Real Estate, Land Use & Environmental Law Blog
Up-to-date Information on Real Estate, Land Use & Environmental Law
Presented By SheppardMullin

CEQA TRUMPS SURPLUS LANDS ACT; LEAD AGENCY MUST RESPOND TO ALL COMMENTS REGARDLESS OF MERIT

***The Flanders Foundation v. City of Carmel-by-the-Sea et al*., No. H035818 (Cal. Ct. App. 6th Dist., January 4, 2012)**

February 2, 2012* By *Michael Gibson

A lead agency must consider and respond to all comments that raise significant environmental issues prior to certifying a final environmental impact report (FEIR) even if the required mitigation measures might have rendered the comment moot or modifying the project in response to the comments might have made the project infeasible. The City of Carmel-by-the-Sea (the City) wanted to sell the Flanders Mansion (listed on the National Register of Historic Places as an example of noted architect, Henry Higby Gutterson) which was surrounded on all sides by a City-owned park. The opponent in the City's effort to sell the Flanders Mansion was the Flanders Foundation (the Foundation) which raised several challenges to the FEIR but the two primarily taken up on appeal were that the FEIR did not adequately: (1) consider the potential environmental impacts associated with the application of the Surplus Land Act (Gov. Code § 54220, et seq.) and (2) the FEIR did not sufficiently respond to a comment that proposed selling a smaller piece of land than initially proposed by the City in order to reduce the loss of potential public parkland. The Foundation was successful on its second argument but not the first.

The application of the Surplus Land Act does not prohibit a governmental entity selling public property from placing mitigation conditions or conservation easements required by state statutory law on property which might forestall certain uses of the property. The Surplus Land Act, at its basic level, is a requirement that governmental entities provide a right of first offer to other governmental entities for the purchase of public land before selling to a private party. The Foundation argued that the Surplus Land Act only references price as the point of negotiation between a selling governmental entity and buying governmental entity and that the exclusion of other factors means that use restrictions or other prohibitions can't be imposed on a buying governmental entity because it limits the application of the Surplus Land Act. The court rejected the Foundation's argument in finding that when the Surplus Land Act conflicts with "any other

provision of statutory law" (Gov. Code § 54226), then the other provision of statutory law controls over the Surplus Land Act. Here, California's Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000, et seq.) was the conflicting law because the mitigation and conservation easements in effect at and around the Flanders Mansion were put in place to comply with CEQA. CEQA trumped the Surplus Land Act because of the language in the Surplus Land Act regarding other statutory regimes controlling over its application.

The City's failure, however, to respond to a well-reasoned comment made the FEIR for the Flanders Mansion inadequate. The Flanders Mansion which the City offered for sale was a 1.252-acre parcel of which approximately 0.50 acres was subject to a conservation easement which prevented development. To counter the Foundation's argument that the City failed to address the comment requesting that the City consider shrinking the size of the parcel for sale, the City essentially argued: what's the difference? The City stated that the conservation easement essentially shrunk the usable size of the parcel already given the use and building restrictions in place as a result of the easement and would have rendered the property unmarketable. Although the court indicated that the City might have a reasonable argument, the fact that the City did not raise the argument or otherwise respond in any way to the comment prior to certification was fatal to the FEIR. (The court also noted in a footnote that the conservation easement merely prohibited visual barriers on certain portions of the parcel; it did not preserve any portion of the parcel as publicly accessible parkland, which was the unmitigated environmental impact at issue.)

In short, a lead agency must ensure that it has addressed, in some fashion, all comments made before the FEIR is certified, even those it may believe are without merit. Without that record of review and analysis before a decision is made to certify an FEIR, the FEIR might be doomed even if reasonable arguments exist that indicate that the comment would not have otherwise changed the FEIR or the lead agency’s decision on the project.