Filed 12/6/12 Coastal Defender v. City of Manhattan Beach CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

COASTAL DEFENDER, Plaintiff and Appellant, v. CITY OF MANHATTAN BEACH et al., Defendants and Respondents; MB DINING, LLC, et al., Real Parties in Interest and Respondents.	B239096 (Los Angeles County Super. Ct. No. BS132163)

APEAL from a judgment of the Superior Court of Los Angeles County, John A. Torribio, Judge. Affirmed.

Lounsbery Ferguson Altona & Peak, Felix M. Tinkov; Strumwasser & Woocher, Frederic D. Woocher and Beverly Grossman Palmer for Plaintiff and Appellant.

Jenkins & Hogin, Christi Hogin and Gregg Kovacevich for Defendants and Respondents City of Manhattan Beach and City of Manhattan Beach City Council.

Kamala D. Harris, Attorney General, John A. Saurenman, Senior Assistant Attorney General, Christina Bull Arndt, Supervising Deputy Attorney General, and Jennifer W. Rosenfeld, Deputy Attorney General, for Defendants and Respondents California Coastal Commission and Peter M. Douglas as Executive Director.

Jeffer Mangels Butler & Mitchell and Sheri Bonstelle for Real Parties in Interest and Respondents.

Coastal Defender challenges land use approvals by the City of Manhattan Beach in connection with a development project by MB Dining, LLC (MB Dining), involving the renovation of a restaurant and nightclub. The city determined that the project was categorically exempt from the requirements for environmental review under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) and exempt from the requirement of a coastal development permit under the California Coastal Act of 1976 (Coastal Act) (§ 30000 et seq.). Coastal Defender appeals a judgment denying its petition for writ of mandate.

Coastal Defender contends (1) the city abused its discretion by relying on mitigation measures in determining that the project was categorically exempt from CEQA; (2) an exception to the categorical exemption applies; and (3) a coastal development permit is required because the project changes the intensity of use of the existing building.

We conclude that the city did not rely on mitigation measures in applying a categorical exemption under CEQA, and Coastal Defender has failed to show a reasonable possibility that the project will have a significant effect on the environment so as to justify an exception to the categorical exemption. We also conclude that Coastal Defender failed to exhaust its administrative remedy as to some issues under the Coastal Act and has shown no abuse of discretion by the city on another issue. We therefore will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Restaurant Renovation Project*

MB Dining submitted an application to the city in October 2010 to amend an existing conditional use permit in connection with the renovation of a restaurant and nightclub. The property is located at 117 Manhattan Beach Boulevard and is within the coastal zone (Pub. Resources Code, § 30103, subd. (a)). At the time of the application, the site was unoccupied but was previously operated as a restaurant known as Beaches. MB Dining proposed constructing two new outdoor balconies on the second story, extending over the sidewalk, to be used for dining; installing fully retractable, roll-up windows and doors on the first and second stories at the front of the building; constructing a new basement; opening a restaurant at the location and extending the dining and drinking hours to 2:00 a.m. on Fridays and Saturdays, from 1:00 a.m., while dancing hours would continue to end at 1:00 a.m. on those nights; adding two additional days of dancing each week and six additional days of special events annually; and extending the opening hours of the restaurant on weekdays to 8:00 a.m. from 10:00 a.m., in addition to other proposed changes.

A representative of MB Dining met with a group of neighbors to discuss concerns regarding noise impacts, opening hours, security and other matters and potential project modifications or restrictions. Members of the public submitted comments on the proposal. The police department recommended imposing conditions that noise from the site must be inaudible beyond 75 feet from the property and that all windows and doors must be kept closed during dancing or entertainment.

2. *Planning Commission Approval*

The city's planning commission conducted a hearing on the project in January 2011. Commissioners and members of the public expressed concerns about noise impacts, the proposed balcony projections over the sidewalk and other matters. The planning commission staff recommended imposing conditions to mitigate noise impacts. The hearing was continued to February 2011.

MB Dining revised its proposal prior to the second hearing, limiting the fully retractable façade to the first story only and reducing the balconies to 18-inch decorative projections without seating or dining. MB Dining also presented a noise impact study by Behrens and Associates, Inc., prior to the second hearing. The study compared projected noise levels from activities at the project with those from activities at the former restaurant on the site, known as Beaches. The projections were generated by computer modeling based on certain assumptions. The study concluded that the project would produce lower noise levels than Beaches. At the second hearing, commissioners and members of the public again expressed concerns about noise impacts, the proposed balcony projections over the sidewalk and other matters. Some questioned the assumptions made in the noise study and the scope of the study.

The planning commission adopted Resolution No. PC 11-02 on February 23, 2011, approving the revised proposal in part with certain restrictions. The commission approved the building renovations and earlier opening hours (8:00 a.m. rather than 10:00 a.m.) on several annual holidays, but did not approve the extension of opening

hours on weekend nights and weekday mornings or the decorative projections.[1] The commission also required closing on weeknights one hour earlier that the existing conditional use permit (midnight rather than 1:00 a.m.). The commission also imposed certain operating restrictions, including that (1) noise emanating from the site must comply with the city's noise ordinance and a future group entertainment permit; (2) no operable windows could be located on the north, east or west sides of the building; (3) all doors and windows must remain closed during entertainment or dancing; and (4) noise from the site must be inaudible beyond 75 feet from the property.

The planning commission approved amending the conditional use permit accordingly. The commission found that the project as approved was categorically exempt from CEQA because it involved only a minor modification of an existing facility. The commission also found that the project as approved did not require a coastal development permit because it did not increase the intensity of use or create additional impacts.

MB Dining appealed the planning commission's decision to the city council, seeking the city council's approval of either dining balconies or decorative projections. Don McPherson, a resident of the city and president of Coastal Defender, also appealed the decision.

---

[1] The resolution stated: "The applicant had also requested extended closing times of 2am . . . and balcony dining within the public right-of-way (later revised to be decorative projections); but these requests were not approved by the Planning Commission due to concerns for increased disruption to the surrounding area and the Manhattan Beach Boulevard right-of-way."

3. *City Council Approval*

The city council conducted a hearing on the two appeals on April 5, 2011. The city council upheld the decision by the planning commission and directed its staff to prepare a resolution for approval of the larger balconies originally proposed by MB Dining. The city council approved an encroachment permit for such balconies at a hearing on April 19, 2011. The city filed a notice of exemption on April 25, 2011, stating that the project was categorically exempt under CEQA.

The city then sought a determination by the Executive Director of the California Coastal Commission (Coastal Commission) as to whether the project was exempt from the requirement of a coastal development permit. The Coastal Commission staff on behalf of the Executive Director determined that the city had correctly determined that the project did not change the intensity or use of the structure and therefore was exempt from the permit requirement. The Coastal Commission staff also determined that the decision by the Executive Director was not appealable to the Coastal Commission.

4. *Trial Court Proceedings*

Coastal Defender, a nonprofit public benefit corporation formed after the project's approval, filed a petition for writ of mandate in May 2011 challenging the city council's decisions. Coastal Defender filed an amended petition in August 2011 alleging counts for (1) violation of CEQA, against the city and city council; (2) violation of the Coastal Act and the local coastal plan, against the city and city council and the Coastal Commission and its Executive Director; (3) violation of the local coastal plan, against the city and city council; (4) violation of a municipal code

provision governing encroachments, against the city and city council; (5) declaratory relief regarding the city's obligations under CEQA, the Coastal Act and the local coastal plan, against the city and city council; and (6) an injunction, against the city and city council. MB Dining completed the project in August 2011, and the restaurant and nightclub have been operating since that time.

After a hearing on the merits, the trial court denied the petition. The court concluded that substantial evidence in the administrative record supported the determination that the project was categorically exempt under CEQA. The court also concluded that there was no evidence that the project would have any significant environmental effect, that there were no unusual circumstances distinguishing the project from others in the exempt category and that the project therefore did not satisfy an exception to the exemption. The court concluded with respect to the Coastal Act that there was no evidence that the project would change the intensity of use of the property.

The court entered a judgment in November 2011 denying the petition. Coastal Defender timely appealed the judgment.

CONTENTIONS

Coastal Defender contends (1) the city abused its discretion by relying on mitigation measures in determining that the project was categorically exempt from CEQA; (2) an exception to the categorical exemption under CEQA applies; and (3) a coastal development permit is required because the project changes the intensity of use of the existing building with respect to parking, public service area and occupancy.

DISCUSSION

1. *Applicable CEQA Requirements*

a. *Overview*

"CEQA is a comprehensive scheme designed to provide long-term protection to the environment. [Citation.] In enacting CEQA, the Legislature declared its intention that all public agencies responsible for regulating activities affecting the environment give prime consideration to preventing environmental damage when carrying out their duties. [Citations.] CEQA is to be interpreted 'to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.' [Citation.]" (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 112 (*Mountain Lion*).)

"The California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) (CEQA) and the regulations implementing it (Cal. Code Regs., tit. 14, § 15000 et seq.) embody California's strong public policy of protecting the environment. 'The basic purposes of CEQA are to: [¶] (1) Inform governmental decision makers and the public about the potential, significant environmental effects of proposed activities. [¶] (2) Identify ways that environmental damage can be avoided or significantly reduced. [¶] (3) Prevent significant, avoidable damage to the environment by requiring changes in projects through the use of alternatives or mitigation measures when the governmental agency finds the changes to be feasible. [¶] (4) Disclose to the public the reasons why a governmental agency approved the project in the manner the agency chose if significant environmental effects are involved.' (Cal. Code Regs.,

tit. 14, § 15002.)" (*Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 285-286 (*Tomlinson*).)

A public agency considering whether to carry out or approve a "project," as defined by CEQA (Pub. Resources Code, § 21065), must determine whether the project is exempt from CEQA under either a statutory exemption (*id.*, § 21080, subd. (b)) or a categorical exemption set forth in the Guidelines.[2] (*Tomlinson*, *supra*, 54 Cal.4th at p. 286; see Pub. Resources Code, §§ 21080, subd. (b)(9), 21084, subd. (a).) A project that is statutorily or categorically exempt is subject to no further environmental review under CEQA. (*Tomlinson*, *supra*, at p. 286; *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 380 (*Muzzy Ranch*).) Instead, the public agency may simply file a notice of exemption (see Guidelines, §§ 15061, subd. (d), 15062, subd. (a)) citing the relevant statute or section of the Guidelines and including a brief statement of reasons supporting the exemption (*id.*, § 15062, subd. (a)(4)). (*Muzzy Ranch*, *supra*, at p. 380.)

If the public agency determines that the project is not exempt, it must conduct an initial study to determine whether the project may have a significant effect on the environment. (*Muzzy Ranch*, *supra*, 41 Cal.4th at p. 380; Guidelines, § 15063, subd. (a).) An initial study must briefly (1) describe the project and its location;

---

[2] All references to Guidelines are to the CEQA Guidelines (Cal. Code Regs., Tit. 14, § 15000 et seq.) developed by the Office of Planning and Research and adopted by the Resources Agency. (Pub. Resources Code, §§ 21083, 21087.) "[C]ourts should afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391, fn. 2.)

(2) identify the environmental setting; (3) identify any environmental effects using a checklist, matrix or other method, provided that the entries on a checklist or other form are briefly explained to show that there is some evidence to support the entries; (4) discuss the ways to mitigate any significant environmental effects identified; (5) examine the project's consistency with existing zoning, plans and other applicable land use controls; and (6) identify the persons who prepared or participated in the initial study. (Guidelines, § 15063, subd. (d).) The agency must consult informally with all responsible and trustee agencies responsible for resources affected by the project before completing an initial study. (Guidelines, § 15063, subd. (g).)

If the initial study shows that there is no substantial evidence that the project may have a significant effect on the environment, the agency must prepare a negative declaration. (Pub. Resources Code, § 21080, subd. (c); *Muzzy Ranch*, *supra*, at pp. 380-381; Guidelines, § 15070.) The agency also must prepare a negative declaration if the initial study shows that the project may have significant environmental effects but the applicant agrees to revisions in the project that would avoid those significant effects or render them insignificant. (Pub. Resources Code, § 21080, subd. (c); Guidelines, § 15070.) A negative declaration must briefly describe the project and its location, include a proposed finding that the project will not have a significant effect on the environment and a copy of the initial study documenting reasons supporting the finding, and state any mitigation measures included in the project to avoid potentially significant environmental effects. (Guidelines, § 15071.)

On the other hand, if the initial study shows that there is substantial evidence that the project may have a significant effect on the environment and the applicant does not agree to revisions that would avoid those significant effects or render them insignificant, the agency must prepare an environmental impact report (EIR) before approving the project. (Pub. Resources Code, §§ 21100, subd. (a), 21151, subd. (a); *Tomlinson, supra*, 54 Cal.4th at p. 286; Guidelines, § 15063, subd. (b)(1).)

b. *Categorical Exemptions*

A categorical exemption reflects a determination by the Secretary of the Natural Resources Agency that a particular class of projects has no significant effect on the environment. (Pub. Resources Code, § 21084, subd. (a); Guidelines, § 15300.) A Class 1 exemption for existing facilities applies to "the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination." (Guidelines, § 15301.) Guidelines section 15301 sets forth a nonexclusive list of examples and states that "[t]he key consideration is whether the project involves negligible or no expansion of an existing use." (*Ibid.*) Among the stated examples of categorically exempt projects involving existing facilities is the addition to an existing structure of no more than 50 percent of the floor area or 2,500 square feet, whichever is less. (*Id.*, item (e)(1).) Coastal Defender acknowledges for purposes of this appeal that, without considering any exception to this exemption, the project fits within this categorical exemption.

Categorical exemptions are subject to certain exceptions, including the general exception that a categorical exemption cannot apply to "an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." (Guidelines, § 15300.2, subd. (c).) This "significant effects" exception is based on the holding in *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 205-206, that the statutory authority for categorical exemptions (Pub. Resources Code, § 21084) extends only to those activities that have no significant effect on the environment and that "where there is any reasonable possibility that a project or activity may have a significant effect on the environment, an exemption would be improper." Coastal Defender contends the significant effects exception applies and precludes the city's reliance on a categorical exemption.

2. *Standard of Review Under CEQA*

The basic standard of review of an agency's decision under CEQA is abuse of discretion. Abuse of discretion means the agency failed to proceed in a manner required by law or there was no substantial evidence to support its decision. (Pub. Resources Code, §§ 21168, 21168.5; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 945 (*County of Amador)*.)

Whether the agency failed to proceed in a manner required by law is a question of law. A court determines de novo whether the agency complied with CEQA's procedural requirements, " 'scrupulously enforc[ing] all legislatively mandated CEQA requirements' (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 [276 Cal.Rptr. 410, 801 P.2d 1161])." (*Vineyard Area Citizens for Responsible*

Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 435.) The failure to comply with CEQA's procedural or information disclosure requirements is a prejudicial abuse of discretion if the decision makers or the public is deprived of information necessary to make a meaningful assessment of the environmental impacts. (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236-1237; *County of Amador*, *supra*, 76 Cal.App.4th at p. 946; see Pub. Resources Code, § 21005.)

There is some uncertainty as to the specific standard of review applicable to an agency's decision in applying a categorical exemption that there is no reasonable possibility that a project will have a significant effect on the environment. (Compare *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 264-267 [applying the "fair argument" standard], with *Association for Protection etc. Values v. City of Ukiah* (1991) 2 Cal.App.4th 720, 728-729, fn. 7 [stating that the substantial evidence standard may be more appropriate].) The California Supreme Court has granted review in a case presenting this and other questions relating to the significant effects exception (*Berkeley Hillside Preservation v. City of Berkeley*, review granted May 23, 2012, S201116). We will assume for purposes of argument that the fair argument standard applies and that the significant effects exception applies if substantial evidence in the record supports a fair argument that the project may have a significant effect on the environment. (*Banker's Hill*, *supra*, at p. 263.)

3. *The City Did Not Rely on Mitigation Measures in Applying the Categorical Exemption*

A categorical exemption is appropriate only if there is no reasonable possibility based on the evidence in the administrative record that the project as proposed by the applicant will have a significant effect on the environment. (*Mountain Lion, supra,* 16 Cal.4th at p. 124; *Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1107 (*Salmon Protection*); Guidelines, § 15300.2, subd. (c).) If there is a reasonable possibility that the project may have a significant effect on the environment, the agency must consider mitigation measures to avoid such an effect or render it insignificant.[3] (Pub. Resources Code, § 21002.) An agency may evaluate such mitigation measures only in connection with a negative declaration (see *id.*, § 21080, subd. (c)(2); Guidelines, § 15070, subd. (b)) or an EIR (see Pub. Resources Code, § 21000, subd. (b)(3); Guidelines, § 15126.4, subd. (a)). An agency relying on a categorical exemption may not consider the impact of mitigation measures in determining that a project will have no significant environmental effect. (*Salmon Protection, supra,* at pp. 1107-1108; *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1199-1201 (*Azusa*).)

---

[3] " 'Mitigation' includes: [¶] (a) Avoiding the impact altogether by not taking a certain action or parts of an action. [¶] (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation. [¶] (c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment. [¶] (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action. [¶] (e) Compensating for the impact by replacing or providing substitute resources or environments." (Guidelines, § 15370.)

Salmon Protection, *supra*, 125 Cal.App.4th at pages 1107-1108, and *Azusa*, *supra*, 52 Cal.App.4th at pages 1199-1201, held that an agency cannot evade the procedural and informational requirements for a mitigated negative declaration or an EIR by imposing mitigation measures to make a project fit within a categorical exemption. Instead, if there is a reasonable possibility that the project without the mitigation measures may have a significant effect on the environment, the agency cannot rely on a categorical exemption. (*Salmon Protection*, *supra*, 125 Cal.App.4th at p. 1107; *Azusa*, *supra*, 52 Cal.App.4th at pp. 1199-1200.)

The planning commissioners here expressed concerns that noise from the renovated restaurant and nightclub would disturb the neighbors. They approved the project subject to certain conditions, including conditions (1) limiting the operating hours on weeknights; (2) requiring compliance with the city's noise ordinance and a future group entertainment permit; (3) prohibiting any operable windows on the north, east or west sides of the building; (4) requiring that all doors and windows must remain closed during entertainment or dancing; and (5) requiring that noise from the site must be inaudible beyond 75 feet from the property. In our view, these were ordinary operating restrictions designed to alleviate noise concerns rather than CEQA mitigation measures for project impacts. These conditions were incorporated into the project as a result of consultations between MB Dining and the neighbors. Such collaboration and constructive solutions should be encouraged rather than discouraged. As in *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1353, "[Coastal Defender] offers no authority for the proposition that a positive effort between developers and a

municipality to improve the project for the benefit of the community and address existing [noise] concerns somehow becomes an evasion of CEQA."

We therefore conclude that the city did not rely on mitigation measures to cause the project to fit within a categorical exemption and that Coastal Defender has shown no abuse of discretion in this regard.

4. *The City Properly Determined that the Significant Effects Exception Is Inapplicable*

Coastal Defender contends the balconies overhanging the sidewalk and the fully retractable first-story façade are "unusual circumstances" for a Class 1 categorical exemption, and those features create a reasonable possibility of significant visual and noise impacts. We need not decide whether Guidelines section 15300.2, subdivision (c) properly requires "unusual circumstances" separate and apart from a reasonable possibility of a significant effect on the environment in order to establish the significant effects exception because we conclude that Coastal Defender has failed to show a reasonable possibility of any significant effect on the environment.[4]

Coastal Defender cites a planning commissioner's statement that she was "worried about the pedestrian experience here in Manhattan Beach" and that "there's nothing really that's interfering with the view [of the Manhattan Beach pier] as you look down." Coastal Defender also cites a statement in the city council's staff report that the

---

[4] Whether the existence of "unusual circumstances" is a separate requirement from the existence of a reasonable possibility of a significant effect on the environment is one of the questions presented in *Berkeley Hillside Preservation v. City of Berkeley*, *supra*, S201116, which is currently pending before the California Supreme Court.

planning commission had concerns about "visual compatability [and] view obstruction," among other concerns, and that the planning commission "could not determine that the balcony dining was appropriate." Coastal Defender also cites a photograph in the record showing a view of the pier taken from Manhattan Beach Boulevard a few doors east of the project site and a photograph with a rendering of the balconies purportedly showing an obstructed view.

In contrast, two city councilmembers and the mayor stated at the city council hearing that they had inspected the site and determined that the balconies would not obstruct the coastal view. Despite the evidence cited by Coastal Defender, the city council determined that the project was categorically exempt under CEQA and would have no significant effect on the environment. The trial court agreed.

We conclude that the evidence in the record does not support a fair argument that the balconies may significantly obstruct the coastal view. Neither the general concerns expressed by the planning commissioner nor the concerns noted in the city council's staff report nor the photographs and rendering in the record transcend the realm of unsubstantiated fears and speculation so as to constitute substantial evidence of a reasonable possibility that the balconies would create significant visual impacts. (*Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 901.) Coastal Defender has shown no abuse of in the city's determination with respect to visual impacts.

Coastal Defender also argues that (1) the city council ignored concerns expressed by planning commissioners, the planning commission staff and members of the public

that the retractable façade would permit noise to escape to the beach approximately 200 feet away and to the surrounding residential neighborhood; (2) the noise study indicated that the restaurant and nightclub would generate noise levels at nearby residences in excess of the levels permitted under the general plan; and (3) this evidence shows that there is a reasonable possibility that the project's direct impacts on the environment will be significant.

The city responds that Coastal Defender failed to present these arguments in the trial court, and we agree. Coastal Defender argued in the trial court that the project would contribute to noise impacts that would be cumulatively significant and therefore satisfied the exception to the categorical exemption for impacts of successive projects of the same type in the same place that are cumulatively significant (Guidelines, § 15300.2, subd. (b)), an argument that it does not pursue on appeal. Coastal Defender also argued in the trial court that the balconies were an unusual circumstance creating a reasonable possibility of significant visual and noise impacts. That argument differs from the argument presented on appeal relating to noise resulting from the retractable façade and from activities within the restaurant and nightclub more generally. Having failed to present these arguments in the trial court, Coastal Defender cannot present them for the first time on appeal. (*Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1325.)[5]

---

[5] " ' "A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant. [Citation.]" [Citations.] . . . Whether the rule is to be applied is largely a question of an appellate court's discretion. [Citation.]'

5. *Applicable Coastal Act Requirements*

The Coastal Act requires each local government to prepare a local coastal program governing land use for the portion of the coastal zone within its jurisdiction. (Pub. Resources Code, § 30500, subd. (a).) A local coastal program consists of land use plans, zoning ordinances, zoning district maps and other implementing actions. (*Id.*, § 30108.6.) The Coastal Commission must certify that a proposed local coastal program conforms with the Coastal Act before the local government can adopt it. (*Id.*, §§ 30512, 30513.)

Development within the coastal zone generally requires a coastal development permit, in addition to any other required permits. (Pub. Resources Code, § 30600, subd. (a).) After the Coastal Commission certifies a local coastal program, the authority to review development within the coastal zone and to issue a coastal development permit is delegated to the local government. (*Id.*, §§ 30519, subd. (a), 30600, subd. (d).) The Coastal Commission has jurisdiction on appeal from the local government's decision only in certain circumstances. (*Id.*, § 30603, subd. (a).)

The city's certified local coastal plan states that certain projects are exempt from the requirement of a coastal development permit. The exempt projects include the maintenance and alteration of existing structures, other than single family dwellings or publics works facilities, provided that the improvements do not "change[] the intensity

---

[Citation.]" (*Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga*, *supra*, 175 Cal.App.4th at p. 1325.)

or use of the structure." (City of Manhattan Beach Local Coastal Program, § A.96.050, item B.1.)

6. *Standard of Review of the City's Decision that the Project Is Exempt from the Coastal Development Permit Requirement*

Any person aggrieved by the decision of a local government implementing a certified local coastal program, if the decision cannot be appealed to the Coastal Commission, may petition the court for a writ of mandate pursuant to Code of Civil Procedure section 1094.5. (Pub. Resources Code, § 30802.) The inquiry extends to whether the agency acted without or in excess of jurisdiction, did not afford a fair trial or prejudicially abused its discretion. (Code Civ. Proc., § 1094.5, subd. (b); *La Costa Beach Homeowners' Assn. v. California Coastal Com.* (2002) 101 Cal.App.4th 804, 814 (*La Costa Beach*).)

An abuse of discretion is shown if the agency did not proceed in the manner required by law, the decision is not supported by the findings or the findings are not supported by the evidence. (Code Civ. Proc., § 1094.5, subd. (b); *La Costa Beach*, *supra*, 101 Cal.App.4th at p. 814.) In cases where the court is not authorized by law to exercise its independent judgment on the evidence, "abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (Code Civ. Proc., § 1094.5, subd. (c).) An appellate court independently determines whether the agency abused its discretion under the same standard governing the trial court. (*La Costa Beach*, *supra*, at pp. 814-815.)

We must presume that the city's decision is supported by substantial evidence and can conclude otherwise only if the evidence in the record compels the conclusion that a reasonable person could not have agreed with the city's factual findings. (*Ross v. California Coastal Com.* (2011) 199 Cal.App.4th 900, 921-922.)

7. *Coastal Defender Has Shown No Error in the City's Decision that the Project Is Exempt from the Coastal Development Permit Requirement*

Coastal Defender contends the project "changes the intensity or use of the structure" within the meaning of section § A.96.050 of the local coastal plan and therefore is not exempt from the requirement of a coastal development permit. Coastal Defender identifies three areas in which the project purportedly either increases or decreases the intensity of use: parking, public service area and occupancy.

Coastal Defender argues that the planning commission staff overstated the building's existing public service area and calculated the existing parking requirement based on that inflated figure. Coastal Defender argues that the staff's statement that the project would decrease the parking requirement by three parking spaces was incorrect and that the project actually increases the parking requirement by 8.5 spaces and therefore increases the intensity of use. The city correctly argues that this issue was never raised in the administrative proceedings. McPherson and others expressed concerns at the time that the project would increase parking demands for other reasons, but they did not challenge the statement as to existing public service area or the calculation of the existing parking requirement.

A party generally must exhaust its administrative remedies before seeking relief in court. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1080.) Exhaustion requires seeking relief from the administrative agency authorized to adjudicate the matter and obtaining a decision from the final administrative decisionmaker. (*Ibid.*) In addition, an issue must be raised in the administrative proceeding before it can be raised in a judicial proceeding. (*Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1136.) The issue must be raised with sufficient specificity to afford the agency a fair opportunity to consider the legal and factual questions and respond as appropriate. (*Id.* at pp. 1139-1140.)

" 'The requirement of exhaustion of administrative remedy is founded on the theory that the administrative tribunal is created by law to adjudicate the issue sought to be presented to the court, and the issue is within its special jurisdiction.' [Citation.] The rule affords the public agency an 'opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review.' [Citation.] Thus, by presenting the issue to the administrative body, the agency 'will have had an opportunity to act and render the litigation unnecessary' [citation]; and, in so doing, 'lighten the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the desired relief. [Citations.]' [Citation.] Finally, the doctrine 'is viewed with favor . . . because it facilitates the development of a complete record that draws on administrative expertise

and promotes judicial efficiency.' [Citation.]" (*Leff v. City of Monterey Park* (1990) 218 Cal.App.3d 674, 681.)

We conclude that Coastal Defender failed to exhaust its administrative remedy with respect to its challenge to the calculation of parking requirements because neither Coastal Defender nor any other person raised the issue in the administrative proceedings before the city. Coastal Defender therefore cannot challenge the city's decision on this basis.[6]

Coastal Defender also argues that if the planning commission staff correctly stated the building's existing public service area, the project "changes the intensity or use of the structure" within the meaning of section § A.96.050 of the local coastal plan because the project reduces the public service area by 15 percent. Coastal Defender argues that either an increase or a decrease in the intensity of use triggers the permit requirement. The city argues that this issue was never raised in the administrative proceedings before the city. We agree and conclude that Coastal Defender failed to exhaust its administrative remedy on this issue as well and therefore cannot challenge the city's decision on this basis.

Finally, Coastal Defender argues that the project increased the permitted occupancy of the building from 274 to 368 persons and therefore increased the intensity of use. The planning commission and city council staff reports did not state the existing permitted occupancy of the building. MB Dining stated in its application that the

---

[6] Contrary to Coastal Defender's argument, the parking issue that it raises on appeal is not an issue of law based on undisputed facts in the record.

existing permitted occupancy was 379 persons and that the project would reduce that figure. Coastal Defender relies on a 1989 staff memorandum to the planning commission in connection with an application for a conditional use permit amendment to replace satellite dish receivers at the site. The memorandum stated that the building's seating capacity was 274 seats. Coastal Defender contends this shows that the permitted occupancy was 274 persons and this permitted occupancy was unchanged at the time of the application by MB Dining in October 2010.[7] We disagree. Seating capacity is not necessarily the same as permitted occupancy. Coastal Defender has not shown that the evidence in the administrative record compels the conclusion that the project increases the intensity of use on this basis.

[7] The respondents do not argue that Coastal Defender failed to raise this issue in the administrative proceedings before the city, and Coastal Defender does not cite the administrative record to show that the issue was raised. In light of our conclusion, however, we need not decide whether Coastal Defender exhausted its administrative remedy on this issue.

DISPOSITION

The judgment is affirmed. Respondents are entitled to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.