

COUNTY OF SANTA CRUZ
INTER-OFFICE CORRESPONDENCE

DATE: September 20, 1999

TO: County Planning Commission

FROM: Rahn Garcia, Assistant County Counsel

SUBJECT: RESPONSE TO C.E.Q.A. ISSUES RAISED REGARDING
APPLICATION NO. 97-0648

Application No. 97-0648 (the "application") for a private equestrian facility associated with an existing residential use was considered by your Commission at its meeting held September 8, 1999. Testifying in opposition to the application, Ms. Celia Scott, Esq., opined that the project did not comply with the requirements of the California Environmental Quality Act (CEQA).

Ms. Scott questioned whether a proper "cumulative impacts" analysis was conducted for the purposes of the Initial Study prepared for the application. Ms. Scott asserted that an cumulative impacts analysis required the consideration of the biomedical livestock operations Master Plan being proposed for the same property. Second, Ms. Scott questioned whether the application was **impermissibly** segmented **from** the Master Plan for the biomedical livestock operation itself. This memorandum will review each issue in turn.

I.
CUMULATIVE IMPACT ANALYSIS

The purpose of an Initial Study is to evaluate the proposed project and determine whether an Environmental Impact Report (EIR) or a Negative Declaration must be prepared. If the Initial Study **finds** that there is no substantial evidence that the project will have a significant effect on the environment, a Negative Declaration is prepared. 14 C.C.R. Section 15 163. CEQA and the State Guidelines require that each Initial Study analyze certain factors to determine if conditions exist which result in a "mandatory finding of significance" requiring the preparation of an EIR. Public Resources Code Section 2 1083; 14 C.C.R. Section 15065. The evaluation of the mandatory findings of significance

includes a cumulative impacts analysis. 14 C.C.R. Section 15065 (c). A cumulative impacts analysis evaluates possible environmental effects which may be individually limited, but cumulatively considerable due to “past projects, the effects of other current projects, and the effects of probable future projects” (emphasis added). Public Resources Code Section 21083 (b); 14 C.C.R. Section 15065 (c). The application of these provisions requires careful analysis, for it requires the preparation of an EIR for a project where the project’s own impacts are determined to be individually limited, but, when considered along with other past, present and future projects, the combined impacts on the environment are determined to be cumulatively considerable.

The issue of how to apply the cumulative impact analysis required for an Initial Study was addressed in San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus (1996) 42 Cal.App.4th 608. In that case, the petitioner challenged the respondent County’s adoption of a negative declaration for a proposed 20-acre sand and gravel extraction operation located near the Tuolumne River. The petitioner alleged that cumulative on and off-site impacts would result in a significant impact on the environment, and that an EIR was required pursuant to Section 15 165 (c).

The Appellate Court made a distinction between the type of cumulative impact analysis required for an initial study by Section 15 165 (c), and that analysis required for an EIR by 14 C.C.R. Section 15355. The Court quoted extensively from a scholarly treatise’ in its discussion:

“Substantial confusion exists about the scope of analysis of cumulative impacts required in an initial study. Many practitioners treat the question of whether impacts are ‘cumulatively considerable’ under 14 Cal Code Regs § 15065(c) as equivalent to ‘significant cumulative effects’ under 14 Cal Code Regs §§ 15130 and 15355, which govern the cumulative impacts analysis in an EIR. See §§ 13.35-13.49. According to this view, any contribution by a project, ever small, to environmental conditions that are cumulatively adverse requires a finding that the project may have a significant cumulative impact. The problem with this view is that it would make the need for an EIR turn on the impacts of other projects, not on the impacts of the project under review. “There appears to be a difference between the

‘Kostka & Zischke, Practice Under the California Environmental Quality Act, Vol. 1, § 6.55, pp.298-299 (CEB 1995).

‘cumulative impacts’ analysis required in an EIR and the question of whether a project’s impacts are ‘cumulatively considerable’ for purposes of determining whether an EIR must be prepared at all. For purposes of an EIR, the Guidelines **define** the ‘cumulative impact’ from several projects as the change in the environment that results **from** the incremental impact of a project when added to other past, present, and reasonably foreseeable future projects. 14 Cal Code Regs § 15355. In contrast, under 14 Cal Code Regs § 15065(c), the lead agency decides whether the ‘incremental effects’ of the project under review are ‘considerable.’ To do so, the agency considers the effects of other projects, but only as a context for considering whether the incremental effects of the project at issue are considerable. In other words, the agency determines whether the incremental impacts of the project are ‘cumulatively considerable’ by evaluating them against the backdrop of the environmental effects of other projects. The question is not whether there is a ‘significant cumulative impact’ but whether the effects of the ‘individual project are considerable.’ 14 Cal Code Regs § 15065(c). See Leonoff v. Monterey County Bd. of Supervisors (1990) 222 CA3d 1337, 1358, 272 CR 372, 383 (impacts of project are not cumulatively considerable when there is no substantial evidence that any of incremental impacts of project are potentially significant). See also Newberry Springs Water Ass’n v. County of San Bernardino (1984) 150 CA3d 740, 750, 198 CR 100, 105 (county need not consider cumulative effects of other dairies when it determined that dairy in question would have no significant effect).” (citation omitted, emphasis added.) San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus, *supra*, 42 Cal.App.4th at pp.-623-624.

The San Joaquin Raptor Court reviewed the record and concluded that there was no evidence presented at the hearing of any incremental effects produced by the project that were “considerable”. The Court cited Leonoff v. Monterey County Board of Supervisors (1990) 222 CA3d 1337, 1358, as reaching a similar conclusion concerning the adequacy of a negative declaration prepared for a proposed commercial center. In Leonoff, the petitioner’s alleged that the County had not properly considered the cumulative impacts resulting **from** a proposed adjacent mini-storage facility that would share a driveway and drainage easements with the subject commercial center. As in San Joaquin Raptor, the

Leonoff Court found no evidence of cumulative effects from the projects that could be regarded as “considerable”.

The San Joaquin Raptor Court’s reasoning is the subject of another scholarly treatise which questions whether the court meant to endorse all aspects of the quoted material from Kostka & Zischke². In this second treatise, the authors also discuss whether there is a difference between the cumulative impact analysis prepared for an initial study, versus that prepared for an EIR. The authors suggest that San Joaquin Raptor could be read as merely requiring that a project itself must result in more than just a “de **minimis**” level of incremental impact before the need for an EIR is triggered under Section 15065 (c). Under this interpretation, an EIR could not be required for a project that makes **no** incremental contribution to a significant cumulative effect. The authors conclude that a case-by-case analysis would be required to determine whether this de **minimis** threshold has been crossed, and suggests that any determination in that regard be adequately documented in the record. Remy, Thomas, Moose, Manley, Guide to the California Environmental Quality Act (CEQA), *supra*, pp. 150-152.

WHAT PROJECTS MUST BE INCLUDED IN A CUMULATIVE IMPACTS ANALYSIS

Regardless of whether the cumulative impact evaluation requirements for an Initial Study are the same as those for an EIR, the analysis does not require the consideration of projects not yet subject to environmental review at the time that the lead agency considers approval of the Negative Declaration. San Franciscans for Reasonable Growth v. City and County of San Francisco (1984) 151 Cal.App.3d 61. In San Franciscans for Reasonable Growth, the Appellate Court ruled that an EIR prepared for a high-rise office complex was inadequate because the document’s cumulative impacts analysis failed to consider other closely related building projects then currently under environmental review. The City of San Francisco had argued that only approved, but not yet constructed projects or projects already-under construction should be considered within the cumulative impacts analysis, while the petitioners argued that projects formally announced by a developer should be included, even if environmental review had not yet begun. The Court stated **that** the City had improperly excluded from its cumulative impact analysis, closely related projects that had already begun environmental review:

In formulating the list of projects to be considered in each cumulative analysis, the Commission had a duty to interpret

²Remy, Thomas, Moose, Manley, *Guide to the California Environmental Quality Act (CEQA)*, Ninth Edition, pp. 149- 152 (Solano Press Books 1996).

the above-cited Guidelines so as to **afford** the fullest possible protection to the environment within the reasonable scope of their language. (Friends of Mammoth v. Board of Supervisors, supra, 8 Cal.3d 247, 259, 104 Cal.Rptr. 761, 502 P.2d 1049; see current Guidelines, § 15003, subd. (f).) Moreover, the Commission also had a duty to “use its best efforts to **find** out and disclose all that it reasonably can.” (Guidelines, § 15 140, subd. (g).) We find that, in omitting from its calculations and analyses of cumulative impacts other closely related projects that were currently under environmental review, (FN13) the Commission applied an unreasonably narrow interpretation of the Guidelines and, in so doing, abused its discretion. San Franciscans for Reasonable Growth v. City and County of San Francisco, supra, 151 Cal.App.3d at 74. (Emphasis added.)

The Court then included in a footnote, a discussion of how to determine when a project was considered to be “under environmental review”:

Projects are constantly being fed into the environmental review process. The problem of where to draw the line on “projects under review” that must be included in the cumulative impact analysis of a particular project could be solved by the use of a reasonable cut-off date which could be set for every project according to a standard procedure. The City itself makes such a suggestion. San Franciscans for Reasonable Growth v. City and County of San Francisco, supra, 151 Cal.App.3d at 74, footnote 14.

Thus, the Court left the question of when a project would be considered under environmental review to the Lead Agency to determine based on a **standardized** cutoff date.

ANALYSIS

As required by CEQA, cumulative impacts were considered as part of the Initial Study. This evaluation concluded that the project proposed by the application (a private equestrian facility) would not have impacts which would be “cumulatively considerable” (see Page 75 of the Environmental Review Initial Study dated March 8, 1999). On the basis of the initial study, a negative declaration was prepared.

The crucial issue in determining whether to approve a negative declaration and whether to

approve the project on the basis of that negative declaration, is whether there is a fair argument backed by substantial evidence that the project may have a significant effect on the environment, either as proposed or as revised to mitigate potential significant effects. An EIR is required if such a fair argument can be made. In deciding whether the cumulative impact analysis employed in the initial study was legally adequate, the Planning Commission must initially determine whether the analysis considered the effect of all closely related past, current and probable future projects.

The question of whether the initial study properly considered the biomedical livestock master plan (the master plan) project is dictated by timing. The master plan project must be considered in the initial study's cumulative impact evaluation, only if it is under environmental review by the time that the approving body takes action on the negative declaration for the equestrian facility project. San Franciscans for Reasonable Growth v. City and County of San Francisco, *supra*, 151 Cal.App.3d at 74.

The Initial Study for the equestrian facility was prepared on March 8, 1999, and the Mitigated Negative Declaration was issued on May 6, 1999. The master plan for the biomedical livestock operation was not accepted as a complete application by the Planning Department until July 1, 1999, or almost two months after issuance of the Negative Declaration. Section 500 (b) of the Santa Cruz County Environmental Review Guidelines states that "the lead agency **shall** begin the formal environmental evaluation of the project after accepting an application as complete and determining that the project is subject to CEQA."

Planning Staff has indicated that its practice is to consider a project as under formal environmental review only at the time of the project's initial hearing before the Environmental Review Committee. This is the time that public review and comment begins and represents a practice that is consistent with the court's suggestion in San Franciscans for Reasonable Growth (that each jurisdiction establish a reasonable, standard cut-off date). However, the Planning Commission may conclude that such a practice is not adequate for ensuring that it has met its duty to "provide public agencies and the general public with adequate and relevant information" about cumulative impacts. San Franciscans for Reasonable Growth v. City and County of San Francisco, *supra*, 151 Cal.App.3d at 79.

If the Planning Commission determines that the master plan project should be considered as part of the cumulative impact evaluation for the initial study, it can direct that the Initial Study be revised to include the necessary analysis.

II. PROJECT SEGMENTATION

The second question raised is whether, for purposes of CEQA analysis, the equestrian facility is a separate project or part of a larger project involving the biomedical livestock operations. If the equestrian facility is part of the larger biomedical livestock project, then it could be considered an impermissible segmentation of the project if action is taken on the subject application separate **from** the Master Plan. In her letter dated September 8, 1999, Ms. Scott cited Laurel Heights Improvement Ass'n v. Regents of the University of California (1988) 47 Cal.3d 376 as authority for her contention that the equestrian facility is actually part of a larger project involving **all the** facilities for the Master Plan **project**, and as such violates CEQA's prohibition against segmenting a project to evade proper environmental review.

Under CEQA, the term "project" refers to the whole of an action and to the underlying activity being approved. 14 C.C.R. Section 15378 (a). The definition of project is broad in order to maximize protection of the environment. Bozung v. LAFCO (1975) 13 Cal.3d 263, 283. A public agency may not divide a single project into smaller individual projects to avoid considering the environmental impact of the project as a whole. Orinda Ass'n v. Board of Supervisors (1986) 182 Cal.App.3d 1145, 1171.

To ensure that a the initial study considers the "whole of an action", it must evaluate all phases of project planning, implementation, **and operation**. 14 C.C.R. Section 15063 (a). A project may not be "piecemealed" into a succession of smaller projects, none of which by itself causes significant impacts. Citizens Association for Sensible Development of Bishop Area v. County of Inyo (1985) 171 Cal.App.3d 151, 165-166; McQueen v. Board of Directors of the Midpeninsula Regional Open Space District (1988) 202 Cal.App.3d 1136, 1144; Laurel Heights Improvement Ass'n v. Regents of the University of California, *supra*, 47 Cal.3d at pp.395-396.

However, a public agency need not include potential later phases or expansions of a project that are not reasonably foreseeable consequences of the approval. Laurel Heights Improvement Ass'n v. Regents of the University of California, *supra*, 47 Cal.3d at pp. 396-397. Laurel Heights involved a proposal by the University to relocate existing pharmacological research activities into an unoccupied **building** near a residential area. Among other matters, the Supreme Court ruled that the EIR failed to assess the impacts of foreseeable future phases of the challenged project:

We hold that an EIR must include a analysis of the environmental effects of future expansion or other action if:
(1) it is a reasonably foreseeable consequence of the initial

project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects. Absent these two circumstances, the future expansion need not be considered in the EIR for the proposed project. Of course, if the future action is not considered at that time, it will have to be discussed in a subsequent EIR before the future action can be approved under CEQA. (Emphasis added.) Laurel Heights Improvement Ass'n v. Regents of the University of California, *supra*, 47 Cal.3d 376, 396-397.

Under this standard, the facts of each case will determine whether and to what extent an EIR must analyze future expansion or other action. Laurel Heights Improvement Ass'n v. Regents of the University of California, *supra*, 47 Cal.3d 376, 397.

The Laurel Heights test has subsequently been applied in many cases. In Christward Ministry v. County of San Diego (1993) 13 Cal.App.4th 31, 45-46, the court concluded that the EIR did not improperly piecemeal review based on an inadequate description of the proposed landfill expansion. In Del Mar Terrace Conservancy, Inc. v. City Council (1992) 10 Cal.App.4th 712, 735-737, the Court applied the Laurel Heights test and determined that a freeway project was not impermissible segmented from an interdependent highway project, that could be constructed in the future. In City of Santee v. County of San Diego (1989) 214 Cal.App.3d 1438, 1452-1454, an EIR prepared by the county in connection with temporary expansion of a prison was determined to be inadequate insofar as the project may not actually be temporary. The Santee court concluded that the project described in the EIR was only one small part of the larger project to ease jail crowding in the entire county. In Sacramento Old City Assn. v. City Council (1991) 229 Cal.App.3d 1011, 1023-1026, the court upheld an EIR concluding that the lack of specificity in parking mitigation measures discussed in the report did not amount to illegal segmentation of project. In Leonoff v. Monterey County Board of Supervisors, *supra*, 222 CA3d at 1358, the court found that the description of the subject commercial center project was accurate and not an attempt to artificially separate the center from an adjoining commercial project.

ANALYSIS

The Planning Commission must review the information before it and determine whether the equestrian facility project is actually part of a larger project which includes the biomedical livestock operations. Under the Supreme Court's decision in Laurel Heights, the test is whether the development proposed in the biomedical livestock operations Master Plan is a reasonably foreseeable consequence of the equestrian facility, and

whether the development proposed by the Master Plan will likely change the scope or nature of the equestrian facility or its environmental effects. Only if both questions are answered affirmatively must both projects be considered together.

The application for the equestrian facility has been revised and conditioned to ensure that it is independent of the existing and proposed future biomedical livestock operations. However, project opponents assert that a decision on the equestrian facility predetermines that there will be development on the upper terrace of the property, which they contend is a critical issue in the Master Plan application. The proposed Master Plan for the property does indicate the location of four other barns, a support facility and a new manure bunker in the vicinity of the equestrian facility.

If the Planning Commission determines that the equestrian facility project is actually only a part of the Master Plan development project, then the Commission should not approve the Negative Declaration, and should direct that the project be incorporated into the EIR for the Master Plan.

cc: Celia Scott, Esq.
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