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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

NORTH COUNTY WATCH,

Plaintiff and Appellant,

v.

COUNTY OF SAN LUIS OBISPO et al.,

Defendants and Respondents;

PAUL VIBORG,

Real Party in Interest and Respondent.

2d Civil No. B230637
(Super. Ct. No. CV098194)
(San Luis Obispo County)

This appeal arises out of a planning commission decision to approve a conditional use permit allowing concrete recycling to continue on an existing mine near the Salinas River in northern San Luis Obispo County (County). Appellant North County Watch (NCW) appeals from judgment after denial of its petition for writ of mandate in which it sought to set aside a County Board of Supervisor's (Board) resolution which conditionally upheld the County's planning commission's (Commission) approval of the conditional use permit (CUP). (Code Civ. Proc., § 1094.5.) We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

Since about 1960, real party in interest, Paul Viborg[1] has owned and operated a surface mine in the County. Its operation as a pit mine was approved in a 1982 reclamation plan under the Surface Mining and Reclamation Act (SMARA). (Pub. Resources Code, § 2710, et seq.) The reclamation plan requires the site to become a residential development when the mining operation terminates.

In about 1995, Viborg began recycling concrete pavement at the site. It blended recycled material with materials that had been mined on-site in order to create road base. In 2007, the County initiated a code enforcement action, having determined that the recycling use had become the primary use of the site.

Viborg applied for a CUP to allow it to continue recycling. Viborg also applied to the Office of Mine Reclamation to change the reclamation plan's end use from residential development to recycling, but Viborg later withdrew that application.

In response to the CUP application, the County conducted an initial study under the California Environmental Quality Act (CEQA). (Pub. Resources Code, § 2100 et seq.) The study identified a potential impact on the San Joaquin Kit Fox, which might use the site as a migration path. The study recommended measures to mitigate the impact, one of which was payment into an approved "in-lieu" fee program such as the Nature Conservancy's voluntary fee-based mitigation program. The County circulated a mitigated negative declaration for review and comment.

After hearing testimony and comment, the Commission granted Viborg's request for a CUP. It approved the mitigated negative declaration, finding there was no substantial evidence that the project would have a significant environmental impact. The

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[1] Viborg filed a responsive brief in which respondent County joined.

Commission also found that the project was consistent with the County's general plan and Title 22 of the San Luis Obispo County Code (Title 22).[2]

NCW appealed the Commission's decision to the Board. NCW listed 13 reasons for its appeal. After public hearing and comment, the Board adopted a resolution substantially upholding the Commission's decision. The Board approved the conditional use permit on conditions, including the condition that recycling operations would cease when the mining operation terminated, or after 20 years, whichever occurred first. The Board approved and certified the mitigated negative declaration and found that the project was consistent with the County's general plan and Title 22.

The County filed its notice of determination on April 29, 2008. The notice erroneously stated that the application included a revised reclamation plan pursuant to which the end use would be changed. In fact, Viborg had withdrawn his request to revise the reclamation plan to change the end use prior to the hearing.

NCW filed a petition for writ of mandate in the superior court, challenging the Board's determination. NCW's petition alleged violation of CEQA, violation of state planning and zoning laws, violation of SMARA, and denial of due process.

The County certified and lodged the administrative record in the trial court. NCW did not move to augment it. NCW submitted a skeletal trial brief without reference to the administrative record. Viborg opposed it, and NCW filed a reply brief in which it presented, for the first time, legal authority and references to the record to support the contentions of the petition. It also presented new contentions. Viborg objected and asked the court to deem six new contentions waived. At the hearing on the petition, NCW's counsel raised additional contentions for the first time and offered authorities and references to the record not previously briefed.

The trial court sustained Viborg's objection to contentions not raised in the trial brief, finding that NCW engaged in "a deliberate 'sandbagging' attempt." The court

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[2] All further references are to the San Luis Obispo County Code unless otherwise indicated.

denied NCW's CEQA claim, finding that it had not met its burden of identifying substantial evidence in the record to support a fair argument that the proposed project may have a significant effect even as mitigated. It denied the state planning and zoning law claim, finding that NCW had not explained how the approval violated any ordinance. It denied the SMARA claim, finding that NCW had not demonstrated how the approval violated SMARA.

NCW filed a notice of appeal. It elected to proceed by using an appendix. (Cal. Rules of Court, rule 8.122.) NCW did not initially designate the administrative record to be included in the record or otherwise furnish it to this court.[3] We brought this to counsel's attention at oral argument. Several weeks later, NCW asked us to vacate submission and allow it to late-designate the record. We granted the request, received the administrative record, and reviewed it.

## DISCUSSION

### *Standard of Review*

"The decision of an administrative agency comes before a court with a presumption of regularly performed official duty." (*Feist v. Rowe* (1970) 3 Cal.App.3d 404, 422.) The trial court's inquiry on a petition for writ of administrative mandamus is limited to the questions whether the agency has proceeded without or in excess of jurisdiction, whether there was fair trial, and whether there was any prejudicial abuse of discretion. (Code Civ. Proc., § 1094.5, subd. (b).) An abuse of discretion exists if the respondent agency "has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (*Ibid.*) Judicial review is precluded if the issue was not first presented to the administrative agency. (*Resource Defense Fund v. Local Agency Formation Com.* (1987)

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[3] It is the appellant's burden to include the administrative record if the appellant intends to raise any issue that requires its consideration. (Cal. Rules of Court, rules 8.121(b)(2) & 8.123(b).)

191 Cal.App.3d 886, 894, disapproved on other grounds in *Voices of Wetlands v. State Water Resources Control Board* (2011) 52 Cal.4th 499, 529.)

The trial court will affirm an agency's adjudicative determination if there is substantial evidence to support the administrative decision, whether it is contradicted or not. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) On appeal, our standard of review is the same. We review the administrative record to determine whether the agency's findings were supported by substantial evidence. (*MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 218.) The agency's decisions enjoy a strong presumption of correctness. (*Mattison v. Signal Hill* (1966) 241 Cal.App.2d 576, 583.)

NCW's contentions, as we understand them, are that (1) the Board could not lawfully expand use on the site to allow recycling because the existing mine was operating without a permit; (2) the recycling operation was a "paving materials" use and therefore not permitted in agricultural lands because not all of the raw materials were extracted on-site; (3) the conditions of approval and mitigation upon which the mitigated negative declaration relied were invalid because they did not satisfy CEQA requirements as articulated in *California Native Plant Society v. County of El Dorado* (1999) 170 Cal.App.4th 1026 (*California Native Plant Society*); (4) the notice of determination was false and misleading in violation of NCW's constitutional right to due process; and (5) the trial court imposed a de facto terminating sanction that was unauthorized when it sustained Viborg's objections to new contentions raised in NCW's reply brief and at the hearing.

*1. Contention That the Board Could Not Lawfully Expand Use on the Site to Allow Recycling Because the Existing Mine Was Operating Without a Permit*

The parties agree that Viborg operated the mine without a permit, as a vested use. NCW contends, and Viborg disputes, that the mine was a "non-conforming" use because a permit is now required by Title 22 for operation of a mine. Title 22 provides that, if a principle use is non-conforming, no additional use may be established

unless (1) the nonconforming use is first brought into conformity, or (2) a CUP approves the new use either on conditions that require the nonconforming use to be brought into conformity or upon a finding that the new use is independent from the nonconforming use and will not act to prolong it. (§ 22.72.050, subd. (A)(2)(a) & (b).)[4] Thus, in its opening brief, NCW contends that the Board could not lawfully issue the CUP unless it either required the mine to be brought into conformity or determined that recycling was an independent use. (*Ibid*.)

NCW has not demonstrated that it made this contention at the administrative level. The trial court found that "[g]eneral plan consistency and zoning were not one of the thirteen issues set out in NCW's notice of [administrative] appeal." NCW has not demonstrated otherwise. Moreover, NCW did not contend in its petition for writ of mandate that expanded use of the site was prohibited because the mine was operating without a permit. NCW does not address the findings of the Commission and the Board that the project was consistent with Title 22. The findings enjoy a strong presumption of correctness which NCW has not overcome.

NCW also contends that the absence of a mining permit meant that recycling could not be allowed as an accessory use. Under Title 22, an "accessory use" must be subordinate to the main use and may not be established unless a conforming principal use is first established. (§ 22.30.030) NCW has not demonstrated that it raised this issue at the administrative level. The issue is also immaterial to resolution of NCW's petition because the County did not allow recycling as an accessory use. It determined that recycling was no longer subordinate to mining and decided to allow recycling under a CUP. Title 22 allows recycling on agricultural lands with a CUP. (§§ 22.30.020, subd. (A) & 22.06.030.)

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[4] NCW incorrectly cites these provisions as "(A)(1)(a)(b)" in its opening brief.

*2. Contention That the Recycling Operation Was a "Paving Materials" Use and Therefore Not Permitted in Agricultural Lands Because the Raw Materials Were Not All Extracted On-Site*

Title 22 allows "Recycling - Scrap & dismantling yards" use on agricultural lands with a conditional use permit. (§§ 22.30.020, subd. (C); 22.06.030, Table 2-2; 22.30.380, 22.30.390.) In addition, Title 22 allows "Paving Materials" use in agricultural lands, with site plan review, but paving material use is limited to "manufacturing operations for which the raw materials are extracted on-site." (§ 22.06.030.) NCW argues that Viborg's recycling operation is a "paving material" use, and is therefore prohibited in agricultural lands because not all of the raw materials that Viborg uses are extracted on-site. (§ 22.06.030.) For this argument, NCW relies on section 22.30.020, subdivision (C)(2), which provides that "[i]f a use is subject to more than one section of this Chapter [standards for specific lands uses, §§ 22.30.010 to 22.30.640], the most restrictive standard shall control."

NCW has not demonstrated that it made this contention at the administrative level. NCW did not make this contention in its petition for writ of mandate. NCW's petition for writ of mandate only alleged inconsistency with the "recycling" regulations of sections 22.30.380 and 22.30.390. NCW has not overcome the presumption that the County correctly found the project was consistent with Title 22.

We will deny NCW's request for judicial notice of three documents it offered to support its claim that the County interprets section 22.06.030 to require one hundred percent of paving material to be extracted on-site. The documents were created after the Board's April 29, 2010 decision. The documents are: (1) minutes of a March 9, 2010 Board meeting, (2) an agenda item transmittal relating to the March 9, 2010 hearing, and (3) minutes of a February 11, 2010 Commission meeting. Judicial review of a mandamus action is limited to review of evidence that was before the administrative decision makers either before, or at the time of, their decision. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 569.) Rarely, extra-record

evidence may be considered if it existed before the agency made its decision and could not, in the exercise of reasonable diligence, be presented before the decision was made. (*Id.* at p. 578.) Here, none of the documents existed before the decision.

NCW also contends that recycling is prohibited on agricultural lands by sections 22.06.030 and 22.30.380. Section 22.06.030 prohibits "storage yards" in agricultural lands. Section 22.30.380 extends certain storage yard screening and dust control requirements to recycling facilities. (§ 22.30.380 [recycling facilities are "subject to all provisions of section 22.30.560 (Storage Yards [screening and dust control].)" From these two provisions, NCW concludes that all storage yard regulations must apply to recycling, and that therefore recycling is prohibited on agricultural lands. This leap is unsupported by the plain language of section 22.30.380 which extends only screening and dust control requirements to recycling facilities. It also contradicts the express provision of section 22.06.030 that recycling is allowed in agricultural lands with a conditional use permit. More fundamentally, it was forfeited when NCW made no mention of section 22.30.020 or storage yards in the petition for writ of mandate.

*3. Contention That the Conditions of Approval and Mitigation Upon Which the Mitigated Negative Declaration Relied Were Invalid Because They Did Not Satisfy CEQA Requirements as Articulated in California Native Plant Society*

Under CEQA, an environmental impact report (EIR) is required whenever there is a fair argument that a proposed project may have a significant effect on the environment. (Pub. Resources Code, § 21061, *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602.) When there is no substantial evidence that the project may have a significant effect on the environment, a negative declaration is instead appropriate. (Pub. Resources Code, § 21080, subd. (c)(1).) When the project may have a potentially significant effect on the environment, but revisions in the project plans would avoid or mitigate the effects to insignificance, a mitigated negative declaration is appropriate. (§ 21064.5) The mitigated negative declaration ends environmental review. A mitigated negative declaration will be overturned if there is

substantial evidence in the record that the project, as revised, may have a significant impact on the environment. (*Citizens for Responsible & Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1340.)

Here, the County issued a mitigated negative declaration based on mitigation measures that included payment into a Kit Fox preservation program. A comprehensive preservation program funded by impact fees may adequately mitigate environmental effects. (*California Native Plant Society, supra,* 170 Cal.App.4th at p. 1030.) But "to be considered adequate, a fee program at some point must be reviewed under CEQA, either as a tiered review eliminating the need to replicate the review for individual projects, or on a project-level, as-applied basis." (*Ibid.*)

In its petition for writ of mandate, NCW generally argued that the mitigated negative declaration was not supported by adequate findings, but it did not challenge the Kit Fox fee program. On appeal, it contends that the mitigation condition was inconsistent with *California Native Plant Society,* that there is no substantial evidence in the record "that a fee paid to a non-existent conservation program will avoid or adequately mitigate the loss of approximately 322 acres of habitat for this special status species," and that no in-lieu fee program presently exists. NCW has not demonstrated that it made this contention at the administrative level. Further, it forfeited the contention when it did not challenge (or even mention) the fee program in its petition for writ of mandate.

*4. Contention That the Notice of Determination Was False and Misleading in Violation of NCW's Constitutional Right to Due Process*

NCW contends that the County violated its due process rights because the notice of declaration erroneously stated that a revised reclamation plan had been approved. We reject the contention.

An agency must file with the county clerk a notice of determination five days after deciding to approve a project that falls under CEQA. (Pub. Resources Code, § 21152, subd. (a).) Here, the notice of determination mistakenly included reference to

the revised reclamation plan which Viborg had actually withdrawn before the hearing. In the trial court, NCW argued that public hearing ought to have been allowed on the revised reclamation plan because the notice of determination mistakenly identified it. The trial court rejected the claim because, "[t]he actual resolution approved by the Board of Supervisors clearly indicates that the Board of Supervisors only approved the conditional use permit and interim management plan," and because, "the withdrawal of the revised reclamation plan, and whether or not approval of a revised reclamation plan was required, was in fact addressed at the Board of Supervisors hearing." Here, NCW contends that the error in the notice of determination was false, misleading, and violated its right to due process. We reject the contention because NCW was not misled, and suffered no prejudice, as a result of the error. As NCW acknowledges in its opening brief, "at the hearing it was announced the Plan had been withdrawn and that no testimony would be permitted on the plan."

*5. Contention That the Trial Court Imposed a De Facto Terminating Sanction That Was Unauthorized When it Sustained Viborg's Objections to Contentions NCW Raised for the First Time in Its Reply Brief and at the Hearing*

Finally, we reject NCW's contention that the trial court's "imposition of a de facto terminating sanction based on vague incompleteness it found in [NCW's] trial briefing is not supported by the record, did not prejudice [any] real party, and in its lack of express findings should not be sustained," and that the trial court "had waived the requirement that Parties submit Statement of Issues." The trial court did not impose any sanctions against NCW. It sustained Viborg's meritorious objections to factual and legal arguments that were raised for this first time at oral argument or in the reply brief, based on its finding that NCW was engaging in deliberate sandbagging. NCW demonstrates no good cause for its delay in presenting those arguments and has not identified authority or evidence in the record to sustain its claim that the court erred. The trial court has inherent authority to enforce order in the proceedings before it and to control its process. (Code Civ. Proc., § 128, subd. (a)(1) & (8).) Unless a clear case of abuse is shown and there has

been a miscarriage of justice, we will not disturb a trial court's exercise of its discretionary power. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) NCW has not met its burden of establishing the claimed error.

DISPOSITION

NCW's request for judicial notice is denied. The judgment is affirmed. Respondent and Real Party In Interest shall recover their costs on appeal.

NOT TO BE PUBLISHED.

COFFEE, J.*

We concur:

YEGAN, Acting P.J.

PERREN, J.

* Retired Associate Justice of the Court of Appeal, Second Appellate district, assigned by the Chief Justice pursuant to article VI, section 6 of the California constitution.

Martin J. Tangeman, Judges

Superior Court County of Santa Barbara

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