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CARDIFF SCHOOL DISTRICT

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. 20-cv-1080-LAB-AHG
Judge: Hon. Larry Alan Burns

MEMORANDUM POINTS AND AUTHORITIES IN SUPPORT OF *EX PARTE* APPLICATION FOR LEAVE TO FILE MOTION TO RECONSIDER AMENDED ORDER OF PRELIMINARY INJUNCTION [Doc. 21]

Complaint Filed: June 12, 2020

I. INTRODUCTION

Before the Court is an action brought under the APA challenging NPS's final approval of a conversion/boundary adjustment for Cardiff School's playfields which include an area that is subject to Section 6(f)(3) of the LWCF Act. Although characterized as "initial" and "hasty," (Doc. 21 at 4:23), the approval was the result of more than 26 months of exhaustive efforts by NPS, the State, and the District. On July 24, 2020, the Court issued its written order enjoining further construction of improvements located within the old 6(f)(3) boundary with limited exceptions ("Order"). (Doc. 21.) The County of San Diego ("County") is now eligible to be off the State's Covid-19 watchlist, which will commence the timeline for schools to reopen. This new fact establishes the balancing of hardships and public interest factors militate against an injunction. The Order also fails to apply the highly deferential standard of review used in APA cases, which requires the Court to review the basis for NPS's approval and only determine if it was reasonable. Instead, the Order ignores NPS's rationale and sets forth the Court's own independent review. Finally, the Order misapplies 36 C.F.R. § 59.3's requirements and finds irreparable injury based on an unavailable remedy. While the District recognizes reconsideration is disfavored, such a motion is warranted here, particularly given the Order, unless it is at least modified, prevents the District from properly reopening for students and staff in accordance with its state and locally approved design for the school.

II. ARGUMENT

A. NEW FACTS MILITATE AGAINST GRANTING AN INJUNCTION

The Order's discussion of the balancing of the equities and public hardship factors appears to be primarily based on the Court's belief that it is unlikely students and/or staff will physically return to school this Fall. (Doc. 21 at 22-24.) However, this situation dramatically changed recently. On August 4, 2020, the County provided guidelines for schools, under which "[t]eachers, support staff, and administrators can return to work physically without students on site while counties

are on the monitoring list ….” (Dorward Decl., Ex. C, p. 13.) More importantly, on August 12, 2020, the County fell below the relevant metrics for positive Covid-19 cases that currently prohibit school re-openings under applicable State orders and is now eligible to be off the State’s watchlist. Assuming the County remains off the watchlist, the District can potentially return to campus for in-person instruction as soon August 28th under the County Health guidelines. (Dorward Decl., ¶ 8.) Thus, it is imperative the District be permitted to complete critical remaining DSA approved access components of the Project to properly prepare for the return of teachers and students.

While approximately two-thirds of the parking lot and drop-off area is complete, the western entrance cannot be constructed under the Order because a small portion of it exists within the old 6(f)(3) boundary, which prevents usage of the off-street one-way student drop off.[1] (Docs. 13-2 ¶¶ 40, 43, 46, 49, 13-3 ¶ 30, 13-8 at 16 (Ex. 23), 13-12 at 73 (Ex. 57).) In addition, the DSA approved ADA walkways from the school entrance to the majority of existing classrooms, play areas, and student restrooms, are located within the old 6(f)(3) boundary and cannot be constructed/utilized until the injunction is modified or lifted. (*Ibid*.)

B. THE COURT COMMITTED CLEAR ERROR BY FAILING TO APPLY THE HIGHLY DEFERENTIAL STANDARD OF REVIEW

To withstand Plaintiff’s challenge under the APA, NPS’s approval of the conversion “need only be a reasonable, not the best or most reasonable, decision.” *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir. 2010) (quotation marks omitted). Unless the agency completely failed to address a factor that was essential to making an informed decision, the Court also must defer to the agency on matters within the agency’s expertise. *Nat’l Wildlife Fed’n v. NMFS*, 422 F.3d 782, 798 (9th Cir. 2005). Even if the Court believes there is a more reasonable conclusion, it “may not substitute its judgment for that of the agency concerning the

[1] It should be noted that the Order also incorrectly states that “no structures have been built in the old 6(f)(3) boundary,” when in fact the exterior structure of Building L is close to complete. (Doc. 21 at 9:12-13; Dorward Decl., ¶ 14.)

wisdom or prudence of [the agency's] action." *River Runners*, 593 F.3d at 1070.

The standard of review in APA cases is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Independent Acceptance Co. v. Cal.*, 204 F.3d 1247, 1251 (9th Cir. 2000). Absent from the Order, however, is any discussion of the rationale provided by NPS in support of its approval. The Order instead improperly reflects the Court's independent review. In doing so, the Court also gives no deference to NPS's expertise in evaluating recreation areas under the LWCF. The failure to apply the proper standard of review clearly warrants reconsideration.

C. THE COURT COMMITTED CLEAR ERROR IN EVALUATING THE LIKELIHOOD OF SUCCESS ON THE MERITS

To determine whether the proposed replacement land is "of reasonably equivalent usefulness" as the converted property, NPS was required to compare the "recreation needs" being fulfilled in the two areas. 36 C.F.R. § 59.3(b)(3)(i). The recreation needs fulfilled within the old 6(f)(3) boundary consisted of two playfields, a playground between the playfields and a concrete walkway around the northern playfield that provided access to the playground. (Docs. 13-3 ¶ 7, 13-5 at 64 (Ex. 6), 13-10 at 141-42, 146 (Ex. 40), 13-10 at 96 ¶ B, 114 (Ex. 48), 13-11 at 155 (Ex. 50).) Aside from an underutilized baseball backstop and dirt infield, and a part of the old walkway, all of these recreational uses are fulfilled within the new 6(f)(3) boundary. (Docs. 13-8 at 16, 13-10 at 138, 141-42, 146, 150-52 (Ex. 40), 13-11 at 155 (Ex. 50).) The new boundary will also include more total sq. footage and additional recreational areas/uses, namely a community garden and hard court area. (Docs. 13-10 at 138, 151 ¶¶ 5-7, 9, 13-11 at 151, 155 (Ex. 50).)

Rather than address the reasonableness of NPS's conclusion concerning equivalency, (Doc. 13-11 at 155 (Ex. 50)), the Order focuses on the new parking lot and concludes it "does not 'meet recreational needs' that are 'like in magnitude and impact' to the recreational purposes served by grassy parkland." (Doc. 21 at 6:19-21.) This is clear error because recreational usefulness is determined by NPS looking at the old and new 6(f)(3) boundary areas in their entirety. Moreover, the

portion of the parking lot located within the old boundary, which is only 7,850 square feet by Plaintiff's own calculation, predominantly consisted of a sloped walkway surrounded by planters, not "grassy parkland." (Docs. 13-5 at 64 (Ex. 6), 13-12 at 63 (Ex. 55); Dorward Decl., Ex. B.) In fact, the new 6(f)(3) boundary area has 11,629 more square feet of recreational greenspace than the old boundary area. (Dorward Decl., Ex. B; Doc. 13-11 at 151 (Ex. 50).)

The Order also erroneously finds that the new hard court area was already "dedicated or managed for recreational purposes." (Doc. 21 at 5:16-7:7.) The 1994 Amendment to the Joint Use Agreement made "available" for public use "the recreational facilities referred to as George Berkich Park …." (Doc. 13-5 at 15 ¶ 3.) While the Amendment suggested this includes hard courts, NPS correctly noted that the Amendment lacked sufficient specificity, and that the new hard court area was outside of "George Berkich Park" as defined by the old 6(f)(3) boundary and thus not covered by the Amendment. (Docs. 13-11 at 154 (Ex. 50), 13-10 at 96 ¶ B, 114 (Ex. 48), 9-4 at 11, 14.) NPS also properly observed that land being "available" is not the same as being "dedicated or managed" within the meaning of 36 C.F.R. 59.3(b)(4)(ii). (Doc. 13-11 at 154 (Ex. 50).) The Order's failure to address NPS's rationale constitutes clear error.

The Order also finds Plaintiff is likely to succeed on its claim that "NPS could not rely on the District's EIR" to satisfy NEPA. (Doc. 21 at 6:27 to 7:1.) However, the EIR unequivocally remains valid and has no bearing on compliance with NEPA because federal agencies are not subject to CEQA. Cal. Pub. Res. Code §§ 21002, 21063. The Order also incorrectly quotes language from the CEQA ruling that was made in the context of whether a CEQA categorical exemption applied to the project, an entirely separate inquiry than whether the EIR was valid under state law.[2] (Docs. 21 at 8:9-11, 9-21 at 3-4.).

[2] As a matter of law, the EIR remains valid. To vacate the EIR, a writ of mandate directing the District to decertify the EIR would have been required, and the District must have elected to comply with the writ instead of filing an appeal, none of which occurred. *See* The Rutter Group, Cal. Prac. Guide: Admin. Law, Chs. 20-F, 21-A, 21-C (Nov. 2019 Update).

The Order's finding that the conversion remains controversial because the parties' settlement agreement did not resolve "the environmental issues" is also misplaced. (Doc. 21 at 8:11-15.) The sole basis for the state court's ruling regarding the EIR was the lack of NPS approval, but NPS addressed this issue, noting that NPS approval could not be granted until the completion of CEQA review. (Doc. 13-11 at 153 (Ex. 50).) NPS approval has now been obtained, which resolved the lone deficiency in the EIR identified by the state court. Moreover, the "environmental issues" as they relate to CEQA, which are the only "environmental issues" raised in this action, were in fact resolved by the settlement agreement.

D. THE COURT ERRED IN EVALUATING IRREPARABLE INJURY

Finally, the Order's analysis of irreparable injury is erroneously based on the fact that Plaintiff seeks restoration of the old "George Berkich Park." (Doc. 21 at 8:17-9:20.) "If the record before the agency does not support the agency action, [or] if the agency has not considered all relevant factors, … the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). A mandatory injunction is governed by the same standard as mandamus, which is only available "when '(1) the plaintiff's claim is clear and certain; (2) the duty is 'ministerial and so plainly prescribed as to be free from doubt'; and (3) no other adequate remedy is available.'" *Oregon Nat. Res. Council v. Harrell*, 52 F.3d 1499, 1508 (9th Cir. 1995). Given that NPS's functions are not ministerial, as they require the exercise of discretion, and remand is available, restoration of the old 6(f)(3) boundary would be improper and thus does not support irreparable injury.

For these reasons, the District respectfully requests leave to file a formal motion for reconsideration on an expedited basis to fully address these issues.

Dated: August 17, 2020

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