overstate somewhat or not sufficiently explain the likely financial costs of delay. (Kuhn Decl. ¶¶ 12-16.) A bond of $30,000 appears sufficient and in the interest of justice. The court considers that Real Party apparently has not started construction. Petitioners have not shown an inability to post a bond in this amount, or that the bond would preclude judicial review.

Conclusion

The motion for a stay is GRANTED. Petitioners to post a bond of $30,000.