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### EIR Invalidated for Failure to Analyze Potential Public Acquisition of Residentially Zoned Land

The EIR for a residential project has been struck down because its discussion of project alternatives did not analyze the possibility that public funds might be used to acquire the land for open space. *Save the Hill Group v. City of Livermore*, 76 Cal. App. 5th 1092 (2022).



The project site was zoned residential and was the last remaining undeveloped area in that section of the city. The 32-acre site was environmentally sensitive: it housed numerous special-status plant and animal species; was adjacent to a wetlands preserve; and was hydrologically connected to the unique Springtown Alkali Sink. Project opponents commented that the site should be preserved as open space rather than developed for housing. They filed a CEQA suit after the city approved the project.

The city noted that during its CEQA and project approval process, the plaintiffs had never tied their request for site preservation to the EIR or its alternatives analysis. Accordingly, the city argued that the plaintiffs had not presented to the city the "exact issue" they alleged in court and therefore had failed to exhaust administrative remedies. The court concluded, largely due to exchanges between city council members and city attorneys rather than comments by the public, that it was clear CEQA project alternatives were at issue and equally clear that even had the plaintiffs mentioned the EIR in relation to their open-space advocacy, it would have made no difference to the city's decision. Therefore, the court found that the plaintiffs had met CEQA's exhaustion

requirement.

The court then held that the EIR's analysis of the No Project Alternative was inadequate because it did not explore the possibility of public acquisition - even though the site was eligible for such acquisition through two settlement funds specifically designed to acquire environmentally sensitive lands in the area where the project site was located. In addition, in 2011 the city had acquired another private property to preserve habitat and avoid residential development, using these same funding sources. Under these circumstances, the court concluded that the existence of these funding sources was "just the sort of information CEQA intended to provide those charged with making important, often irreversible, environmental choices on the public's behalf."

Finally, although the plaintiffs abandoned their challenges to the EIR's analyses and mitigation measures for impacts to vernal pool fairy shrimp and the Springtown Alkali Sink, the court addressed and rejected those challenges, concluding that: 1) mitigation requiring future presence/absence surveys for the shrimp was not impermissibly deferred; 2) substantial evidence supported the EIR's finding that the project would not cause a significant impact to the Springtown Alkali Sink; and 3) mitigation requiring offsite compensatory mitigation for species impacts at the 85-acre "Bluebell" site was adequate even though the city's general plan already called for preservation of that entire area, because the mitigation measure, unlike the general plan, required a permanent easement with an endowment for restoration and management.

Proposed greenfield development often elicits comments that a project site should be preserved rather than developed. The circumstances of *Save the Hill Group* are unusual, however, both in the biological quality of the site and, particularly, in the apparent availability of funds to acquire the site for preservation. Although most greenfield development projects will not feature these characteristics, the court's decision indicates that lead agencies should take special care in their EIRs analyzing developments with potentially significant impacts to biological resources. In such cases, it may be wise to discuss whether legal or other reasons render public acquisition of the project site infeasible.

## **Authors**