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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CITY OF IRVINE,

Plaintiff and Appellant,

v.

COUNTY OF ORANGE et al.,

Defendants and Respondents.

G050802

(Super. Ct. No. 30-2014-00697611)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kim Garlin Dunning, Judge. Affirmed.

Rutan & Tucker, Todd O. Litfin, Jeffrey Melching and Ann Levin for Plaintiff and Appellant.

Nicholas S. Chrisos, County Counsel, Jack W. Golden, Assistant County Counsel and Nicole M. Walsh, Deputy County Counsel, for Defendants and Respondents.

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I. INTRODUCTION

This is the fourth appeal involving a challenge by the City of Irvine to the plans of the County of Orange (County) to expand an existing jail on county land behind Irvine’s back fence. (See *City of Irvine v. County of Orange* (2015) 238 Cal.App.4th 526, 532 (*Musick III*) [showing project site immediately adjacent to the east of Irvine’s Great Park].) Here is a quick recap:

(1) *City of Lake Forest et al. v. County of Orange* (Dec. 8, 2000, G023884) [nonpub. opn.] (*Musick I*) held the original 1996 Environmental Impact Report (EIR) on the expansion plans, EIR 564, satisfied the requirements of the California Environmental Quality Act (CEQA).

(2) *City of Irvine v. County of Orange* (2013) 221 Cal.App.4th 846 (*Musick II*), affirmed the trial court’s determination an application by the County for funding pursuant to Assembly Bill 900 was not a “project approval” under CEQA, hence did not require its own CEQA environmental review. (See *id.* at p. 865.)

(3) *Musick III, supra*, 238 Cal.App.4th 526, affirmed the trial court’s determination a 2012 supplemental EIR prepared to update 1996’s EIR 564 (SEIR 564) complied with CEQA on the merits.

This case, *Musick IV*, is essentially an amalgam of Irvine’s last two challenges to the expansion project. As in *Musick II*, Irvine argues an application to the State of California for funding – this time pursuant to Senate Bill 1022 (SB 1022) as distinct from Assembly Bill 900 – requires additional CEQA documents. As in *Musick III*, Irvine argues discrepancies in coordinating the phasing of the building of the project and the timing of funding from the state also require more CEQA documents.

Consequently, our conclusions are variations on themes sounded in *Musick II* and *Musick III*. Under the rationale set forth in *Musick II*, the county’s “SB 1022” application for funds is not a “project approval” triggering a requirement for any CEQA documents and under the rationale set forth in *Musick III*, any minor discrepancies

between the existing CEQA documents and the SB 1022 application do not justify yet more CEQA documents. At any rate, Irvine waived the argument because its brief beats a dead horse – the 1996 EIR 564 – a challenge rendered moot by 2012’s SEIR 564. Accordingly, we affirm the trial court’s denial of Irvine’s request for a writ of mandate.

II. FACTS

As recounted in *Musick II*, back in the mid-1990’s the county prepared EIR 564 in anticipation of expanding its existing incarceration facilities on unincorporated land to the northeast of Irvine at the James A. Musick honor farm and jail. EIR 564 passed CEQA muster in *Musick I*, decided in 2000. (*Musick II, supra*, 221 Cal.App.4th at p. 852.) The expansion envisioned by EIR 564 is an ultimate build-out to 7,584 beds by 2030. (*Id.* at p. 851.) In the early 2000’s, however, the project came to a stop because it “lacked funding.” (*Id.* at p. 852.)

In 2005, a federal district court put the delivery of medical services to all California prison inmates into receivership, in part because of state prison overcrowding. (See *Plata v. Schwarzenegger* (N.D. Cal. 2005) 2005 U.S. Dist. LEXIS 43796 at p. 72 [noting “extreme state of overcrowding”]; see also *Brown v. Plata* (2011) ___ U.S. ___, ___ 131 S.Ct. 1910, 1922 [“After years of litigation, it became apparent that a remedy for the constitutional violations would not be effective absent a reduction in the prison system population.”].) The Legislature attempted to deal with the problem of prison overcrowding by enacting Assembly Bill Number 900 (2007-2008 Reg. Session) (AB 900) to provide money for local jail construction. (See *Musick II, supra*, 221 Cal.App.4th at p. 852.)

AB 900 promised money needed to begin the jail expansion. And so, in late 2011, the County’s board of supervisors passed a resolution to apply for AB 900 funds to increase the existing capacity – 1,200 inmates – by 512 medium security beds. (*Musick II, supra*, 221 Cal.App.4th at pp. 851, 853.) About a month later, in January

2012, Irvine challenged the County's AB 900 application on the theory the application itself was a "project approval under CEQA" that required CEQA documents. (*Ibid.*)

At the time of Irvine's January 2012 challenge, SEIR 564 was already in preparation, but not yet complete. SEIR 564 would, in fact, not be certified as complete until almost a year later, by which time Irvine's litigation against the AB 900 application was well underway in the trial court. When SEIR 564 was certified as complete in December 2012, Irvine immediately filed yet a third suit to challenge its certification. (*Musick III, supra*, 238 Cal.App.4th at p. 536.)

The upshot was a situation in which Irvine's challenge to the AB 900 application – the challenge that would result in *Musick II* – overlapped Irvine's challenge to SEIR 564 – the challenge that would result in *Musick III*. Irvine's request for a writ to make the County go back and prepare CEQA documents specifically to address the AB 900 application was denied by the trial court in 2012, and reached this court in the summer of 2013. That was several months after the trial court denied Irvine's request for a writ of mandate to make the County go back and re-do SEIR 564. The challenge to SEIR 564 reached this court in the spring of 2015, and resulted in *Musick III* being filed in mid-June 2015, by which time *Musick II* was long since final.

The same pattern has held in the present case (*Musick IV*). The appellate briefing was completed in April 2015, which was about two months *prior* to this court's decision in *Musick III*. Not surprisingly, then, Irvine's briefing in *Musick IV* does not attempt to deal with SEIR 564 (which, in April 2015, Irvine might still have hoped to overturn), but instead focuses on phasing discrepancies between 1996's EIR 564 and the County's 2013 SB 1022 application, as if it were a foregone conclusion that SEIR 564 would be found deficient.

The County's SB 1022 application contemplates *no* external changes to the Musick Jail facility plans not already stated in EIR 564 and SEIR 564.¹ The application states the footprint and structural features of any construction occasioned by the SB 1022 monies "will remain the same" as the "completed CEQA documentation necessary to support this new construction" represented by EIR 564 and SEIR 564.² To the degree there *might* be any changes from existing plans as set out in SEIR 564, those changes are completely *internal*. It appears that, in line with SB 1022's aims to promote rehabilitation, the County hopes to have relatively more space that can be devoted to flexible use facilities that can be used by local social service, education and health care agencies, as distinct from just adding more jail beds.

Irvine's request for a writ of mandate to require (more) CEQA documentation based on the SB 1022 application was heard in July 2014 – about nine months after *Musick II* came down and a year before *Musick III* would be decided. The trial judge asked at the hearing whether the application was "a capital P Project" triggering CEQA documentation requirements. Concluding it was not, the trial court

¹ To quote from the agenda staff report prepared for the Board of Supervisors dated October 8, 2013: "The project proposed in the RFP [the application] contemplates dedicated spaces in the housing areas that are configured to support enhanced and centralized programming and treatment to promote least restrictive options of confinement. There will be 384 new adult detention beds added for this purpose. The proposed design for the construction of additional beds *mirrors the design footprint analyzed by the certified Supplement to EIR No. 564; the construction will be in accordance with the 2012 JAMF Master Site Plan that was analyzed in Supplement to EIR No. 564.* (See ASR Exhibit A, Appendix to RFP, SB 1022 Phase 2 Jail Construction Site Plan compared to Exhibit J, Supplement to EIR No. 564, at pp. 42, 45 and SB 1022 site plan contained in the appendix of the RFP.) Moreover, the addition of 384 beds through an award of SB 1022 financing and the addition of 512 beds through AB 900 financing, were contemplated to comprise Phase I construction by certified Supplement to EIR No. 564. Supplement to EIR No. 564 analyzed Phase I construction comprising up to 1,024 additional beds at the JAMF. *The addition of 384 beds is a necessarily included element of the project considered in Final EIR No. 564 and Supplement to EIR No. 564.* Thus, no substantial changes have been made in the project as evaluated by the Supplement to EIR No. 564 certified on December 11, 2012. The Board action, a step in the process to obtain financing, is a necessarily included element for the project that is the subject of the Supplement to EIR No. 564 and EIR No. 564." (Italics added.)

² Ironically, the application notes the City of Lake Forest now supports the project and its CEQA documentation. The City of Lake Forest was one of the original antagonists to EIR 564 back in *Musick I*.

denied Irvine’s requested writ to require a “proper CEQA analysis” as a prerequisite to any SB 1022 application.³

III. DISCUSSION

A. *Not a Project Approval*

In response to Irvine’s argument, *Musick II* explored in detail the problem of exactly what constitutes a “project approval” under CEQA. Taking our cue from CEQA Guideline 15004, we emphasized that the question turns on whether a lead agency has taken action which *forecloses* alternative or mitigation measures that would “ordinarily be part of CEQA review of that public project.” (*Musick II, supra*, 221 Cal.App.4th at p. 860, quoting CEQA Guidelines, § 15004, subd. (b)(2)(B).) And because the County’s AB 900 application was, in context, just a “preliminary step” to exploring and evaluating a partial expansion, it did not constitute a project approval; after all, no alternative or mitigation measures were being foreclosed by simply asking for money which in any event would be granted *conditionally*. (See *Musick II, supra*, 221 Cal.App.4th at p. 861.) As we said, Irvine had failed “to identify any aspect of the state process or the County’s Application that committed the County to expanding the Musick Facility *simply by submitting its Application to the state*.” (*Id.* at p. 863, italics added.)

The main difference between the case before us now and *Musick II* is that *now* there is an updated EIR, namely SEIR 564, and it is now the law of the case that SEIR 564 complies with CEQA. (See *Musick III, supra*, 238 Cal.App.4th at p. 532 [“All these considerations compel us to the conclusion SEIR 564 is legally unobjectionable.”].) That difference strengthens the County’s position. The SB 1022 application was made on the assumption that SEIR 564 provided the required environmental review, and in fact the application expressly said so. We held the City was right about that. Even so, the

³ Irvine’s counsel did not address the complications arising out of his request for relief in view of the fact the deadline for SB 1022 funding applications had long since passed. Obviously a ruling that an SB 1022 application would require its own CEQA review would, given the Legislature’s deadline, be an application-killer.

application is still only an application. The money is by no means guaranteed.⁴ (See *Musick II, supra*, 221 Cal.App.4th at p. 861 [noting that even conditional award of funds by state did not guarantee any reimbursements].)

Moreover, on the precise point of what constitutes a “project approval” requiring CEQA documents, *Musick II* contrasted *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116 (*Save Tara*) [agreement between city and developer sufficiently committed city to require prior CEQA documentation] with *Cedar Fair, L.P. v. City of Santa Clara* (2011) 194 Cal.App.4th 1150 (*Cedar Fair*) [approval of detailed term sheet with developer only memorialized preliminary terms of proposed stadium deal, city retained discretion not to go ahead with project and no prior CEQA documentation was required].) Here, because the case involves a simple, unconsidered funding application, it is factually much more like *Cedar Fair* [no documents required] than *Save Tara* [documents required]. What might happen if the state were to deny the County funds altogether? In *Save Tara*, the local government entity would get sued for breach of its agreement with the developer. But here, as in *Cedar Fair*, nothing would happen. The bottom line is that no separate CEQA documents were needed for the County to make an application for funds.

B. No Change From SEIR 564

There are two additional and independent reasons we affirm the judgment: 1) Irvine has waived any argument based on a possible discrepancy between SEIR 564 and 2) the SB 1022 application and no such discrepancy (certainly not a prejudicial one) exists anyway.

⁴ The parties have not updated us on any post-notice of appeal disposition of the application by the BCSS.

1. Waiver

Irvine's brief is predicated on the theory that differences between the levels of completion of the jail expansion projected in 1996's EIR 564 and the 2013 SB 1022 application require new CEQA documents.

Thus Irvine focuses on the fact that "Phase I" of the jail expansion in the 1996 EIR 564 projected about 202,000 square feet of build out in Phase I, while, given construction contemplated in both the AB 900 and SB 1022 proposals, the total "Phase I" square footage will in fact be about 330,000 square feet.⁵ But nowhere do we find any argument that differences between 2012's SEIR 564 and 2013's SB 1022 application would justify further environmental study. Rather, Irvine simply says at the end of its opening brief – which, to repeat, was written in February 2015, about four months before *Musick III* was filed – that *if* SEIR 564 is voided, then the SB 1022 application must be voided too. Irvine doesn't articulate the logical converse of that proposition, which is that an application that follows an approved SEIR 564 does not need any further environmental review. By failing to articulate any differences between what the County seeks funding for in the SB 1022 application and SEIR 564, Irvine has waived any argument based on any differences. (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1533 [argument must be made in opening brief].)⁶

⁵ The argument of course relies on the artificiality of classing steps in construction as discrete capital P "Phases." The trial judge readily sensed that too (we quote her comments in footnote 9, *post*), i.e., grouping 512 beds from the AB 900 application with the 384 beds from the SB 1022 application to arrive at 896 beds, and calling all 896 beds "Phase I." One could just as reasonably call the 512 beds from AB 900 "Phase I" and the 384 beds from SB 1022 "Phase II."

⁶ To the degree Irvine argues that the County should have "at least" prepared an "addendum" (see *Fund for Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538 [addendum satisfied CEQA for changes in project] Irvine fails to recognize it got *better* than an addendum – it got a full-scale supplemental EIR that dwarfed the original EIR. (See *Musick III, supra*, 238 Cal.App.4th at p. 540 ["EIR 564 is The Hobbit to SEIR 564's Lord of the Rings."].)

2. Phasing

Finally, the substance of Irvine's argument has already been rejected in *Musick III*. Irvine's basic complaint about the SB 1022 application is that it doesn't correspond to Phase I of EIR 564. But EIR 564 is ancient history.

The phasing-correlation argument was much more formidable in *Musick III*, where it was directed at the traffic studies that are part of SEIR 564. (See *Musick III, supra*, 238 Cal.App.4th at pp. 541-544.) The County faced a problem inherent in any environmentally impactful development projected to take a long period of time to complete build-out: It is impossible to predict with precision the micro effects of various stages of construction at precise points in time without also knowing precisely when one will have the funding to implement those various stages of construction. The best you can do is come reasonably close. That, the County did. The phasing-correlation issue has been decided.

The archetype of long-term development is the light-rail line at issue in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439 (*Metro Line*), which involved a 20-some year project with an ultimate completion date projected to be 2030. (See *id.* at p. 447.) The *Metro Line* EIR failed to gauge the impact of the construction on existing conditions as of 2009 (the date of finalization of the EIR), and instead devoted itself to describing conditions at ultimate build-out in 2030. The failure to have a current-condition base line could not be justified because there was no reason to think that using existing conditions would be misleading. However, because the EIR's use of future conditions showed impacts not "substantially different" from those in 2009, the error was technical and not prejudicial. (*Id.* at p. 463; see *Musick III, supra*, 238 Cal.App.4th at p. 543.)

As in *Musick III*, Irvine relies on *Metro Line* and argues decisionmakers need to know not only the long-term effects of a project, but the "short and medium-term

environmental costs” as well. (See *Metro Line*, *supra*, 57 Cal.4th at p. 455.) However, as distinct from the facts in *Metro Line*, the jail expansion evaluated in SEIR 564 included both current conditions *and* ultimate build-out conditions. (See *Musick III*, *supra*, 238 Cal.App.4th at p. 543.) Moreover, as we also pointed out in *Musick III*, Irvine fails to show how discrepancies arising out of “start dates” for given increments of construction somehow fail to give decisionmakers a realistic view of the short- and medium-term environmental costs of the jail expansion. (See *id.* at p. 544.)

To put some flesh on the bones of this discussion, let us compare what SEIR 564 says about the initial phasing of the jail expansion with what the SB 1022 application says. SEIR 564 described the “Phase I Implementation” of the project as the construction of “the following structures, which will house *up to* 1,024 beds by 2018 in addition to existing jail uses and structures: [¶] Construction of up to 1,024 additional jail beds [¶] New visitor parking area (160 spaces) and new staff parking area (326 spaces) [¶] Main entrance from Alton Parkway [¶] New interior access road [¶] Storm water detention basin in lower west corner of project site.” (Italics added.) The SB 1022 application is for funds to build (if one also includes the beds garnered from the AB 900 funds) 896 beds by October 2019, plus “facility support buildings for warehousing [] and maintenance.”

Thus if anything – and consistent with SB 1022’s emphasis on rehabilitation –the SB 1022 application seeks funds for a slightly less intensive land use by 2019 than what SEIR 564 projected by 2018. In light of *Metro Line*, that difference is inconsiderable. And in *Metro Line*, there was far more “play” between the EIR’s description of impacts by the 2030 build-out and current conditions in a 2009 EIR than there is here between 2018 and 2019.

The main case Irvine relies on, *American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 Cal.App.4th 1062 (*American Canyon*) is inapposite. In *American Canyon* a 24-hour 7-day a week super big

box store⁷ was substituted in for plans which had garnered a negative declaration based on eight smaller retail buildings, a roadway and parking areas. (See *id.* at pp. 1067-1068.)

Obviously in *American Canyon* there were environmental impacts inherent in the super big box project that could not be dismissed in a negative declaration. By contrast, in this case there is less external effect than in *Musick III* – a reduction in beds as distinct from impact on various intersections – a tighter timeline, and a very large and thorough EIR (SEIR 564) instead of a mere negative declaration.⁸ Thus under *Musick III*, the SB 1022 application is well within what has already been environmentally evaluated.

IV. CONCLUSION

It is well established in CEQA law that project proponents cannot sneak a project by environmental review by “piecemealing” it into little bits. The Supreme Court said it plainest in an early CEQA case, *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-284: “[E]nvironmental considerations do not become submerged by chopping a large project into many little ones – each with a minimal potential impact on the environment – which cumulatively may have disastrous consequences.” While we doubt the drafters of CEQA Guideline 15378 were thinking of Matthew Arnold’s famous aphorism about life – see it steadily and see it whole – they certainly had the same idea about what constitutes a “project” under CEQA. Guideline 15378 defines a project under CEQA to be “*the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . .*” (Cal. Code Regs., tit. 14, § 15378, subd. (a), italics added.)

⁷ So “super” that its presence was expected to put another big box store of the same commercial chain in a nearby city out of business. (See *American Canyon, supra*, 145 Cal.App.4th at p. 1082.)

⁸ And, as the SB 1022 application notes, the footprint and structure of the jail facilities remains the same as those contemplated in SEIR 564. (Cf. *Ventura Foothill Neighbors v. County of Ventura* (2014) 232 Cal.App.4th 429 [addendum insufficient where it failed to address 15-foot height increase].)

Here, the trial judge insightfully spotted “reverse piecemealing,” where every step in a project is broken down and attacked as needing its own environmental review.⁹ We agree with her comments. Guideline 15378 requires the project be seen steadily and seen whole. SEIR 564 has already done that.

We affirm the judgment here. The County will recover its costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.

⁹ As shown by these comments in a discussion with Irvine’s counsel: “The court: Okay, but when you call the SB 1022 a capital P project, as the city has, that’s an effort to piecemeal. So if the lead agency can’t piecemeal, why can a challenger to the phasing or whatever? The project is the same as it’s always been. But I’m not sure it’s fair to say that a particular phase is its own project. The County couldn’t get away with doing that, so I’m not sure how the city can get away with doing that.”