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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

COASTAL ENVIRONMENTAL RIGHTS
FOUNDATION et al.,

Plaintiffs and Appellants,

v.

COUNTY OF SAN DIEGO,

Defendant and Respondent;

COVERT CANYON, LLC,

Real Party in Interest and Respondent.

D071544

(Super. Ct. No. 37-2016-00000696-
CU-WM-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Eddie C. Sturgeon, Judge. Affirmed.

Coast Law Group, Marco A. Gonzalez, Chris C. Polychron and Livia B. Beaudin
for Plaintiffs and Appellants.

Caldarelli Hejmanowski Page & Leer and Marisa Janine Page for Defendant and Respondent County of San Diego and Real Party in Interest and Respondent Covert Canyon.

INTRODUCTION

Coastal Environmental Rights Foundation, Cleveland National Forest Foundation, and Save our Forest and Ranch Lands (collectively appellants) appeal a judgment denying their petition for writ of mandate. The trial court determined the director of San Diego County's Planning & Development Services department (director) did not abuse his discretion in classifying a use of private property, known as Covert Canyon, LLC (Covert Canyon or the property), for firearms and associated training activities for military and law enforcement agencies as a Law Enforcement Services use type pursuant to the San Diego County Zoning Ordinance (SDCZO), section 1346.¹

Appellants contend the County of San Diego (County), through the director, abused its discretion (1) by not conducting a review pursuant to the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) before classifying the Covert Canyon's activity as Law Enforcement Services and allowing Covert Canyon to conduct Law Enforcement Services activities under a stipulated administrative enforcement order (SAEO) while it submitted a Site Plan application and other permit applications, (2) by refusing an appeal of the director's classification determination to the Board of Supervisors, and (3) by failing to ensure compliance with

¹ We capitalize the names of the use types designated by the SDCZO because this convention is used throughout the SDCZO. (SDCZO, § 1205.)

the Williamson Act (Gov. Code, § 51200 et seq.). We conclude the classification of use was not an abuse of discretion and neither the classification nor the SAEO constituted a project approval requiring CEQA review prior to execution of the SAEO. The director's classification did not constitute an environmental determination and did not warrant an appeal to the Board of Supervisors. Finally, the director's classification of use is consistent with agricultural use and compatible uses described by the Williamson Act and the contract. Appellants have not established approval of a project in violation of the Williamson Act. We affirm the judgment.

BACKGROUND

A

Covert Canyon is a private rural property owned by Marc Halcon. It consists of approximately 152 acres, mostly surrounded by the Cleveland National Forest. The northwest corner portion of Covert Canyon abuts a parcel of privately owned land. Covert Canyon is located in an area designated as rural lands and is zoned as A72-General Agricultural. The property contains a 700-yard landing strip approved by the Federal Aviation Administration.

B

Unrestricted discharge of firearms is permitted in the unincorporated territory of the County where Covert Canyon is located, so long as it is done in a reasonably safe distance from "all recreational areas, communities, roads or occupied dwelling house, residence, or other building or any barn or other outbuilding used in connection therewith." (San Diego County Code of Regulatory Ordinances (SDCCRO), § 33.101,

subd. (a).) Firearm discharge is allowed even if not within a reasonably safe distance from these areas if done "on and pursuant to the safety regulations of a shooting range established and operated pursuant to a permit issued by the Sheriff." (*Ibid.*) For purposes of this section, the regulation states, "150 yards or less is not a reasonably safe distance from any occupied dwelling house, residence, or other building or any barn or other outbuilding used in connection therewith unless the person discharging the firearm or device is the owner, person in possession of the premises or a person having the express permission of the owner or person in possession of the premises." (*Id.*, subd. (b).)

Where allowed, there is no limit on the number of people who may discharge firearms, the frequency with which a person may discharge firearms, the purposes for which a person may do so, or the types of firearms that may be discharged. The regulations do not prevent target practice. (SDCCRO, § 33.101 et seq.)

C

The County received a complaint in March 2007 about the airstrip and operation of a training facility on the Covert Canyon site. After investigating the complaint, the County determined unpermitted structures were present on the site and training activities were being conducted. The County issued a notice to cease the activities.

Covert Canyon submitted an application for a major use permit (MUP) in October 2007 for a tactical training facility for federal, state, and local law enforcement and military personnel. The application proposed two small arms shooting ranges, a variable length rifle range, a 1,600-square-foot urban warfare training house, a 960-square-foot simulated ship training structure, an 800-square-foot rappelling and training tower that

was 45 feet high, a nighttime training and special operations area, and a helipad for helicopter activities such as training and emergency evacuation. The director classified the proposed use as Major Impact Services and Utilities, which are "public or private services and utilities which have substantial impact." (SDCZO, § 1350.) The Planning Commission voted in 2010 to send the application for the MUP back to the planning department for further analysis. Covert Canyon was asked to submit a fire protection plan and other studies and to undertake fuel modification efforts.

While work continued on the MUP, the County received additional complaints from the neighbors and conducted as many as 50 site inspections. The County determined the property was being used intermittently for social gatherings, shooting events, and unpermitted training activity. The County charged Covert Canyon with operating a paramilitary training facility without a MUP and with operating an outdoor shooting range without a MUP or license by the sheriff. Covert Canyon denied the allegations and contended it was legally discharging firearms on the property.

Covert Canyon and the County entered into an SAEO in August 2011 (2011 SAEO) to resolve the alleged violations. The County agreed the former SDCCRO section 21.102, subdivision (u) required " 'shooting ranges' " to be licensed by the Sheriff, but did not define how "shooting ranges[]" differ from a "private target shooting area, military, law enforcement, or other training facilities." (*Ibid.*)² The County agreed the

² SDCCRO sections 21.102 and 21.1901 were amended by Ordinance No. 10489(N.D.) effective July 27, 2017, and now do not list shooting ranges among activities for which a sheriff's license is required.

property could be used for discharging firearms consistent with the SDCCRO and SDCZO. It specified this could include recreational use "such as target practice by family and friends, and firearm practice conducted socially by invited guests ... provided the activity is not offered for monetary gain or on a commercial basis." As part of the 2011 SAEO, Covert Canyon agreed it would not operate a commercial or private membership only shooting range without obtaining a MUP.

D

Covert Canyon approached the County in the summer of 2015 with a request to reconsider the 2011 SAEO and described a reduced scale of use for the property. The new use eliminated the tactical training structures and helipad and limited the training to firearms training for military and law enforcement agencies.

Pursuant to his authority under SDCZO section 1220, the director evaluated and classified the described use as Law Enforcement Services, which "refers to the provision of police protection by a governmental agency." (*Id.*, § 1346.) The director "took into consideration all relevant facts of the described use at Covert Canyon, evaluated the use types in the [SDCZO] [s]ection 1250 through [s]ection 1899, and determined the use best fit within the Law Enforcement Services use type." The director determined the reduced level of activities did not meet the substantial impact threshold required for classification as a Major Impact Services and Utilities use type, but more suitably fit the Law Enforcement Services use type. In reaching this conclusion, the director noted Covert Canyon is located in a remote area where the discharge of firearms is permitted and the

government military and law enforcement training activities, with the limitations required by the SAEO, would not exceed the usual limitations placed on the land use.

The County and Covert Canyon entered into a new SAEO on October 27, 2015, which superseded and replaced the 2011 SAEO. The SAEO was entered into "to resolve alleged violations" and governs enforcement at the property "while Covert Canyon actively seeks a discretionary Site Plan permit, building permits, and a grading permit for the [p]roperty in accordance with the compliance measures" set out in the SAEO.

The SAEO requires all activity on the property to comply with the SDCCRO and SDCZO, including the noise ordinance, and limits the number of people on the property to 45 at one time. It does not prohibit the use of the property for free, noncommercial firearm discharge activities on the property so long as such use complies with the zoning code and regulations and does not take place at the same time as training activities. It also requires compliance with a fire protection plan.

The SAEO sets forth the director's classification of the use of the property for firearms and associated training activities for governmental military and law enforcement as Law Enforcement Services. It provides conditions for use of the property for governmental military and law enforcement training "[w]hile a Site Plan permit for the [p]roperty is being processed and compliance measures are met on schedule" as outlined in SAEO.

The SAEO limits firearms and associated training to specified military and federal and local law enforcement agencies. It limits the hours and days of the week in which training may occur; prohibits overnight use associated with training; limits the ordinances

used to 50-caliber; prohibits use of incendiary devices or explosives; prohibits training when the National Weather Service issues warnings related to rain or fire; and, to ensure compliance with the conditions of the SAEO, requires preparation and retention of records for inspection as requested related to all government contracts entered into related to use, the number and types of trainings held, and number of participants.

The SAEO also outlines a schedule for meeting key milestones toward the processing of a discretionary permit. This includes cooperating in the "processing and issuance of a discretionary Site Plan permit and associated CEQA documents and technical studies" for the use described. Among other things, Covert Canyon was required to submit within 60 days of the execution of the SAEO: (1) a complete application for evaluation of a discretionary Site Plan permit; (2) an application for building permits for existing unpermitted buildings, garage, and sea cargo containers located on the property; (3) a noise assessment report; and (4) a survey and plot plan. Within 90 days of execution of the SAEO, Covert Canyon was required to submit an application and grading plans for a grading permit for existing and proposed grading of the property and for completion of turnouts and road improvements as outlined by the fire protection plan. The SAEO outlined additional milestones for completion of work with a final approval deadline for the Site Plan permit of January 31, 2018.

The SAEO provides the uses allowed by the SAEO will cease and the County may rescind the SAEO if Covert Canyon defaults as to any term, payment, compliance measure, or condition. If the Site Plan permit does not issue for any reason, Covert

Canyon assumes liability for any costs incurred in performing the actions required by the SAEO.

E

The County provided notice to property owners regarding the SAEO, stating it allowed "interim use of the property for government military and law enforcement firearms training while pursuing a discretionary permit." The notice stated the use was classified as Law Enforcement Services and stated the decision of the director may be appealed "pursuant to the Administrative Appeal Procedure at Section 7200 and following in the Zoning Ordinance." The neighbors and appellants appealed.

The Planning Commission heard the appeal. The staff report indicated the administrative appeal was limited under SDCZO section 7200 to " 'a written decision of the [d]irector made pursuant to the administration of the Zoning Ordinance.' " The director's classification of the use of Covert Canyon as within the Law Enforcement Services use type was a portion of the SAEO constituting a " 'written decision of the [d]irector' " and was the only issue for the appeal. The appeal did not encompass the conditions or contents of the SAEO. With a vote of three commissioners in favor of the appeal, three opposed to the appeal, and one absent, the appeal failed and the director's classification decision stood.

The neighbors and the appellants requested an appeal to the Board of Supervisors. The director stated the appeal could not be accepted because a Planning Commission vote on an administrative appeal was final under SDCZO section 7206 and was not subject to the provisions of SDCCRO section 86.401 for appeals related to environmental

determinations. Since the director's "determination of use type is an interpretation of a classification of use" within the SDCZO, no "environmental determination was required."

F

The appellants filed a petition for writ of mandate. The writ petition alleged the County abused its discretion by (1) violating CEQA and the County's zoning ordinances when the director entered into the SAEO and classified use of private property for firearms and associated training activities for military and law enforcement agencies as a Law Enforcement Services use without first conducting a CEQA review, (2) failing to provide an administrative appeal to the County Board of Supervisors for the director's classification, and (3) violating the Williamson Act in making the classification of use and executing the SAEO.

The trial court denied the writ petition concluding the director did not abuse his discretion in classifying the use as Law Enforcement Services. The court entered judgment for the County.

DISCUSSION

I

No Abuse of Discretion in Classification of Use

"While we are required to exercise independent judgment regarding an agency's statutory interpretation, giving due deference to the agency's views, we apply a different standard of review when evaluating the agency's application of its governing statute to particular circumstances. Under both Code of Civil Procedure sections 1085 and 1094.5, we evaluate the agency's exercise of judgment for abuse of discretion. (Code Civ. Proc.,

§ 1094.5, subd. (b); *O.W.L. Foundation v. City of Rohnert Park* (2008) 168 Cal.App.4th 568, 585–586 [Code Civ. Proc., § 1085].)" (*Southern California Cement Masons Joint Apprenticeship Committee v. California Apprenticeship Council* (2013) 213 Cal.App.4th 1531, 1549.)

In this case, the director exercised his authority under SDCZO sections 1008 and 1220 to evaluate and classify the revised use of Covert Canyon for limited law enforcement and military firearms training. He considered two separate use types identified by the SDCZO—Law Enforcement Services and Major Impact Services and Utilities.³ The director determined "firearms training, certification, and regular requalification are essential components of all law enforcement branches and the majority of governmental military branches. Therefore, firearms training is a necessary law enforcement service for the provision of police protection." Based upon staff research, the director determined many law enforcement facilities contain firearms training in conjunction with administrative offices. The director considered the language of SDCZO

³ SDCZO section 1346 provides: "The Law Enforcement Services use type refers to the provision of police protection by a governmental agency, including administrative offices, storage of equipment and the open or enclosed parking of patrol vehicles."

SDCZO section 1350 provides: "The Major Impact Services and Utilities use type refers to public or private services and utilities which have substantial impact. Such uses may be conditionally permitted in any zone when the public interest supersedes the usual limitations placed on land use and transcends the usual restraints of zoning for reasons of necessary location and community wide interest. Typical places or uses are schools, sanitary landfills, public and private airports, public park/playground/recreational areas (other than public passive park/recreational areas), hospitals, psychiatric facilities, cemeteries, nursing homes, detention and correction institutions, trade schools (with outdoor training facilities) or security, law enforcement, military, paramilitary type training facilities, or field medical training uses."

section 1346 regarding law enforcement services use types to be nonexclusive examples of supporting facilities and activities aiding in provision of police protection. He found firearms training is a "comparable and integral activity for law enforcement members." He also found the reduced level of activity on the property no longer involved the substantial impact threshold to qualify for Major Impact Services and Utilities. In addition, the enforcement mechanisms contained in the SAEO requiring documentation of all trainings held along with the number of participants and contact information for the governmental entities using the site would ensure the use remains within the Law Enforcement Services use type. We conclude there was nothing arbitrary about the director's classification decision.

II

The SAEO Was Not a Project Approval Requiring CEQA Compliance

We independently review the issue of whether a particular agency action is a " 'project' " for CEQA purposes as an issue of law. (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 131 (*Save Tara*).

"CEQA defines a '[p]roject' as 'an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: [¶] (a) An activity directly undertaken by any public agency.' ([Pub. Resources Code,] § 21065.) "The term "project" "means the whole of an action" [citation] and "refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies" [citation]. It "does not mean each separate governmental approval." [Citation.]' (*Cedar*

Fair[, L.P. v. City of Santa Clara (2011) 194 Cal.App.4th 1150,] 1160, quoting Cal. Code Regs., tit. 14, § 15378, subds. (a) & (c).) ' "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.' (Cal. Code Regs., tit. 14, § 15352, subd. (a).)" (*City of Irvine v. County of Orange* (2013) 221 Cal.App.4th 846, 855 (*City of Irvine*).)

The SAEO, which included the director's classification decision, did not constitute a project approval requiring CEQA analysis. The director's written decision interpreting and applying the SDCZO is not a project. It is an application of law to his finding of facts. Similarly, the conditions in the SAEO are not a project approval. They are interim enforcement mechanisms to limit the activities at the property to those stipulated in the SAEO during a defined period of time when the property owner and the County will undertake steps to obtain the information necessary for a complete discretionary review. The SAEO requires preparation and consideration of CEQA documents for the Site Plan permit application. The director and County counsel advised the Planning Commission a CEQA analysis and all impacts and mitigation will be considered during the Site Plan permitting process.

This is not inconsistent with CEQA. "Agencies sometimes provide preliminary assistance to persons proposing a development in order that the proposal may be further explored, developed or evaluated. Not all such efforts require prior CEQA review. (See, e.g., Cal. Code Regs., tit. 14, § 15262 [conduct of feasibility or planning studies does not require CEQA review].)" (*Save Tara, supra*, 45 Cal.4th at p. 136.) "[R]equiring

agencies to engage in the often lengthy and expensive process of EIR preparation before reaching even preliminary agreements ... could unnecessarily burden public and private planning. CEQA review was not intended to be only an afterthought to project approval, but neither was it intended to place unneeded obstacles in the path of project formulation and development." (*Id.* at p. 137.)

It is likely for this same reason CEQA does not limit or restrict a public agency from enforcing or administering its laws. (See Pub. Resources Code, § 21174.)⁴ The County contends the Legislature recognized in this section that the actions of public agencies administering their enforcement powers are not projects within the meaning of CEQA. We agree. To require CEQA analysis of such matters would unnecessarily burden the ability of public agencies to timely and effectively enforce its laws or to reach reasonable solutions for code violations, pending further environmental evaluation.

In *Save Tara*, the Supreme Court rejected a bright-line rule defining project approval as either "execution of an *unconditional* agreement" or of "*any* agreement for development concerning a well-defined project." (*Save Tara, supra*, 45 Cal.4th at

⁴ Public Resources Code section 21174 states no provision of CEQA places "a limitation or restriction on the power or authority of any public agency in the enforcement or administration of any provision of law which it is specifically permitted or required to enforce or administer"

The County does not contend the SAEO falls within the enforcement class of categorical exemptions defined by the Secretary for Resources for projects that do not have a significant effect on the environment. (See Cal. Code Regs., tit. 14, §§ 15300, 15321.) An agency must decide if a statutory or categorical exemption applies only if it "proposes to 'approve' a 'project.'" (Remy et al., *Guide to CEQA, California Environmental Quality Act* (11th ed. 2007) p. 112.)

p. 138.) Instead, the court adopted "the general principle that before conducting CEQA review, agencies must not 'take any action' that significantly furthers a project 'in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of that public project.'" (*Ibid.*) "In applying this principle ... courts should look not only to the terms of the agreement but to the surrounding circumstances to determine whether, as a practical matter, the agency has committed itself to the project as a whole or to any particular features, so as to effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered, including the alternative of not going forward with the project." (*Id.* at p. 139.) The court in *Save Tara* ultimately concluded the city in that case had committed itself "to a definite course of action" regarding a development project for low-income senior housing at a historical building "before fully evaluating its environmental effects." (*Id.* at p. 142.) The city publicly announced its determination to proceed with the project. It undertook efforts to relocate tenants from the property. It provided substantial financial contribution and expressed approval for an agreement before undertaking a CEQA analysis.

Such is not the case here. The County has not "committed itself to the project" so as to "effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered." (*Save Tara, supra*, 45 Cal.4th at p. 139.) The SAEO does not commit the County to a particular project or use of the property. It restricts activities on the property for a window of time while discretionary review takes place. The SAEO limits the number of people allowed, the time and weather conditions in which the use may be undertaken, the types of weapons that may be used, and requires

documentation to allow the County to enforce both the SAEO and the zoning code and ordinances.⁵

The court in *City of Irvine, supra*, 221 Cal.App.4th 846 concluded an application for state funding to expand a jail facility did not constitute a project approval under CEQA. The application was a "preliminary step" in the process for counties to seek funding for jail expansion. (*Id.* at p. 851.)

Similarly, here, the SAEO is a preliminary step. It establishes timelines for submitting applications for building permits, grading permits, and a Site Plan. The SAEO requires fuel modification and completion of some turnouts and road improvements in connection with a fire protection plan within a certain period of time, so long as Covert Canyon obtains permission and permitting from the United States Forestry Service, which will likely also require some environmental review. The work contemplated is to provide access through the property in the event of an emergency, for the benefit of not only those on Covert Canyon property, but also for access to the neighboring property as well.

The fact there is some detail about the types of activities contemplated and the types of applications the SAEO requires Covert Canyon to submit does not mean the

⁵ Although Covert Canyon previously agreed in conjunction with the 2011 SAEO to limit use to free recreational activities, it did not admit its prior use constituted a commercial use prohibited by the SDCZO or the SDCCRO. We need not reach the issue of whether commercial use of the property is prohibited without a MUP or Site Plan. Covert Canyon stipulated to a substantially more restrictive scope of use in the SAEO than is allowed as a matter of right under the SDCCRO for discharge of firearms on private property or under the 2011 SAEO, even for free recreational use.

County has committed to a definite course of action. "The amount of detail or the advanced stage of the project's design, however, covers only part of the analysis for determining whether an agency's action constitutes an approval under CEQA. An approval under CEQA requires both a definite course of action and a commitment to that definite course of action." (*City of Irvine, supra*, 221 Cal.App.4th at p. 865.)

The SAEO does not commit to a definite course of action, other than the timely submission of documents necessary to complete a discretionary evaluation. It contains provisions allowing the County to rescind the use allowed under the SAEO if any of the terms or conditions of the SAEO are not fulfilled or if the Site Plan permit is not issued for any reason. Under the facts of this case, we conclude the County has not yet committed to a definite course of action. Therefore, a CEQA evaluation was not required for the classification or execution of the SAEO.

III

No Denial of Administrative Relief

The appellants pursued an appeal of the director's classification to the Planning Commission as provided in SDCZO section 7200 et seq. The decision of the Planning Commission was final under SDCZO section 7206. Neither the director's classification of use type nor the execution of the SAEO was an "environmental determination[]" subject to an appeal to the Board of Supervisors, which involves decisions to certify an environmental impact report, approve a negative declaration or mitigated negative declaration, or a determination a project is exempt from CEQA. (SDCZO, § 7206; SDCCRO, §§ 86.401–86.403.) The director did not make such a determination. The

director's written decision was a classification of use. An environmental determination and project decision will be issued after submission of the Site Plan application with supporting CEQA documents.

IV

No Violation of the Williamson Act

One parcel of Covert Canyon is subject to a contract entered into with the County under the Williamson Act, which designated a portion of the property as an agricultural preserve. The Williamson Act defines an agricultural preserve as "an area devoted to either agricultural use, ..., recreational use ..., or open-space use ..., or any combination of those uses." (Gov. Code, § 51201, subd. (d).) The contract provided the property shall be "devoted to agricultural uses and compatible uses." Zoning regulations are to be applied to lands within an agricultural preserve to permit "agricultural uses, open space use, recreational use, or other uses determined to be compatible with such uses." (San Diego County Bd. of Supervisors Policy, I-38, par. No. 4.)

The Williamson Act does not categorically prohibit commercial use of land within an agricultural preserve. Both the Williamson Act and the contract for this property permit commercial production of salt as open space use. (Gov. Code, § 51201, subds. (k), (o).) The Williamson Act permits public use of such lands, "with or without charge," for "walking, hiking, picnicking, camping, swimming, boating, fishing, hunting, or other outdoor games or sports for which facilities are provided for public participation." (*Id.*, subd. (n).) The contract for this property allows such public recreational use "with or without charge" provided the landowner obtains a special use permit. The contract also

allows, with special use permits, commercial uses of the property such as packing and processing plants for farm crops, public stables, kennels, chinchillas, airport, and animal waste processing.

The County previously determined the MUP submitted for a much larger scale training operation was not compatible with agricultural use. However, that determination is not applicable to the activities at issue in this appeal.

Firearm discharge is permitted in the A72-General Agricultural area. (SDCCRO, § 33.101 et seq.) Law Enforcement Services are also permitted in this area, subject to obtaining a Site Plan permit. (SDCZO, § 2722.) The director's classification of use as Law Enforcement Services was not inconsistent with agricultural use and the Williamson Act. The SAEO requires submission of a Site Plan application. Appellants have not yet shown a project approval in violation of the Williamson Act.

DISPOSITION

The judgment is affirmed. The County shall recover its costs on appeal.

McCONNELL, P. J.

WE CONCUR:

HALLER, J.

IRION, J.