Save the Park and Build the School v. National Park Service et al

17_3:20-cv-01080-L-AHG (California Southern District 3:20-cv-01080-L-AHG)

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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SAVE THE PARK AND BUILD THE SCHOOL,

Plaintiff,

v.

NATIONAL PARK SERVICE; DAVID L. BERNHARDT, in his official capacity as Secretary of the United States Department of the Interior; DAVID VELA, in his official capacity as Director of the National Park Service; LISA MANGAT, in her official capacity as Director of the California Department of Parks and Recreation; and CARDIFF SCHOOL DISTRICT,

Defendants.

Case No. 3:20-cv-01080-LAB-AHG

REPLY TO DEFENDANTS' OPPOSITIONS TO PLAINTIFF SAVE THE PARK AND BUILD THE SCHOOL'S MOTION FOR PRELIMINARY INJUNCTION

Date: July 20, 2020
Time: 11:30 a.m.
Ctrm.: 14A
Judge: Hon. Larry Alan Burns

Complaint Filed: June 12, 2020
Trial Date: Not set

I. ARGUMENT

A. Plaintiff Did Not Move for Injunctive Relief Against Director Mangat

Plaintiff did not move for injunctive relief against Director Mangat or NPS and neither NPS nor DPR made any argument in support of their approval. NPS recognized as much and therefore, no response to NPS's limited opposition is necessary for purposes of this Motion. The same is true as to Director Mangat's Opposition. The Opposition is at most a preview of a motion to dismiss on technical standing and immunity grounds specific to Director Mangat only. While Plaintiff disagrees with the arguments, they are irrelevant to Plaintiff's likelihood of prevailing on the merits to set aside NPS's approval and its right to injunctive relief against the District. As a consequence, Plaintiff will not encumber the Court with a reply, nor given its page limitations could it. If the Court believes that a reply is necessary to Director Mangat's Opposition, Plaintiff respectfully requests for an opportunity to brief the issues.

B. Plaintiff Will Suffer Irreparable Harm Absent an Injunction Against the District

"Irreparable harm should be determined by reference to the purposes of the statutes being enforced."[1] The District's Opposition completely disregards the purposes of the LWCFA and its own Project Agreement (which expressly contemplates injunctive relief as a remedy for an unlawful conversion),[2] and instead argues that Plaintiff is unlikely to suffer irreparable injury because "the purported damage has already been done" and a court is "'without power to stop' conversion of park where the project was almost finished. . . ."[3]

While the District claims that Plaintiff "sat by and watched the purported damage that they now seek to stop", nothing could be further from the truth.

A brief recitation of the critical background facts necessarily informs the

[1] *National Wildlife Fed'n v. National Marine Fisheries Serv.*, 886 F. 3d 803, 818 (9th Cir. 2018).
[2] *See* Pl.'s P. & A., ECF No. 9-1 at 28-29.
[3] ECF No. 13 at 25:16-19 (citing *Weiss v. Secretary of U. S. Dep't of Interior*, 459 F. App'x 497 (6th Cir. 2012)).

analysis. On February 26, 2020, the District and Plaintiff entered into a settlement agreement whereby the District materially promised not to touch the Park until it had NPS approval. The Agreement provided that the San Diego Superior Court would retain jurisdiction in order to enforce the Agreement and that Plaintiff was entitled to a temporary restraining order for any violation of the above material promise. On March 17, 2020, the San Diego Superior Courts closed any "non-emergency services" on account of COVID through May 22, 2020. On March 25, 2020, without prior notice, the District demolished the walking track and baseball backstop. While it subsequently claimed the violation was "inadvertent", the District refused to provide any documentation to support that contention.[4] Undoubtedly, the District's unlawful demolition gave it a head start on the construction that it continues to perform today.

On April 23, 2020, NPS signed an amendment to the LWCF Agreement, approving the District's conversion. On April 28, 2020, the District began bulldozing the balance of the Park, notifying Plaintiff's counsel of the NPS approval at the same time. On May 22, 2020, Plaintiff sent NPS a lengthy 4,631 page comment letter with supporting evidence detailing the many errors in its findings respectfully requesting that NPS set aside its approval in order to avoid litigation.[5] In response, on May 28, 2020, NPS wrote to Plaintiff's Counsel that it was "seriously looking at the claims in the letter. NPS needs more time to give it careful consideration. We will provide you with an update in two weeks time."[6] On June 11, 2020, NPS wrote to Plaintiff's Counsel notifying her that Plaintiff's letter had been shared with the District and that NPS was providing the "State and the District an opportunity to provide NPS with documentation." NPS promised to provide another update in two weeks.[7] In light of the District's fast paced construction in the Park, the following day (June 12), Plaintiff filed this lawsuit and quickly moved for a temporary restraining order.

[4] *See* Reed Decl.; ECF No. 9-32 (Pl.'s Ex. 29).
[5] Reed Decl.
[6] Supp. NOL Ex. 39.
[7] *Id.*

These facts clearly show that Plaintiff did not merely sit "by and watch the purported damage" without doing anything but instead were prevented from doing anything as a consequence of the District's unlawful conduct and following NPS approval, attempted to resolve the matter with NPS without resort to litigation.[8]

The District has admittedly razed the Park. It started demolition in violation of a settlement agreement and in violation of federal law (without NPS approval). It then moved swiftly ahead with its construction knowing of this challenge and during a time that NPS was "seriously looking" at Plaintiff's request for reconsideration of its approval which if made would require the District to stop its construction. In light of the foregoing facts, it is strongly inferential that the District acted in the manner it did in order to make the argument it now makes. In any event, the case cited by the District for its proposition actually supports Plaintiff's request for an injunction.

In *Weiss*, the plaintiffs sought to stop a development project that caused alleged environmental damage.[9] The district court denied the plaintiffs' motion for temporary restraining order and preliminary injunction, which was not appealed. By the time the Sixth Circuit reviewed the claims, the golf course at issue was constructed and open and the new parkland had "been completely, or almost completely, improved."[10] Because of this, the court held that the plaintiffs' claims under NEPA and under the National Historic Preservation Act were moot, since the impacts resulting from the project have already occurred.[11] Because construction was completed, the court was unable to "give any 'meaningful relief' and any declaratory judgment 'would be an advisory opinion.'"[12]

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[8] "Usually, delay is but a single factor considered in evaluating irreparable injury; courts are 'loath to withhold relief solely on that ground.'" *Arc of Cal. v. Douglas*, 757 F.3d 975, 990 (9th Cir. 2014). "Although a plaintiff's failure to seek judicial protection can imply the lack of need for speedy action, [citations], such tardiness is not particularly probative in the context of ongoing, worsening injuries." Courts have held that a several-month delay in bringing a preliminary injunction is not unreasonable where a court determines that the plaintiff has pursued the action with reasonable diligence.

[9] *Weiss*, 459 F. App'x at 499.

[10] *Id.* at 500.

[11] *Id.*

[12] *Id.* (quoting *Bayou Liberty Ass'n v. U.S. Army Corps of Eng'rs*, 217 F.3d 393, 397 (5th Cir. 2000)).

Here, if the Court declines to enjoin the District's construction of the permanent improvements within the Park, Plaintiff's ability to seek redress after a disposition on the merits may be rendered moot. The District is constructing the improvements within the Park as quickly as possible and has begun working on weekends to construct these improvements as quickly as possible. Incredibly, the District claims that its construction should be allowed to continue because the remedy for an unauthorized conversion is the replacement of property with mitigation property, "which the District would be able to continue to work with OGALS and NPS to achieve."[13]

Critically, and contrary to foregoing assertion, the District has already admitted that it does not have any mitigation property to offer in exchange for a conversion. The District explained that it "has done everything it believes is feasibly possible with this Project to achieve a boundary adjustment/conversion . . ." and cannot "acquire additional property for park purposes for a boundary adjustment conversion. "[14] It is apparent that if this conversion is not approved, the District has no other land available to serve as replacement property. Moreover, the District's representation ignores the fact that the LWCF Manual expressly provides that approval of a conversion "is a discretionary action ***and should not be considered a right of the project sponsor***."

In essence, the District claims that it can construct the improvements and even if the Court ultimately sets aside NPS's approval, Plaintiff will have no recourse. The District's contention coupled with its false claim that it can provide mitigation land should NPS's approval be set aside underscores why the relief Plaintiff now seeks is critical. If NPS's approval is set aside, the District is not entitled to covert the parkland and build concrete non-recreational improvements on it. Therefore, knowing that the District apparently believes that this Court does not have the authority to ultimately order the removal of the improvements and knowing that the District has no means to

[13] ECF No. 13 at 26:21-27:2.
[14] ECF No. 9-15 at 2 (Pl.'s Ex. 12 at 434).

cure its unlawful encroachment, it should not be allowed to construct its improvements and finally convert the park for its own use while this matter is pending adjudication.

C. Save the Park is Likely to Prevail on the Merits of its Claims

1. All Practical Alternatives to a Conversion Were Not Evaluated by the District

Despite the District's clear and unambiguous admissions that it ***never*** considered an alternative project design which does not encroach into George Berkich Park, it decries "nine rounds of public review and revisions" referring to its EIR which it contends "shows that the District evaluated 18 potential site layouts." However, what remains unrebutted is the fact that all of the "public review and revisions" and all of the community feedback occurred before the District even knew about its obligations under the LWCFA and more importantly, ***all of the proposals included encroachment into the Park.*** [15] Put simply, the District has not, nor could it rebut the foregoing facts which on their own demonstrate that NPS's approval was in violation of 36 C.F.R. §59.3(b).

Notwithstanding, in a strained attempt to circumvent its prior admissions on the topic, the District attempts to post hoc transmute the testimony of its agent and Person Most Knowledgeable with respect to the conversion of George Berkich Park, Randall Peterson. [16] The testimony speaks for itself.

> Q. So we talked about this long process. This drawn out process of trying to get a conversion that started really with Ms. Musick's e-mail to the District notifying them of their obligations under the L&WCFA Agreement. Since that – ***since you received that e-mail back in February 2018 through today, has the District ever considered an alternative to the site plan we see at 25 relative to the improvements that have been designed into the 6(f)(3) boundary?***
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> A. ***No.*** [17]

[15] *See* ECF No. 9-8 (Pl.'s Ex. 5) (showing that all of the District's proposals converted parkland).

[16] ECF No. 13 at 19:27-20:14.

[17] Q. Why not, if you know? A. It was never presented to the District that we needed to redesign… A. The question was asked of OGALS if we needed to redesign and they said no. Q. Even though they also said the work to be performed would not be in compliance with the agreement? A. That's correct . . . Q. Did you or anyone on

The inquiry as to whether the District considered all practical alternatives to the conversion of George Berkich Park can cease here. However, the balance of the District's arguments and contentions only serve to underscore the point. In support of its contention that it considered all practical alternatives to the conversion of the Park, curiously the District refers to an "alternative site plan" drafted by Brett Farrow (a member of the Cardiff Community) and contends, for the first time, it considered this proposal as an alternative to its approved project design. First, as the District concedes "the Farrow proposal placed improvements within the old boundary" (referring to George Berkich Park/the 6(f)(3) boundary). As such, the proposal is irrelevant since, even if the District considered it, it was not an alternative to the conversion of George Berkich Park and therefore, cannot constitute a "practical alternative" within the meaning of 36 C.F.R. §59.3(b). ***Indeed, in its approval and related findings, NPS does not cite the Farrow Plan as an alternative the District considered. In fact, NPS does not cite the proposal whatsoever.***[18]

2. The District's Partial Infiltration Basins are Not Recreational Spaces

Simply put, biolfiltration basins are not recreation spaces. The District's hydrology section of its EIR makes this clear (in which the District conceded that the basins are stormwater management devices designed to filter pollutants such as oils, grease, fuel, antifreeze, fertilizers, herbicides, pesticides, trash and other debris.[19] Notwithstanding, in a strained attempt to convert nearly 10,000 square feet of recreational grassy playspace to its biofiltration ponds (necessary on account of its new impervious paved parking lot), the District represented to State Parks and NPS that the basins are "play area[s]" and "picnic area[s]."[20] It now represents to the Court that the biofiltration basins "will function as an extension of the interactive playfield areas and can serve as outdoor

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the – on behalf of the District, if you know, contact Studio E to come up with any contingency design plan which would exclude these improvements that were designed into the 6(f)(3) boundary from the boundary? A. No.

[18] ECF No. 9-33 (Pl.'s Ex. 30).

[19] *See* ECF No. 9-9 at 16 (Pl.'s Ex. 6 at 66).

[20] *see* ECF No. 13-10 at 138, 145 (NOL Ex. 40).

instructional areas."[21] In doing so, the District, vis-à-vis its ***bond manager***, Randall Peterson, lodged photos of the Encinitas Community Park in which he claims show "bio-swales that are ***exactly*** as those planned on the school site . . . ."[22] Preliminarily, Mr. Peterson is not qualified to opine on the design and nature of the retention basins in Encinitas Community Park. *See* Evidentiary Objections lodged herewith.

In any case the Encinitas Community Park improvements are patently irrelevant. Unlike George Berkich Park, the Encinitas Community Park is not a LWCFA protected park and therefore, not subject to LWCFA obligations. The Encinitas Community Park's construction plans calls the basins what they are – retention basins – not recreation spaces.[23]

In any event, a simple comparison of the District's design plans with the Encinitas Community Park's approved construction plans (which the District did not lodge but are lodged as Ex. 38 herewith), show that the District's biofiltration basins and Encinitas's retention basins are strikingly different.[24] Encinitas's construction documents show that the "retention basin" is a continuation of the same Bermuda grass contained in the athletic field,[25] and are open and contiguous with the athletic fields[26], while the District's partial infiltration basins are surrounded by dense plants and boulders, and the partial infiltration basins themselves contain cobble, mulch and storm drains.[27] The facts show that the biofiltration ponds are not of reasonably equivalent usefulness and do not meet the same recreation needs as the former grassy parkland. As a consequence Plaintiff has shown a fair chance of success on the merits of its claims.

3. The Parking Lot is a Support Facility that Does Not Meet the Recreational Needs of the Converted Parkland

The District also claims that the parking lot is suitable replacement property and

[21] ECF No. 13 at 22:3-10.
[22] ECF No. 13-2 at 14 (Peterson Decl. , ¶ 37); ECF No. 13-2 at 74 (NOL Ex. 58).
[23] Supp. IOE Ex. 38.
[24] *Compare* Supp. IOE Exs. 36-37 and 38.
[25] Supp. IOE Ex. 38 at 649-650.
[26] Supp. IOE Ex. 38 at 649-650.
[27] Supp. IOE Ex. 36 at 641-42, Ex. 37 at 644-46.

that an in-kind exchange of land is not required. While the District cites to the Regulations which state "the replacement property need not provide identical recreation experiences,"[28] the District omits the express language in the Regulations which state that replacement property must be "***of reasonably equivalent usefulness and location as that being converted***" and must "***meet recreation needs which are at least like in magnitude and impact to the user community as the converted site***."[29] The parking lot does not meet this standard.

It is without question that a parking lot does not meet the recreation needs that are "like in magnitude and impact" to the public as the open playfields and walking track. Despite the District's contentions otherwise, the LWCF Manual is instructive on this issue. While the LWCF Manual states that LWCF funding may be used for eligible support facilities, including parking lots, funding "[m]ust serve viable outdoor recreation area" and must "not constitute solely of support facilities," except in limited circumstances not applicable here.[30] Clearly, NPS acknowledges that support facilities are fundamentally different than eligible recreational facilities like sports and playfields, and it is illogical to claim that a support facility (i.e., a parking lot) would meet the same recreation needs as a grassy parkland when converting an eligible recreation facility. As a matter of common sense, one need only think of children picnicking in hot summer weather on hot asphalt near parked and moving cars as opposed on that same day to picnicking on designated grassy playfields.

4. The Hardcourts Have Been Dedicated for Public Outdoor Recreational Use and are not Eligible Support Facilities

The District claims that the hardcourts constitute replacement property because the Joint Use Agreement with the City "was subject to termination upon a mere six months' notice by either party," and "the District approved termination of the [Joint Use Agreement] in December 2019." However, the District's argument ignores the plain text

[28] 36 C.F.R. § 59.3(b)(3).
[29] *Id.* (emphasis added).
[30] LWCF Manual at Page 3-14-15.

of the conversion requirements which provides that land which is currently in public ownership is not eligible for replacement property if the land has "been dedicated or managed for recreational purposes ***while in public ownership***."[31]

5. The District's Conversion is Not Categorically Excluded from NEPA

The District attempts to sidestep its NEPA and CEQA violations by what can only be described as misrepresenting the terms of the Settlement Agreement between the Parties in the State Litigation.[32] The District claims that the State Litigation "was eventually dismissed along with all challenges to the legitimacy of the CEQA decision[.]"[33] In so doing, the District half cites the release in the Settlement Agreement omitting the following material language:

> The Parties further agree that ***STP may use <u>any</u> ruling issued and any evidence obtained in this Lawsuit to challenge any actions taken, or to be taken, by OGALS and/or NPS*** in connection with the Districts current or any future application for revision of the 6(f)(3) Boundary or conversion of land within the 6(f)(3) Boundary. ***The Parties also agree that the District retains the right to challenge the meaning, effect, or significance of any rulings or evidence used by STP in such proceedings.*** [34]

It is patently evident that by including the foregoing brokered term, Plaintiff expressly reserved its right to rely on the San Diego Superior Court's rulings, including its CEQA ruling, in connection with this challenge. As is evident from Plaintiff's Complaint and Motion, Plaintiff is not suing the District for violations of CEQA or NEPA in this action. Instead, it is relying on the San Diego Superior Court rulings to show that the District did not comply with applicable environmental law and as a consequence, it was an abuse of discretion for NPS to find that the District complied with CEQA and NEPA. The reasons for the District's extraordinary efforts to avoid the Court's CEQA ruling are transparent. The San Diego Superior Court granted Plaintiff's Petition for Writ of Mandate under CEQA ***in full***—holding that the District was not exempt from CEQA and

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[31] 36 C.F.R.§ 59.3(b)(4)(ii) (emphasis added).
[32] ECF No. 13 at 24:13-16.
[33] *Id.*
[34] ECF No. 9-31 at 6 (Pl.'s Ex. 28 at 504) (emphasis added).

its EIR was inadequate.[35] Given that the District has never even attempted to cure its defective EIR, the District cannot satisfy the environmental prerequisites for a conversion, and thus for this reason alone, NPS's approval was an abuse of discretion.[36]

D. Balance of Hardships and the Public Interest Favor Plaintiff

The District claims that Plaintiff failed to meaningfully address the purported harm to the District that may result as a result of an injunction. The fact of the matter is the District is the architect of its own prejudice, and should not be permitted to alter the status quo in a way that will permanently deprive Plaintiff of a remedy under the law. The District claims that the improvements in the Park are critical to the Cardiff School site and that the school could not have been designed in any other manner; yet, the District knowingly undertook the huge gamble in demolishing nearly the entire school and beginning construction of the new campus without NPS's approval to build within the Park. Had the District not begun construction without the required approvals, it would not be in this situation.

There is a "well-established 'public interest in preserving nature and avoiding irreparable environmental injury.'"[37] The Ninth Circuit has recognized that there is a "public interest in careful consideration of environmental impacts before major federal projects go forward," and suspending such projects until such a consideration occurs "comports with the public interest."[38] Both the balance of hardships and public interest therefore weigh in favor of Plaintiff.

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[35] ECF No. 9-21 (Pl.'s Ex. 18).

[36] The District's Opposition also fails to address any of the law cited by Plaintiff, including the fact that categorical exclusions are not applicable where there are "unresolved conflicts concerning alternative uses of available resources." Clearly, there is a significant conflict regarding alternative uses of the George Berkich Park site and where there is evidence "that exceptions to the categorical exclusion may apply, . . . the fact that the exceptions may apply is all that is required to prohibit use of the categorical exclusion."

[37] *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) (quoting *Lands Council v. McNair*, 537 F. 3d 981, 1005) (9th Cir. 2008), *overruled in part on other grounds by Winter v. Nat. Res. Def. Council, Inc.*, 555 U. S. 7).

[38] *Id.* (quoting *South Fork Bank Council of Western Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F. 3d 718, 728 (9th Cir. 2009)).

E. No or Nominal Bond is Appropriate in this Case

The District requests that the Court set a bond of $200,000 per month, or $2. 4 million per year, for the pendency of the action, and that Plaintiff must show the financial condition "*of its four members*" for the Court to set a nominal bond. Preliminarily, the District's request ignores the corporate structure of Save the Park—a California unincorporated nonprofit association—which is a distinct entity separate from its members and directors. [39]Additionally, the cases cited by the District, which state that a public interest should provide information as to their financial status, only support the issuance of at most a $50,000 bond.[40]

Notably, the District was unable to cite any case wherein a court ordered a significant bond of $200,000 per month in environmental litigation. This is true because "[c]ourts routinely impose either no bond or a minimal bond in public interest environmental cases."[41] Especially relevant here is that a "strong showing on the merits and the defendants' apparent prejudgment to proceed prematurely with the Project before the required environmental studies were considered suggests that a large bond should not be required."[42]

II. CONCLUSION

For the reasons stated above, Save the Park and Build the School respectfully requests that the Court grant its Motion for Preliminary Injunction and enjoin any and all construction within the 1993 6(f)(3) boundary during the pendency of this action.

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[39] *See* Cal. Corp. Code § 18605.

[40] *See Western Watersheds Project v. Zinke*, 336 F. Supp. 3d 1204, 1247 (D. Idaho 2018) (appeal filed) ($10,000 bond); *Save Our Sonoran, Inc. v. Flowers*, 408 F. 3d 1113, 1126 (9th Cir. 2005) (although holding that the district court did not abuse its discretion in setting $50,000 bond, but in response to the defendant's argument that the bond was too low, the court recognized the Ninth Circuit's "long-standing precedent that requiring nominal bonds is perfectly proper in public interest litigation" in response to the defendant's argument that the bond was too low).

[41] *See, e.g.*, *City of South Pasadena v. Slater*, 56 F. Supp. 2d 1106, 1148 (C.D. Cal. 1999) (setting no bond); *Sierra Club v. Eubanks*, 335 F. Supp. 2d 1070, 1084 n. 18 (E.D. Cal. 2004) (no bond in environmental logging case); *Stop H-3 Ass'n v. Vlope*, 349 F. Supp. 1047, 1049 (D. Haw. 1972) (setting $100 bond in NEPA action).

[42] *Davis v. Mineta*, 302 F.3d 1104, 1126 (10th Cir. 2002), *abrogated on other grounds by Diné Citizens Against Ruining Our Env't v. Jewell*, 893 F.3d 1276 (10th Cir. 2016).