SUPERIOR COURT OF CALIFORNIA, COUNTY OF MONTEREY

CARMEL VALLEY FORUM, INC,

Petitioner,

v.

LOCAL AGENCY FORMATION COMMISSION OF MONTEREY COUNTY,

Respondent.

Case No. M83394

Intended Decision

LOCAL AGENCY FORMATION COMMISSION OF MONTEREY COUNTY,

Cross-Complainant,

v.

CARMEL VALLEY FORUM, INC,

Cross-Defendant.

This matter came on for court trial on April 24, 2008. All sides were represented through their respective attorneys. The matter was argued and taken under submission. This intended decision resolves factual and legal disputes, and shall suffice as a statement of decision as to all matters contained herein.

Background

Petitioner Carmel Valley Forum, Inc. (Carmel Valley), challenges an October 18, 2006 decision by Monterey County Local Area Formation Commission (LAFCO or Commission), whereby LAFCO required the preparation of an Environmental Impact Report (EIR) before LAFCO would evaluate and vote on Carmel Valley's Petition for the incorporation of the Town of Carmel Valley.

LAFCO's Executive Officer released a report on the Proposal to Incorporate the Town of Carmel Valley on October 6, 2006 and set a hearing for October 18, 2006.

(Administrative Record (AR) 5676, 5678.) The report included a draft resolution that provided a finding: "In accordance with the Initial Study and proposed Negative Declaration, ... the proposed incorporation will have no significant impact on the environment." (AR 5739.) Section IV of the report discusses compliance with CEQA. The Executive Officer recommended that the Commission approve and adopt a Negative Declaration for the incorporation of the town. Public comments from 2005 and 2006 regarding the incorporation were considered, as well as minor changes to the boundary of the proposed town, none of which changed the original findings and recommendation to adopt a Negative Declaration. (AR 5704.)

At the October 18, 2006 hearing, the Commission passed a motion that an EIR be prepared after defeating a motion to adopt the Negative Declaration. (AR 6301-6304.)

Carmel Valley seeks (1) a writ prohibiting LAFCO from requiring an EIR and further delaying the election process; (2) a declaration that LAFCO violated Government Code section 56880 and CEQA (the California Environmental Quality Act) in requiring the EIR; and (3) an injunction prohibiting LAFCO from requiring an EIR and any further delay to an election.

Administrative Record

The administrative record was admitted into evidence.

Contentions

Carmel Valley contends: (1) that LAFCO cannot indefinitely continue the hearing on the Petition and must vote to grant or deny the Petition within 35 days from the date of the hearing (Government Code §56880); (2) LAFCO adopted a Negative Declaration for the project in December 2005 and is estopped from requiring an EIR; (3)

the incorporation is not a project; (4) the incorporation is exempt from further CEQA review if it is deemed to be a project; and (5) there is no substantial evidence in the record to support the Commission's EIR determination.

LAFCO contends that the first, second, fifth, sixth, seventh, and eighth causes of action should be dismissed on the grounds of laches, and that the second, fifth, sixth, seventh, and eighth causes of action are barred by the statute of limitations.

Standard of Review

Government Code section 56107(c) provides that a LAFCO determination may be set aside upon a finding of fraud or a prejudicial abuse of discretion. This language has been judicially interpreted to include whether LAFCO failed to follow the procedure required by law or whether its actions have been arbitrary, capricious, or lacking in evidentiary support. (*City of Santa Cruz v. Local Agency Formation Com.* (1978) 76 CA3d 381, 393.)

Discussion

The three-tiered process required of public agencies to protect the environment was set out in *Save Our Carmel River v. Monterey Peninsula Water Management District* (2006) 141 Cal.App.4th 677 (*Save Our Carmel River*). "The first tier is jurisdictional, requiring that an agency conduct a preliminary review in order to determine whether CEQA applies to a proposed activity. (Guidelines, §§ 15060, 15061.) [Citation.]. CEQA applies if the activity is a 'project' under the statutory definition, unless the project is exempt. If the agency finds the project is exempt from CEQA under any of the exemptions expressly set forth in the statute and in the Guidelines, no further environmental review is necessary. If no exemption applies, the agency proceeds to the

second tier and conducts an initial study in order to determine 'if the project may have a significant effect on the environment.' (Guidelines, § 15063, subd. (a).) If the initial study shows that there is 'no substantial evidence that the project or any of its aspects may cause a significant effect on the environment,' the agency prepares a negative declaration so stating. (Guidelines, § 15063 (b)(2); [Citation].). If the project does not qualify for a negative declaration, the agency must proceed to the third step in the process, a full environmental review in an EIR. (Guidelines, §§ 15063, subd. (b)(1), 15080; [Citation].)." (*Save Our Carmel River, supra,* 141 Cal.App.4th at p. 688.)

(A). Timing and Procedural Issues

(1). Government Code section 56880

Carmel Valley contends that LAFCO must vote on the Petition within 35 days of a LAFCO hearing at which an Executive Officer's report was submitted to the Commission. (Government Code section 56880.) Carmel Valley states that the Executive Officer's report was submitted to the Commission on October 18, 2006 and LAFCO has not taken final action by adopting a resolution that either approves or disapproves of the Petition.

LAFCO argues that section 56880 does not apply at this juncture of the proceedings because the hearing was never concluded. Rather, the hearing was continued until the EIR is completed and the Fiscal Analysis is updated. (AR 6367-6369.)

Government Code section 56880 provides: "Adoption of resolution. At any time not later than 35 days after the conclusion of the hearing, the commission shall adopt a resolution making determinations approving or disapproving the proposal, with or without conditions, the plan of reorganization, or any alternative plan of reorganization as

set forth in the report and recommendation of a reorganization committee. If the commission disapproves the proposal, plan of reorganization, or any alternative plan of reorganization, no further proceedings shall be taken on those proposals or plans."

LAFCO argues that it has the discretion to continue the hearing from time to time. Government Code section 56106 provides: "Any provisions in this division governing the time within which an official or the commission is to act shall in all instances, except for notice requirements and the requirements of subdivision (i) of Section 56658, be deemed directory, rather than mandatory."

LAFCO cannot comply with Government Code section 56880 until the Petition is approved or disapproved and the hearing has been concluded. Because Government Code section 56880 is directory, LAFCO has not abused its discretion by continuing the hearing for the receipt of more information. However, LAFCO should not construe this finding to conclude that the court would condone an unreasonable delay.

(2). Laches

LAFCO contends that Carmel Valley unreasonably delayed in filing suit. (*H.D. Arnaiz, Ltd. V. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1368.) LAFCO argues that the causes of action accrued either January 24, 2005 or October 18, 2006. LAFCO argues that Carmel Valley allowed LAFCO to process the Negative Declaration on January 24, 2005 and Carmel Valley unreasonably delayed in suing LAFCO. (AR 2882.) Alternatively, LAFCO also argues that it exercised its discretion on October 18, 2006, in requiring that an EIR be prepared and Carmel Valley unreasonably delayed in bringing this action to challenge that decision. (AR 6304.)

Carmel Valley argues that there was no unreasonable delay nor has LAFCO been prejudiced. (*Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1127.) Carmel Valley sets forth four contentions. First, no final action has been taken on the Petition because LAFCO, at the October 23, 2006 meeting, directed staff to prepare new documents to accompany the EIR. (AR 6457-6482.) Secondly, Carmel Valley filed suit on March 6, 2007 after attempting to persuade LAFCO to change its decision. Thirdly, the less than five-month time period is not unreasonable and LAFCO has shown no prejudice. Lastly, LAFCO's rejection in January 2005 of Carmel Valley's argument that the incorporation of the town was exempt from CEQA review could not be a trigger for filing suit.

"Laches bars a mandamus action if the petitioner delays in initiating or prosecuting an action, and prejudice to the respondent results. [Citation.] 'The prejudice must be caused by the delay and may be of either a factual nature or some prejudice in the presentation of a defense.' [Citation.] [¶] Whether laches exists is a question of fact for the trial court to determine 'in light of all of the applicable circumstances, and in the absence of manifest injustice or a lack of substantial support in the evidence its determination will be sustained. [Citation.] However, when the underlying facts are undisputed, we may determine the issue as a matter of law. [Citation.].'" (*San Bernardino Valley Audubon Soc'y v. City of Moreno Valley* (1996) 44 Cal. App. 4th 593, 605.)

LAFCO fails to meet its burden regarding the October 18, 2006 date. Even if the court were to start the clock on January 24, 2005, LAFCO has not met its burden of proof and the production of evidence to demonstrate prejudice. At most, LAFCO suggests that Carmel Valley's agreement to pay for the Initial Study resulted in LAFCO staff

committing months of effort to move the Petition along the path towards the ultimate vote by the public. LAFCO does not cite any other evidence to support the prejudicial argument, and the Court cannot fathom how LAFCO's processing of the Petition, paid for in part by Carmel Valley, resulted in prejudice.

LAFCO argues that Carmel Valley was required to file suit at the time LAFCO decided to go forward with the Initial Study and Carmel Valley could not reserve its "rights" to sue later. However, Carmel Valley was exhausting its administrative remedies by protesting LAFCO's decision to deem the incorporation a "project" that was not entitled to an exemption and to proceed with an Initial Study.

The court finds the suit is timely and LAFCO has not affirmatively demonstrated any prejudice from the time LAFCO decided to require an EIR and the date that Carmel Valley filed suit. Carmel Valley did not unreasonably delay in filing suit.

(3). Statute of Limitations

LAFCO argues that Code Civ. Proc. section 1094.6(b) is determinative. Carmel Valley only had 90 days to file suit following LAFCO's decision to require an EIR and Carmel Valley filed too late. LAFCO contends that Public Resources Code section 21167(d) (180-day statute of limitations), or Public Resources Code section 21167(b) and (e) (30-day statute of limitations), do not apply because LAFCO determined that incorporation of the town was a project subject to CEQA and no notice of determination was filed by LAFCO.

Carmel Valley argues that the 90-day statute of limitations of Code Civ. Proc. section 1094.6(b) does not apply because (1) there was no final decision; (2) LAFCO did not provide notice to Carmel Valley as required by Code Civ. Proc. section 1094.6; and

(3) LAFCO's requirement that an EIR be prepared is not a decision coming within the statutory language. Carmel Valley contends that the four-year statute of limitations of Code Civ. Proc. section 343, in harmony with Code Civ. Proc. section 363, controls. (*County of San Diego v. Assessment Appeals Board No. 2 of Sand Diego County* (1983) 148 Cal.App.3d 548, 554.)

Code Civ. Proc. section 1094.6 provides in relevant part: "(a) Judicial review of any decision of a local agency, other than school district, as the term local agency is defined in Section 54951 of the Government Code, or of any commission, board, officer or agent thereof, may be had pursuant to Section 1094.5 of this code only if the petition for writ of mandate pursuant to such section is filed within the time limits specified in this section. [¶] (b) Any such petition shall be filed not later than the 90th day following the date on which the decision becomes final.... [¶] [¶].... (e) As used in this section, decision means a decision subject to review pursuant to Section 1094.5, suspending, demoting, or dismissing an officer or employee, revoking, denying an application for a permit, license, or other entitlement, imposing a civil or administrative penalty, fine, charge, or cost, or denying an application for any retirement benefit or allowance. [¶] (f) In making a final decision as defined in subdivision (e), the local agency shall provide notice to the party that the time within which judicial review must be sought is governed by this section. [¶] As used in this subdivision, 'party' means ... a person ... whose application for a permit, license, or other entitlement has been denied ...."

While it might be argued that there was a "final" decision on October 18, 2006 or October 23, 2006 that an EIR be prepared, this is not a situation where LAFCO was "suspending, demoting, or dismissing an officer or employee, revoking, denying an

application for a permit, license, or other entitlement, imposing a civil or administrative penalty, fine, charge, or cost, or denying an application for any retirement benefit or allowance." There is no evidence in the record that LAFCO gave notice to Carmel Valley as required by subsection (e), and Carmel Valley's "entitlement has [not] been denied."

In addition, the "90-day statute of limitations ... is *tolled* until such time as the subdivision (f) notice is given. (*El Dorado Palm Springs, Ltd. v. Rent Review Com.* (1991) 230 Cal.App.3d 335, 346, italics in original.) Prior to "the enactment of section 1094.6[,] ... the applicable statute of limitations [for a administrative writ was] three or four years." (*Id* at p. 345.)

The statute of limitations issue is a decidedly vexing problem.

The CEQA statutes of limitations cited by LAFCO do not appear to have any applicability under the posture of this case, nor does Code Civ. Proc. section 1094.6.

Public Resources Code section 21167 is not applicable because (1) no notice of determination was filed (subsections (b), (c), (d), and (e)); (2) LAFCO is not carrying out the project "without having determined whether the project may have a significant effect on the environment" (subsection (a)); and (3) LAFCO has not made a "decision to carry out ... the project...." (subsection (d)).

The inapplicability of Public Resources Code section 21167 is supported by Guidelines section 15352, which provides: "(a) 'Approval' means the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person. *The exact date of approval of any project* is a matter determined by each public agency according to its rules, regulations,

and ordinances. Legislative action in regard to a project often constitutes approval." (Emphasis added.) Guidelines section 15352(b) provides: "Approval occurs upon the earliest commitment to issue or the issuance by the public agency of a discretionary contract, grant, subsidy, loan, or other form of financial assistance, lease, permit, license, certificate, or other entitlement for use of the project." LAFCO has not approved the project.

Code Civ. Proc. section 1094.5 allows a court to "inquir[e] into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, ..."

Carmel Valley filed this action under Code Civ. Proc. section 1085 and section 1094.5 and also requests injunctive and declaratory relief. Code Civ. Proc. section 338 and the three-year statute of limitations is applicable to this action. (Code Civ. Proc. §1085.) The traditional mandate and requests for declaratory and injunctive relief are timely.

Code Civ. Proc. section 343 provides: "Relief for which no period previously provided; Four years. An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

LAFCO made decisions regarding whether the Petition was a CEQA project, exempt from environmental review, and to require an EIR in lieu of a Negative Declaration (Code Civ. Proc. §1094.5, Public Resources Code §21168). The only statute of limitation that appears to be applicable at this juncture of the proceedings is Code Civ. Proc. section 343. Carmel Valley's suit is timely.

(4). Negative Declaration

Carmel Valley argues that LAFCO adopted a Negative Declaration on December 14, 2005. Having voted to adopt a Negative Declaration, LAFCO did not have the authority to change that decision and order that an EIR be produced for the project. (AR 3955.) Carmel Valley states that LAFCO staff did not have the authority to change the Commission's vote and the written resolution is void. (Guidelines, §15074(b).) Carmel Valley contends that LAFCO should be estopped from arguing otherwise.

LAFCO argues that the notice for the December meeting was defective, and that LAFCO was actually adopting an "Intent to Adopt a Negative Declaration," and that this is reflected in the resolution. (AR 6565-6566.) [1]

On or about September 15, 2005, LAFCO ran an ad in a local newspaper that was titled in part "Notice of Intent to Adopt a Negative Declaration" for Carmel Valley incorporation, stating the incorporation would have no significant environmental impacts and an EIR was not required. (AR 3205, 3207.)

The Executive Director's report for the meeting recommended that the Commission "adopt a Negative Declaration, or other appropriate environmental determination." (AR 3742.) The Executive Dictator agreed with the environmental consultant that a Negative Declaration was appropriate. (AR 3743.) The Executive

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[1] "If, however, the project does not fall within an exemption and it cannot be seen with certainty that the project will not have a significant effect on the environment, the agency takes the second step and conducts an initial study to determine whether the project *may* have a significant effect on the environment. (Guidelines, §§ 15002, subd. (k)(2), 15063; [Citation.].) If the initial study shows there is no substantial evidence the project may have a significant effect on the environment or revisions to the project would avoid such an effect, the lead agency prepares a negative declaration. ([Public Resources Code] § 21080, subd. (c)(1); Guidelines, §§ 15002, subd. (k)(2), 15063, subd. (b)(2), 15070 et seq.)." (*Farm Bureau, supra,* 143 Cal.App.4th at p. at 177.)

Director pointed out that the Commission would need to make one of three environmental determinations, a Negative Declaration, Mitigated Negative Declaration or an EIR. (AR 3743-3744.) The report concluded in part that "[w]hile it is acknowledged that the proposed incorporation Carmel Valley generates a great deal of controversy, this is not reason alone to prepare an EIR. If Commissioners believe that a fair argument standard has been met to support the preparation of an EIR, then the Executive Officer should be directed to initiate the EIR process with the release of a Notice of Preparation. However, the [comment letters] received to date do not meet the fair argument standard. Therefore, it is recommended the Commission adopt the attached resolution and Notice of Determination for a Negative Declaration." (AR 3746.)

The transcript of the December 14, 2005 meeting provides in relevant part that the Commission was considering staff's "recommendation to adopt a Negative Declaration, or any other appropriate environmental document...." (AR 3926.) The Executive Officer recommended that the Commission "determine that it is appropriate to adopt a Negative Declaration and file a Notice of Determination [and that the Executive Director had] drafted for [the Commission's] consideration a resolution that is attached to the staff report." (AR 3929.) After receiving public comments and discussion amongst the member of the Commission, a Commissioner moved that "we adopt the resolution presented by staff with the changes ... staff has proposed. (AR 3949.) The Commission unanimously voted in favor of the motion. (AR 3955.)

The minutes of the December 14, 2005 meeting provide in part: "Upon Motion ... [the] resolution adopting a Negative Declaration with changes made by staff and

counsel, for the Proposed Incorporation of the Town of Carmel Valley ... was unanimously approved." (AR 3914.)

Resolution No. 05-30, is titled in part: "Resolution ... Approving a Notice of Intent to Adopt a Negative Declaration ...." (AR 6565.) In the body of the Resolution it states that "[b]ased on preliminary information available at this time, no significant impacts would result from the project implementation and so the Commission hereby approves a notice of *intent to adopt* a Negative Declaration, subject to final analysis and determination at a future public hearing when the Commission will consider the entire public record and testimony and may approve the incorporation proposal, at which time a Notice of Determination would be filed for the final environmental determination and approval of incorporation proposal." (Emphasis added.) (AR 6565-6566.)

The Notice for the October 18, 2006 public hearing provides in part: "As part of the public hearing, ... the Commission, acting as the lead agency ... will read and consider a Negative Declaration for the project, and may adopt it." (AR 5678.)

The Executive Officer's report provides in Section IV CEQA, that at the time of the December 14, 2005 special meeting "LAFCO approved a resolution of intent to adopt a Negative Declaration, pending final analysis and determination at the October 18, 2006 public hearing." (AR 5704.) The Executive Officer was recommending that the Commission adopt a Negative Declaration. (AR 5705.)

The Commission ultimately decided to prepare an EIR. (AR 6301-6304.)

Is LAFCO estopped from asserting that it did *not* adopt a Negative Declaration in December 2005?

"The [estoppel] doctrine acts defensively only. It operates to prevent one from taking unfair advantage of another *but not to give an unfair advantage to one seeking to invoke the doctrine.*" (*In re Marriage of Thompson* (1996) 41 Cal.App.4th 1049, 1061, italics added.)

"Estoppel requires: (1) the party to be estopped knew the facts; (2) the other party was ignorant of the true facts; (3) the party intended his conduct would be acted upon, or acted in a manner that the party asserting the estoppel had a right to believe it so intended; and (4) the other party relied upon the conduct to his injury. Where one of the elements is missing, there can be no estoppel." (*Id.* at p. 1061.)

There are conflicts in the record regarding the issue of adoption or *intent* to adopt a Negative Declaration. Resolution No. 05-30 was an *intent* to adopt a Negative Declaration, and the Notice and Executive Officer's report for the October 2006 meeting clearly followed Resolution No. 05-30 regarding an intent to adopt a Negative Declaration. Carmel Valley was not ignorant of the Resolution or the intent to adopt a Negative Declaration at the October 2006 meeting. It would be unfair to invoke the doctrine because Carmel Valley was not misled, the Resolution was not concealed, and Carmel Valley was not prejudiced. Additionally, when a party is seeking to raise an estoppel argument against the government, the court must "weigh the equities and consider the impact on public policy of permitting an estoppel in a given case." (*J.H. McKnight Ranch, Inc. v. Franchise Tax Board* (2003) 110 Cal.App.4th 978, 991.) The public policy of providing the fullest protection of the environment, and the fact that Carmel Valley did not change its position in reasonable reliance on LAFCO's Resolution

or conduct during the proceedings provides that the doctrine is not applicable on these facts.

(B). CEQA issues

(1). Is the proposed incorporation of the Town of Carmel Valley a Project?

LAFCO contends that the incorporation is a project because (1) LAFCO, as a public agency, will exercise its discretion on the Petition; and (2) the incorporation will have direct and indirect impacts on the environment. These impacts include traffic and housing. (*Napa Citizens for Honest Government v. Napa County Bd. Of Supervisors* (2001) 91 Cal.App.4th 342, 367.) LAFCO equates the incorporation of the town, a quasi-legislative act, to a zoning amendment, whereby there may be foreseeable direct and indirect impacts on the environment. Furthermore, LAFCO points to the opinion of the Office of Planning and Research that "incorporations are projects subject to CEQA review." (AR 1726-1727.)

Carmel Valley argues there is no substantial evidence to support LAFCO's finding that incorporation is a project because incorporation does not commit the town to any definite course of action involving physical impacts to the environment; therefore CEQA review would be premature. (Guidelines, §15378, *Kaufman and Broad-South Bay, Inc. v. Morgan Hill Unified School District* (1992) 9 Cal.App.4th 647, 471 (*Kaufman and Broad*).) Additionally, Carmel Valley argues that incorporation will not result in any direct or reasonably foreseeable indirect physical changes in the environment. (*Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1206-07 *(Lighthouse Beach)*.) Carmel Valley points to LAFCO's December 14, 2005 meeting whereby LAFCO stated that an initial study was done out of an abundance of

caution even though the incorporation proposal was not a project. Carmel Valley also points out that incorporation of the town is not a project because there will be no changes in the uses of the land within the new town's boundaries. (*Simi Valley Recreation & Park District v. LAFCO of Ventura County* (1975) 51 Cal.App.3d 648, 666 (*Simi Valley*).)

"Where the facts in the record are undisputed, the court decides as a matter of law whether the challenged activity falls within CEQA's definition of a project. [Citations.]" (*San Lorenzo Valley Community Advocates v. San Lorenzo Valley Unified School District* (2006) 139 Cal.App.4th 1356 at p. 1377.)

"A 'project' under CEQA is a discretionary activity by a public agency that 'may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment ....'([Public Resources Code] § 21065, subd. (a).) It includes agency approval of 'a lease, permit, license, certificate, or other entitlement.' ([Public Resources Code § 21065, subd. (c).)." (*Save Our Carmel River, supra* 141 Cal.App. 4th at p. 695.)

Guidelines section 15378 provides in pertinent part that a "(b) Project does not include: (5) Organizational or administrative activities of governments that will not result in direct or indirect physical changes in the environment. [¶] (c) The term 'project' refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term 'project' does not mean each separate governmental approval."

"CEQA's conception of a project is broad. Our Supreme Court has stated that when a court determines whether an activity is a project, the statute is "to be interpreted in such manner as to afford the fullest possible protection to the environment within the

reasonable scope of the statutory language.' ... [¶] In keeping with this broad conception of a project, the CEQA Guidelines call for CEQA review at an early stage in any process that will lead to an impact on the environment. Environmental documents (environmental impact reports or negative declarations) 'should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design.' (Cal. Code Regs., tit. 14, § 15004, subd. (b).) Without first carrying out CEQA review, agencies must not 'take any action which gives impetus to a planned or foreseeable project in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review.' (Cal. Code Regs., tit. 14, § 15004, subd. (b)(2)(B).) [¶] This means that agency action approving or opening the way for a future development can be part of a project and can trigger CEQA even if the action takes place prior to planning or approval of all the specific features of the planned development. In *Fullerton, supra*, 32 Cal.3d 779, the Supreme Court held that the State Board of Education's approval of a plan to allow Yorba Linda to secede from the Fullerton High School District was a CEQA project and that CEQA review was not premature. None of the necessary decisions had been made about construction in the new district. Yorba Linda did not contain a high school and one would have to be built; and other actions, such as the alteration of bus routes, would necessarily have to be taken. (32 Cal.3d at pp. 784, 794–797.) Therefore, the board's approval was 'an essential step leading to ultimate environmental impact' and constituted a project. (*Id.* at p. 797.) CEQA review could not be delayed until a later stage even though 'a more specific and useful [environmental] study' might be possible later. (32 Cal.3d at p. 797.) [¶] At the same time, CEQA review is premature if the agency action in question occurs too early in

the planning process to allow meaningful analysis of potential impacts. Although environmental review must take place as early as is feasible, it also must be 'late enough to provide meaningful information for environmental assessment.' (Cal. Code Regs., tit. 14, § 15004, subd. (b).)." (*Friends of the Sierra Railroad v. Tuolumne Park & Recreation Dist.* (2007) 147 Cal.App.4th 643, 653-655 (*Friends of the Sierra Railroad*).)

The Court in *Kaufman and Broad, supra,* held that a school district's resolution to establish a CFD (community facilities district) to raise funds, "'to acquire sites for the construction of schools, to lease or purchase portable classrooms and buses, and to rehabilitate future facilities' was not a 'project' for purposes of CEQA compliance." The court explained: "The only foreseeable impact from formation of CFD 1 is that when the District does determine sometime in the future to acquire sites for the construction of schools, to lease or purchase portable classrooms and buses, and to rehabilitate future facilities it will have some of the funds necessary to do so. When it makes those decisions, which depend in large part on the pattern of development within the District, it will have to examine the environmental impacts. Here the District's resolution forming CFD 1 is not an essential step culminating in action which may affect the environment." (*Kaufman and Broad, supra*, 9 Cal.App.4th at p. 474.)

The *Simi Valley* court held that LAFCO approval of detachment of land from a recreation and park district was not a project where the activity was only a change of organization or personnel, the only environmental impact of which was the replacement of one group of managers by others who might hold different views on the future use of the land in question. (*Simi Valley, supra*, 51 Cal.App.3rd at pp. 652, 666.)

LAFCO struggles to point to reasonably foreseeable changes which will occur in the environment. Traffic, housing and boundary changes were determined by LAFCO to be issues after the initial environmental review.

However, any changes in traffic are conjectured. At this point, no one knows if there will be new city hall construction, or if the city hall will use leased space. No one knows where it might be located. No one knows how many employees might be hired. The parties suggest there might be seven (7) new employees. LAFCO suggests there will be two town departments, but does not suggest how many employees might work in these two departments. No one knows if there will be any new requirements pursuant to a housing elements plan. No one knows what, if any, boundary changes there might be and what impact this might have. Any possible impacts that might occur because of these issues cannot be meaningfully analyzed without more information. Environment review must be "late enough to provide meaningful information for environmental assessment." (*Friends of the Sierra Railroad, supra*, 147 Cal.App.4th at p. 655.)

The Office of Planning and Research's opinion is not binding on this court. The court finds that incorporation will not result in any direct nor any "reasonably foreseeable indirect physical changes in the environment" in regards to traffic, housing or boundary changes. (*Save Our Camel River, supra,* 141 Cal.App.4th at p. 695.) The substitution of one governmental body for another by way of the incorporation process, under the facts of this case, does not trigger environmental review and LAFCO abused its discretion in finding otherwise.

(2). In the alternative, if the incorporation *could be deemed a project and not exempt*, was the Commission's decision to prepare an EIR correct?

If the initial study shows "there is substantial evidence, in light of the whole record ... that the project may have a significant effect on the environment," the lead agency must take the third step and prepare an environmental impact report (EIR) [Citation.]." (*Farm Bureau, supra,* 143 Cal.App.4th at p. 177.)

Carmel Valley contends that an EIR was not required because the Initial Study showed that there were no substantial effects on the environment. (Guidelines, §15070(a).) Carmel Valley argues that there is no "fair argument" regarding substantial evidence in the record that the incorporation may have a significant environmental impact. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75.) Carmel Valley asserts that the evidence relied upon by LAFCO to justify an EIR is nothing more than opinions created by public controversy. (Public Resources Code §21082.2(c), Guidelines, §15384, *Newberry Springs Water Association v. County of San Bernardino* (1984) 150 Cal.App.3d 740, 749.)

LAFCO contends there is substantial evidence in the record to support a fair argument of potentially significant (1) traffic; (2) affordable housing development; and (3) alternative boundary adjustments, requiring the preparation of an EIR.

"Substantial evidence is defined in the CEQA Guidelines as enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. (Guidelines, § 15384, subd. (a).) Substantial evidence includes facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts. ([Public Resources Code] § 21082.2, subd. (c); Guidelines, § 15384, subd. (b).) It does not include argument, speculation, unsubstantiated opinion or narrative, evidence which is

clearly inaccurate or erroneous, or evidence of social or economic impacts which do not contribute to, or are not caused by, physical impacts on the environment. ([Public Resources Code] § 21082.2, subd. (c).)." (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 653-654, internal quotations omitted.)

"A significant effect on the environment is defined as a substantial, or potentially substantial, adverse change in the environment. [Citation.] A significant effect on the environment is limited to substantial, or potentially substantial, adverse changes in physical conditions which exist within the area as defined in [Public Resources Code] Section 21060.6. [Citation.] [Public Resources Code] Section 21060.5 defines environment as the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance. [Citation.]" (*Lighthouse Beach, supra,* 131 Cal.App.4th at p.1180.)

(a). Traffic impacts

LAFCO contends that potential adverse traffic impacts must be analyzed and LAFCO had to require an EIR. (*County of San Diego v. Grossmont-Cuyamaca Community College Dist.* (2006) 141 Cal.App.4th 86.)

LAFCO's evidence:

(i). New traffic patterns will be created because new government employees and citizens will travel on Carmel Valley road to new town offices. (AR 359-395, 5696, 5701, 6620.)

(ii). The Initial Study assumed that the governance of the town would be carried out within the existing community. (AR 5798.)

(iii). Monterey County Resolution No. 02-024 imposes a moratorium on development in certain areas because Carmel Valley Road has already attained critical traffic volume thresholds on several segments. (AR 5609-5610.)

(iv). In 2001, Ronald Lundquist (Monterey County Deputy Public Works Director), commented that the bulk of Carmel Valley Road is at LOS D and the County General Plan calls for LOS C on all County Roads. (AR 209.)

(v). The October 17, 2006 letter from an attorney states in part that the "project may have a significant impact on traffic congestion . . . and [the] potential traffic impacts of the City's new facilities should be thoroughly analyzed in an EIR." (AR 5601, 5618-5619.)

(vi). An attorney's letter stated that a "city hall [will] generate significant traffic ... [and] the city halls' potential traffic [is not] studied or even addressed." (AR 3432-3433.)

(vii). Commissioner Smith stated at the October 18, 2006 hearing that the City Hall is "going to increase traffic ... on Carmel Valley Road" because the road "has had a restriction for many years ... as road volume ... Level C." (AR 6292.)

(viii). Dr. Kryger stated at the October 18, 2006 hearing that he "can't even ... turn onto Carmel Valley Road for sometimes five to ten minutes due to the traffic." (AR 6254-6255.)

(ix). The CA Department of Transportation (Caltrans) in a letter dated October 13, 2005, stated that as "part of the Environmental Factors Potentially Considered should also include 'Transportation/Traffic.'" (AR 3449.)

The evidence can be lumped into several categories: (1) the creation of the town will result in increased traffic because the town will have a town council and employees and a new city hall may be constructed; (2) there is a moratorium on new development because some areas of Carmel Valley road have a traffic level of service (LOS) that is greater than called for in the County General Plan; and (3) Caltrans advised that the transportation and traffic issued should be considered.

"[I]n the absence of a specific factual foundation in the record, dire predictions by non-experts regarding the consequences of a project do not constitute substantial evidence." (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1417.)

First, there is no evidence in the record that a new town hall will be built or where town meetings might occur. Second, the arguments that incorporation will result in a city council, city employees, council meetings and the consequent traffic caused by citizens conducting city business, versus the offset of people driving to Salinas for County business, are nothing more than "[u]nsubstantiated opinions, concerns, and suspicions about a project . . . [and] do not rise to the level of substantial evidence supporting a fair argument of significant environmental effect." (*Leonoff v. Monterey County Board of Supervisors* (1990) 222 Cal.App.3d 1337, 1352 (*Leonoff*).)

The personal observations regarding traffic on Carmel Valley Road are not substantial evidence. The declarations and testimony are "generalized concerns and fears about traffic." (*Lucas Valley Homeowners Assn. v. County of Marin* (1991)233 Cal.App.3d 130, 162-164.) The letters from the attorneys contain unsubstantiated speculations that incorporation of the town will increase traffic on Carmel Valley Road as noted above. (Public Resources Code §§ 21080(e), 21082.2(c).)

The fact that the LOS on some parts of Camel Valley Road is greater than the County General Plan's criteria, and that a moratorium exists on some aspects of the road, does not constitute substantial evidence warranting an EIR. The hypothetical traffic that may result from incorporation cannot be causally linked to the LOS and the partial moratorium. "[F]ocusing on the increase in traffic at one segment of the road while ignoring the corresponding decrease in traffic at other segments' [is myopic]. 'Significant effect on the environment' means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project ....' (§ 15382; cf. Code, § 21068.)." (*Leonoff, supra*, 222 Cal.App.3d at p.1353.)

The Caltrans letter was sent to LAFCO on or about October 25, 2005 in response to the circulation of the Initial Study and Negative Declaration. Caltrans was concerned because access to Carmel Valley is by means of two State highways. This was important to Caltrans because the new Town of Carmel Valley will be a lead agency that will have land-use decision-making authority. The Initial Study did address Transportation/Traffic on pages 43-44. (AR 3191-3192.) All the boxes on the checklist on page 43 (a-g) are checked "No Impact." It concluded: "The proposed project will adopt all existing County plans, policies, ordinances and regulations related to land use, transportation and traffic. The project is an administrative act, will not expand or intensify existing uses and therefore will not introduce any new uses or sources of traffic. No mitigation is necessary, as no impacts or physical changes to existing conditions would occur." The Caltrans letter is not substantial evidence because it does not address the issue of significant environmental impacts because of "increased" traffic on Carmel Valley Road.

Rather, it references the fact that the town will become a lead agency that will be involved in transportation planning.

The public controversy, as well as the Caltrans information regarding traffic does not require the preparation of the EIR because there is no substantial evidence that the incorporation will have a significant effect on the environment. (Public Resources Code §21082.2(b), Guidelines, §15064(f)(4).)

(b). Affordable housing

LAFCO argues that the demand for affordable housing is foreseeable and the probable location is predictable based on current land use designations, thus the impacts from the housing must be analyzed in an EIR.

LAFCO's evidence:

(i). Upon incorporating, the town will be obligated to take steps with respect to affordable housing. (AR 3810-3811.)

(ii). The town will have to look at potential significant effects of affordable housing because the existing county zoning and land use ordinances will remain in effect for at least 120 days after incorporation. (AR 5694.)

(iii). The town's fair share of affordable housing in regards to the County's current fair share must be examined. (AR 3030.)

(iv). Commissioner Gourley stated that the California Department of Housing and Community Development "is going to come down on [the new town] for [the] housing element numbers. [The town is] going to be required to produce affordable housing in [the] new city. [The] affordable housing requirement [will result in] houses [being] built." (AR 6281.)

(v). Commissioner Smith states that there is "a component of affordable housing that has to be looked at" because of "a critical housing crises that every city ... is trying to address." (AR 6292-6293.)

(vi). A local citizens group stated that "[a]n extensive EIR should address city requirements for low-income housing, and attempt to examine its potential impact on both traffic and the environment. (AR 3432.)

Each local government must adopt a housing element as a component of a general plan. (Government Code §§65580(a), 65581(b), 65582(d).) Should the Town of Carmel Valley come into existence, it will be required to prepare a housing element which includes: "An analysis of population and employment trends" and this "shall include the locality's share of the regional housing need in accordance with Section 65584 ...." "The number of extremely low income households and very low income households shall equal the jurisdiction's allocation of very low income households pursuant to Section 65584." (Government Code §65583(a)(1).)

Any attempt at an analysis would be pure speculation because housing inventory's and various calculations will be required to determine the fair share of affordable housing after incorporation, and any determination of fair share would be subject to mandamus.

Additionally, there is no evidence in the record that upon incorporation the town will begin building or allocating affordable housing within the town's boundaries. The future development of affordable housing is unspecified and uncertain. (*National Parks & Conservation Assn. v. County of Riverside* (1996) 42 Cal.App.4th 1505, 1515, Guidelines, §15064(d)(3).) The "evidence" cited by LAFCO consists of vague

"concerns" about affordable housing being built sometime in the future and the calculation of the town's fair share. These opinions and concerns are not substantial evidence of a potential effect on the environment. (*Leonoff, supra*, 222 Cal.App.3d at p. 1352.)

(c). Boundary alternatives

LAFCO contends that it must consider "alternative courses of action on the cost and adequacy of services and controls in the area and adjacent area" and "the effect of the proposed action and of alternative action, on adjacent areas, on mutual social and economic interests." (Government Code §56668(b) & (c).)

LAFCO's evidence:

(i). There were 27 request to opt out of the incorporation. (AR 5692, 5713-5727, 6059-6085.)

(ii). A comment provided "an EIR must be prepared to analyze possible alternatives to the proposed incorporation boundary." (AR 6552.)

(iii). Commissioner Rubio inquired at the October 18, 2006 meeting: "[W]here are the alternative boundary options based on the tests that we just talked about?" (AR 6284.)

(iv). Commissioner Gourley requested an EIR for boundary alternatives. (AR 6281)

(v.) Commissioner Smith requested an EIR for boundary alternatives. (AR 6292.)

The first relevant question is whether the boundary issue is an environmental or fiscal question. If purely fiscal, the court's inquiry ends because CEQA does not analyze

general economic and social concerns. (*San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 697.)

The comments noted above appear for the most part to deal with the requests to opt out because of economic and social concerns as submitted by concerned citizens and business owners. "[S]ocial and/or economic impacts do not contribute to, and are not caused by physical impacts on the environment." (*Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 800.) The requests to opt out are concerned with potential economic issues but these are not matters for CEQA. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1205.)

Consequently and additionally, there is no substantial evidence that boundary adjustments will have a potentially significant effect on the physical environment that necessitates the preparation of an EIR. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1123.)

Conclusion

LAFCO abused its discretion when it decided that incorporation of the Town of Carmel Valley was (1) a project and (2) that an EIR was required. There is no substantial evidence in the whole record of any potential effect on the physical environment.

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Disposition

Carmel Valley's writ of mandate is granted as set forth above. The disposition should not be construed to require LAFCO to exercise its lawful discretion in a particular way. (Public Resources Code §21168.9(c).) The court directs the attorney for Carmel Valley to prepare an appropriate judgment consistent with this ruling, present it to all counsel for approval as to form, and return it to this court for signature.

Dated: 5/2/08

HON. LYDIA VILLARREAL
Judge of the Superior Court

CERTIFICATE OF MAILING

C.C.P. SEC. 1013A

I do hereby certify that I am not a party to the within stated cause and that on I deposited true and correct copies of the following documents:

ORDER AFTER SUBMISSION in sealed envelopes with postage thereon fully prepaid, in the mail at Salinas, California, directed to each of the following named persons at their respective addresses, as hereinafter set forth:

Amy Morgan
2280 Market St., Suite 300
Riverside, CA 92501-2121

Michael Stamp
479 Pacific St. Suite One
Monterey, CA 93940

Richard Egger
3500 Porsche Way, Suite 200
Ontario, CA 91764

Dated: 05-02-08

CONNIE MAZZEI Clerk of the
Monterey County Superior Court

By Dorsey, Deputy

L. DORSEY