From: Francois, Matthew
Sent: Monday, March 4, 2019 2:16 PM
To: Petaluma City Council
Subject: RE: Safeway Fuel Center Project; March 4, 2019 City Council Agenda Item 5.A

Dear Mayor Barrett and Councilmembers Healy, King, Fischer, and McDonnell:

Attached please find a Declaration from Amanda Monchamp, the attorney of record for the developer/Real Party in Interest in McCorkle Eastside Neighborhood Group v. City of St. Helena. As Ms. Monchamp explains in her declaration, because the design review ordinances for St. Helena and Petaluma are analogous, the discretion the agencies have is analogous and the court's ruling in McCorkle applies. Since your SPAR ordinance does not give you the authority to consider environmental consequences, you cannot require an EIR for the Safeway Fuel Center Project. Ms. Monchamp also "strongly disagrees" with staff's position that the Georgetown Preservation Society v. County of El Dorado case applies, correctly noting that case does not involve the same legal issue as McCorkle as to whether CEQA applies.

Thank you for your consideration of Ms. Monchamp's declaration. Please feel free to contact me with any questions regarding this correspondence.

Sincerely yours,
Matt Francois

I, Amanda Monchamp, declare as follows:

1. I am an attorney admitted to practice law before all the courts of the State of California and a partner with the law firm of Monchamp Meldrum LLP. I have personal knowledge of all of the facts stated within this declaration and, if called as a witness, I could and would testify competently thereto.

2. I have been an environmental law attorney for 20 years this year and have specialized in the California Environmental Quality Act ("CEQA") for nearly that long. In the last 15 years, I have worked on nearly 50 lawsuits related to CEQA. I was a partner and in senior management at the law firm of Holland & Knight LLP, an Am Law 100 firm, for 13 years before founding my own firm last year. I have been awarded the Super Lawyer distinction for the last five years and by Best Lawyers last year. I am a member of UC Berkeley Haas School of Business' Fisher Center Policy Advisory Board and Lambda Alpha International. I also serve as an Oakland Planning Commissioner and I teach Land Use Controls at the University of California Berkeley Master of Real Estate Development + Design.

3. I am and have been the attorney of record for Real Party in Interest Joe McGrath in the *McCorkle Eastside Neighborhood Group v. City of St. Helena* (2018) 31 Cal.App.5th 80l; 242 Cal.Rptr.3d 379 case since the filing of the lawsuit, and myself and my partner Joanna Meldrum were the sole attorneys who substantively worked on the *McCorkle* case at our prior law firm Holland & Knight LLP prior to founding our firm. I am familiar with all aspects of the *McCorkle* case and can speak to the factual record, the City of St. Helena's municipal code, and the briefing of the case.

4. In considering the 8-unit residential project at issue in *McCorkle*, the City did not have the benefit of the decision that has since been issued by the First District Court of

Appeal. The City of St. Helena considered its design review process discretionary and broad enough to allow it great discretion over many factors related to what the building looked like. Because it considered its ordinance discretionary, the City consistently was advised and found that CEQA applied and thus reviewed the project under CEQA and found the project was exempt under Class 32.

5. The McCorkle approval was subject to significant controversy and great public debate. Many in the City, including Planning Commissioners and City Councilmembers, wanted the City to use its broad design review authority to consider issues beyond design. These issues included drainage and circulation on McCorkle Avenue, traffic safety, historic resources, and that the site had been contaminated by the former owner. These issues were passionately argued by neighbors who opposed the project.

6. The only approval necessary for the McCorkle project was design review. Based on that, the St. Helena City Attorney advised that the City could only consider issues related to design. This frustrated several of the Planning Commissioners and City Councilmembers and the approvals were not unanimous. Brown Act violations were also alleged. This was discussed at length at a Planning Commission hearing and on an appeal to the City Council.

7. The City of St. Helena did not have the benefit of the *McCorkle* decision in reviewing the project. However, the City did, as the *McCorkle* decision notes, take "quasi-adjudicative notice of case law that has determined that, in situations where an agency's discretion to deny or consider a particular activity is limited (such as the proposed residential land use at the project site) its approval decision is considered ministerial and CEQA does not apply or CEQA review is limited to the extent of the discretion." *McCorkle* at 384. The unpublished case law the City had taken notice of was *Venturans for Responsible Growth v. City of San Buenaventura* (Cal. Ct. App.,

June 20, 2013, No. 2D CIV. B242008) 2013 WL 3093788, which involved a chain grocery store that was permitted by right and the only discretionary approvals were for cosmetic improvements to the exteriors and a sign variance. Even though that agency had imposed CEQA review and found the project exempt, the court held that "[b]ecause any permit WINCO might need to operate a 24–hour grocery store would be ministerial, CEQA simply does not apply to the use of the premises for that purpose." *Venturans* at *3, citing *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924, 940. A true and correct copy of *Venturans for Responsible Growth v. City of San Buenaventura* is attached as **Exhibit A**. Based in part on that case, the City of St. Helena limited its review of the McCorkle project to design review issues.

8. The City of St. Helena also relied on the CEQA statute and Guidelines which state that an agency's discretion derives from laws other than CEQA and CEQA does not expand the scope of an agency's discretion. Public Resources Code Section 21004 states that "[i]n mitigating or avoiding a significant effect of a project on the environment, a public agency may exercise only those express or implied powers provided by law other than [CEQA]." CEQA Guidelines Section 15040 states "CEQA is intended to be used in conjunction with discretionary powers granted to public agencies by other laws. CEQA does not grant an agency new powers independent of the powers granted to the agency by other laws. . . . The exercise of discretionary powers for environmental protection shall be consistent with express or implied limitations provided by other laws." Because its discretion was limited, the City only considered issues related to design in applying CEQA.

9. The decision issued by the *McCorkle* court focused on the limited scope of discretion in St. Helena's design review ordinance and included the following quote in its published decision (*McCorkle* at 388-389 (emphasis added)):

Under section 17.164.020 of the St. Helena Municipal Code, [t]he purpose of design review is:

A. To promote those qualities in the environment which bring value to the community;

B. ***To foster the attractiveness and functional utility of the community as a place to live and work***;

C. To preserve the character and quality of our heritage by maintaining the integrity of those areas which have a discernible character or are of special historic significance;

D. To protect certain public investments in the area;

E. To encourage, where appropriate, a mix of uses within permissible use zones;

F. To raise the level of community expectations for the quality of its environment.

Under section 17.164.030, the Planning Commission (and City Council) should consider the following:

1. ***Consistency and compatibility with applicable elements of the general plan***;
2. Compatibility of design with the immediate environment of the site;
3. Relationship of the design to the site;
4. Determination that the design is compatible in areas considered by the board as having a unified design or historical character;
5. ***Whether the design promotes harmonious transition in scale and character in areas between different designated land uses*;**
6. Compatibility with future construction both on and off the site;
7. Whether the architectural design of structures and their materials and colors are appropriate to the function of the project;
8. Whether the planning and siting of the various functions and buildings on the site create an internal sense of order and provide a desirable environment for occupants, visitors and the general community;
9. Whether the amount and arrangement of open space and landscaping are appropriate to the design and the function of the structures;
10. ***Whether access to the property and circulation systems are safe and convenient for pedestrians, cyclists and vehicles***;
11. Whether natural features are appropriately preserved and integrated with the project;
12. Whether the materials, textures, colors and details of construction are an appropriate expression of its design concept and function and whether they are compatible with the adjacent and neighboring structures and functions;
13. Whether the landscape design concept for the site, as shown by the relationship of plant masses, open space, scale, plant forms and foliage textures and colors

create a desirable and functional environment and whether the landscape concept depicts an appropriate unity with the various buildings on the site;

14. Whether sustainability and climate protection are promoted through the use of green building practices such as appropriate site/architectural design, use of green building materials, energy efficient systems and water efficient landscape materials.

10. The *McCorkle* court found the agency's discretion was "expressly limited" by citing to the following two sections of St. Helena's code (*McCorkle* at 384):

> Section 17.164.010, Statement of Policy. The city council finds that development can have a substantial impact on the character of the area in which it is located. Some harmful effects of one land use upon another can be prevented through zoning, subdivision controls and housing and building codes. Other aspects of development are more subtle and less amenable to exacting rules of thumb promulgated without regard to specific development proposals. Among these are the general form of the land before and after development, the spatial relationships of the structures and open spaces to proximate land uses and the appearances of buildings and open spaces as they contribute to an area as it is being developed.
>
> Section 17.164.040.C, Limitation of review. Only the proponent's failure to take reasonable account of the items discussed in Sections 17.164.010 through 17.164.030 shall justify the commission's disapproving a proposal solely on the basis of design.

These two sections simply provide a policy statement and state that the commission is limited to the authority granted in the code. All planning commissions are bound to the limitations in their code and thus these sections of St. Helena's code in no way distinguish them from the codes applied in other cities.

11. The *McCorkle* court upheld the City's determination that the project was exempt from CEQA ruling that "the issues addressed during design review did not require the separate invocation of CEQA," and "the design review ordinances prevented [the City] from disapproving the project for non-design related matters." *McCorkle* at 388. The court further found, despite the fact that the City itself had determined CEQA applied because of their discretion, that CEQA review was not required because the City's design review process did not give the City "the authority to mitigate environmental impacts" and "the discretionary component of the action must give the agency the

authority to consider a project's environmental consequences to trigger CEQA." *McCorkle* at 386, 390.

12. The *McCorkle* court relied on *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, where the only discretionary approval required for development of a chain bookstore was a site plan and design review. As paraphrased by the court in *McCorkle,* "when use is consistent with local zoning and a use permit either is not required or has been obtained, issuance of building permit is usually ministerial act." *McCorkle* at 388, citing *Friends of Davis* at 1010-1011.

13. The court in *McCorkle* also relied on *San Diego Navy Broadway Complex Coalition v. City of San Diego*. In *San Diego Navy*, the scope of the City of San Diego's discretion was limited to the issue of consistency with the Development Plan and Urban Design Guidelines as set forth in a Development Agreement for redevelopment of the San Diego Navy Complex. The court there held that "CEQA does not apply to an agency decision simply because the agency may exercise some discretion in approving the project or undertaking. Instead, to trigger CEQA compliance, the discretion must be of a certain kind; it must provide the agency with the ability and authority to 'mitigate ... environmental damage' to some degree." *San Diego Navy* at 934, citing a practice guide.

14. The *McCorkle* case is directly applicable to the matter that the City of Petaluma has agendized as City Council March 4, 2019, Agenda Item 5.A for the Safeway Fuel Center Project ("Safeway Project"). I reviewed the Staff Report for Item 5.A and found it to be factually and legally analogous to the *McCorkle* case. The Safeway Project is a permitted use for which the City has only site plan and design review authority and yet it has applied CEQA, because, as the City of St. Helena was faced with while processing the McCorkle project, there was no case on point that squarely

addressed review of projects for which there is only discretion over design review of an otherwise permitted use.

15. The Staff Report compares itself to the *McCorkle* case on page 21 and states "The SPAR [site plan and architectural review] factors in Section 24.010(G) of the IZO are not limited to merely aesthetic considerations, since the stated intent to achieve **harmony of the development** with its surroundings is broadly worded, and evaluation of **functional design considerations** such as **ingress, egress and internal circulation** (and related **safety considerations**) is included." (emphasis added). However, as quoted in *McCorkle* above, the St. Helena ordinance requires consideration of the exact same items including, "***whether the design promotes harmonious transition in scale and character in areas between different designated land uses,"*** the ***"functional utility of the community as a place to live and work,"*** and ***"whether access to the property and circulation systems are safe and convenient for pedestrians, cyclists and vehicles."*** *McCorkle* at 388-389 (emphasis added).

16. The plain language of the two ordinances are extremely similar. As noted below, the provisions of the SPAR code are mirrored in the referenced sections of the St. Helena code:

> G. Standards for Review of Applications. The appropriate reviewing body shall review the exhibits, together with the reports of the Director, and based on these documents, evidence submitted, and the considerations set forth below, may approve the project as applied for, approve the project with modifications, or disapprove the project. In taking action, the reviewing body shall consider the following:
>
> 1. It is the intent of this Section that any controls be exercised to achieve a satisfactory quality of design in the individual building and its site, appropriateness of the building to its intended use, and the harmony of the development with its surroundings. Satisfactory design quality and harmony will involve among other things:
>
> 1. The appropriate use of quality materials and harmony and proportion of the overall design. (*See St. Helena 17.164.020C, F*)

2. The architectural style which should be appropriate for the project in question, and compatible with the overall character of the neighborhood. (*See St. Helena 17.164.020, C; 17.164.030, 1, 4, 5, 6, 12)*
3. The siting of the structure on the property, as compared to the siting of other structures in the immediate neighborhood. (*See St. Helena 17.164.030, 8, 12)*
4. The size, location, design, color, number, lighting, and materials of all signs and outdoor advertising structures. (*See St. Helena 17.164.030, 7, 12, 13)*
5. The bulk, height, and color of the proposed structure as compared to the bulk, height, and color of other structures in the immediate neighborhood. (*See St. Helena 17.164.030, 7, 12, 13)*

2. Landscaping to approved City standards shall be required on the site and shall be in keeping with the character or design of the site. Existing trees shall be preserved wherever possible, and shall not be removed unless approved by the Planning Commission. (*See St. Helena 17.164.030, 19)*
3. Ingress, egress, internal circulation for bicycles and automobiles, off-street automobiles and bicycle parking facilities and pedestrian ways shall be so designed as to promote safety and convenience, and shall conform to approved City standards. Any plans pertaining to pedestrian, bicycle, or automobile circulation shall be routed to the PBAC for review and approval or recommendation. (*See St. Helena 17.164.030 10)*
4. It is recognized that good design character may require participation by a recognized professional designer, such as an architect, landscape architect or other practicing urban designer and the reviewing body shall have the authority to require that an applicant hire such a professional, when deemed necessary to achieve good design character. (*See St. Helena 17.164.040, A)*

17. The Staff Report at page 12 also notes that General Plan consistency is not a specifically required finding. As quoted by the *McCorkle* court, St. Helena Municipal Code 17.164.030,1 does require consideration of consistency and compatibility with the general plan as a factor for design review, and therefore St. Helena's code is arguably broader than Petaluma's SPAR code.

18. The Staff Report on page 23 finds that the *McCorkle* case and *Georgetown Preservation Society v. County of El Dorado* (2018) 30 Cal.App.5th 358 ("*Georgetown*") are in conflict resulting in the law being unsettled in this area. I

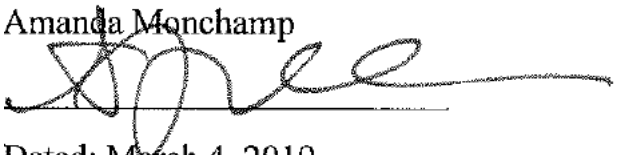
strongly disagree with this conclusion. What the Staff Report fails to address is that the two cases do not relate to the same legal issues. The court in *Georgetown* did not analyze the scope of the County's discretion under its design review authority when it applied its Historic Design Guide to the approval of a Dollar General retail store. Like the City of St. Helena, the County made its decision to apply CEQA without the benefit of the *McCorkle* decision. The project at issue in Georgetown required a lot merger to merge three parcels to allow the chain store to proceed, and a finding that filling a wetland was consistent with the General Plan that instead required a 50-foot setback from wetlands. *Georgetown* at 364, 365, 377, **Exhibit B** (County of El Dorado, Dollar General, Notice of Decision). Page 23 of the Staff Report further states that "It follows that supporting the Georgetown court's holding is the recognition that a project may satisfy zoning and design review guidelines and still present environmental impacts that may be significant, requiring an EIR" but this statement does not address the key factual and legal difference between the two cases. The *McCorkle* holding relates to whether CEQA is triggered if an agency does or does not have discretion to condition a project to address environmental impacts. If it does, CEQA applies; if it does not have that type of discretion, as was the case in St. Helena and is also the case here, CEQA does not apply. In *Georgetown*, the County had the discretion to address the environmental impacts of creating a much larger lot and filling a wetland, which it did through imposing mitigation in the Mitigated Negative Declaration prepared for the project. Moreover, had the legal issue been raised as to the scope of discretion, the *Georgetown* case may have been decided differently. The two cases are not in conflict but rather address entirely different issues.

19. Here the municipal codes for the cities of St. Helena and Petaluma are analogous, the discretion that the agencies have is analogous and thus the court's ruling in *McCorkle* applies. Because the City of Petaluma's design review process does not give the City "the authority to mitigate environmental impacts" and "the discretionary component of

the action must give the agency the authority to consider a project's environmental consequences to trigger CEQA." *McCorkle* at 386, 390.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Amanda Monchamp



Dated: March 4, 2019

Exhibit A: *Venturans for Responsible Growth v. City of San Buenaventura*

2013 WL 3093788
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Only the Westlaw citation is currently available.

Court of Appeal,
Second District, Division 6, California.

VENTURANS FOR RESPONSIBLE GROWTH,
Plaintiff and Appellant,
v.
CITY OF SAN BUENAVENTURA, Defendant and Respondent;
Winco Foods, LLC, Real Party in Interest.

2d Civil No. B242008
|
Filed June 20, 2013

Glen M. Reiser, Judge Superior Court County of Ventura. (Super. Ct. No. 56–2011–00402390–CU–WM–OXN)

Attorneys and Law Firms

Johnson & Sedlack, Raymond W. Johnson, Abigail A. Broedling, Kimberly A. Foy for Plaintiff and Appellant.

Ariel Pierre Calonne, City Attorney; Jenkins & Hogin, Christi Hogin, Gregg Kovacevich for Defendant and Respondent.

Best Best & Krieger, Sarah E. Owsowitz, Stephanie R. Straka for Real Party in Interest.

Opinion

GILBERT, P.J.

***1** Venturans for Responsible Growth, an unincorporated Association (Venturans) appeal a judgment denying its petition for peremptory and administrative writ of mandate. (Code Civ. Proc., §§ 1085, 1094.5.) Venturans contend that the City of San Buenaventura's (City) design approval for exterior modifications to an existing building and grant of a sign variance violated the California Environmental Quality Act (CEQA; Pub. Resources Code § 21000 et seq.), and county and city codes. We affirm.

FACTS

WINCO Foods, LLC (WINCO) intends to operate a 24–hour grocery store at the Riviera Shopping Center on Telephone Road in the City of Ventura (City). The space in which WINCO intends to operate was occupied by Mervyn's Department Store from 1992 to 2008.

The Riviera Shopping Center was constructed in the early 1980s. An environmental impact report (EIR) for the shopping center project was certified in 1977.

The WINCO property is in the City's commercial planned development (CPD) zone. Grocery stores are a permitted use in the zone. The City's zoning ordinance does not limit operating hours. The only discretionary approvals WINCO needs from the City are for cosmetic improvements to the exterior and a sign variance.

The cosmetic improvements are modifications to the exterior of the existing structure, restriping the parking lot, and removal and replacement of the landscaping. Modifications to the exterior include a tower element at the front of the building. The tower element will increase the height of the building by 22 feet.

The City's current sign ordinance allows signs of 100 square feet. WINCO sought a variance to allow two signs totaling 360.25 square feet.

WINCO applied to the City's design review committee (DRC) for design approval and a sign variance.

Venturans demanded that the City prepare an EIR to study the impacts of the proposed 24–hour grocery store on air quality and traffic. The City conducted an initial study for the project and gave notice that a negative declaration would be prepared. But the City later rescinded the initial study. Instead, the City determined that the project is categorically exempt from CEQA pursuant to Guidelines sections 15301 and 15303.[1]

DISCUSSION

I

Venturans contend CEQA requires a comprehensive review of all environmental impacts.

Unless exempt, all "discretionary projects" proposed to be carried out or approved by a city require environmental review. (Pub. Resources Code, § 21080, subd. (a).) A discretionary project is a project that requires the exercise of judgment or deliberation when a public agency decides to approve or disapprove a particular activity. (Guidelines, § 15357.)

CEQA does not apply to "[m]inisterial projects." (Pub. Resources Code, § 21080, subd. (b)(1).) A ministerial project is a project involving little or no personal judgment by a public official. (Guidelines, § 15369.)

CEQA may require an EIR where the City's approval or denial of a project is a matter of the exercise of its discretion. But even if a project will have significant negative environmental consequences, no EIR is required if the City has no discretion to deny or modify the project. As the court in *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 272, explained: "[F]or truly ministerial permits an EIR is irrelevant. No matter what the EIR might reveal about the terrible environmental consequences of going ahead with a given project the government agency would lack the power (that is, the discretion) to stop or modify it in any relevant way. The agency could not lawfully deny the permit nor condition it in any way which would mitigate the environmental damage in any significant way. The applicant would be able to legally compel issuance of the permit without change. Thus, to require the preparation of an EIR would constitute a useless—and indeed wasteful—gesture."

***2** Venturans claim the project is discretionary. It is only discretionary with regard to the exterior design and signs. But Venturans are complaining about lack of environmental review for impacts on air quality and traffic. Those impacts are not related to exterior design and signs. Those impacts are related to the use of the premises as a 24–hour grocery store. The City has no discretion with regard to WINCO's use of the premises as a 24–hour grocery store. Thus, CEQA does not require and EIR to assess impacts related to such use.

Venturans argue that the City's Municipal Code (SBMC) gives the DRC authority to respond to concerns beyond aesthetics or design. Venturans cite SBMC section 24.545.110. "The decision-making authority, in approving an application for design review, may impose such conditions that it deems necessary or desirable to insure that the project authorized by such design review will be established, operated, and maintained in accordance with the findings required by Section 24.545.100 and all other requirements of this zoning ordinance, this Code, and other provisions of law. The decision-making authority may further require reasonable guarantees and evidence that such conditions are being, or will be, complied with. Such conditions imposed by the decision-making authority may involve any factors affecting the colors, materials, design, landscaping, signs, or other architectural features of a project."

Venturans emphasize "all other requirements of this zoning ordinance, this Code, and other provisions of law." (SBMC, § 24.545.110) Venturans fail to include the final sentence, "Such conditions imposed by the decision-making authority may involve any factors affecting the colors, materials, design, landscaping, signs, or other architectural features of a project." (*Ibid.*)

It would be unreasonable to interpret SBMC section 24.545.110 as giving a design review committee authority to impose conditions involving any and all provisions of the law. Instead, the reasonable interpretation of the section is that the authority to impose conditions is limited to "factors affecting colors, materials, design, landscaping, signs or other architectural features of the project." (*Ibid.*)

If there is any doubt about the DRC's authority over WINCO's use of the premises as a 24–hour grocery store, it is resolved by SBMC section 24.545.040, subdivision A. That subdivision provides: "Neither the design review committee, the historic preservation committee, nor the director shall in the course of the design review process for projects or uses requiring no other discretionary permits or approvals, determine the operation or appropriateness of land uses if such uses of land comply with applicable zoning district regulations."

Because the use of the premises as a 24–hour grocery store complies with applicable zoning district regulations, the DRC has no authority whatsoever over WINCO's use of the premises, Venturans' concerns over air quality and traffic arises from the use of the premises, not its exterior design.

Venturans argue that CEQA does not allow partial environmental review. But nothing in CEQA requires the City to do a useless act. That is why Public Resources Code section 21080, subdivision (b)(1) provides that CEQA does not apply to ministerial projects. Because the City has no authority to prevent or modify WINCO's use of the premises as a 24–hour grocery store, environmental review of the impacts of that use would be worthless. A

statute should be interpreted to avoid an absurd result. (*Cummings v. Stanley* (2009) 177 Cal.App.4th 493, 507–508.)

***3** Venturans' argument was rejected in *San Diego Navy Broadway Complex Coalition v. City of san Diego* (2010) 185 Cal.App.4th 924. There, the city's discretion in approving the project was limited to design review. Opponents of the project argued the EIR should include a study of the project's impacts on global warming. In rejecting the argument, the court noted that the City has no discretion to modify or deny the project based on global warming. The court stated, "[T]here is no basis for requiring the City to conduct an environmental review of an issue as to which it would have no ability to respond." (*Id.* at p. 940.)

II.

Venturans contend the categorical exemption contained in Guidelines section 15301 does not apply.

Guidelines section 15301 provides a categorical exemption from CEQA for projects consisting of "minor alteration of existing ... private structures ... involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination."

It was not necessary for the City to rely on Guidelines section 15301 to exempt the use of the premises as a 24–hour grocery store from CEQA review. Public Resources Code section 21080, subdivision (b)(1) contains its own categorical exemption for "ministerial projects." Because any permit WINCO might need to operate a 24–hour grocery store would be ministerial, CEQA simply does not apply to the use of the premises for that purpose. (See *San Diego Navy Broadway Complex Coalition v. City of San Diego, supra,* 185 Cal.App.4th at p. 940.)

In any event, the City's reliance on Guidelines section 15301 is supported by the evidence. The City bears the burden of demonstrating, based on substantial evidence, that the project falls within the categorical exemption. (*California Unions for Reliable Energy v. Mojave Desert Air Quality Management Dist.* (2009) 178 Cal.App.4th 1225, 1239.) We must determine the scope of the exemption as a matter of law, and then determine whether substantial evidence supports the City's finding that the project falls within the exemption's scope. (*Ibid.*)

Venturans argue adding a tower that increases the building height by 22 feet and a variance allowing 360.25 square feet of signs does not qualify as a "minor alteration." But Guidelines section 15301 gives examples of qualifying projects. One example allows additions to existing structures of up to 10,000 square feet. (Guidelines, § 15301, subd. (e)(2).) If additions of up to 10,000 square feet qualify for the exemption as a "minor alteration," certainly WINCO's cosmetic alterations to the exterior qualify.

Venturans point out the exemption requires a finding that the project involves "negligible or no expansion of use beyond that existing at the time of the lead agency's determination." (Guidelines, § 15301.) Venturans argue that at the time of the lead agency's determination the building had been vacant for three years. Venturans claim that the traffic generated by WINCO's project will exceed even the traffic generated by the building's previous use as a Mervyn's Department Store.

But the only project before the City was WINCO's application to change the building's façade and for a sign variance. The City's approval of the design for the building façade and signs does not involve an expansion of the building's use.

The project is categorically exempt from CEQA review under Guidelines section 15301. We need not determine whether the project is also exempt under Public Resources Code section 21166 or Guidelines section 15303.

***4** Venturans argue that an exception to the categorical exemption applies. Guidelines section 15300.2, subdivision (c) provides: "A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances."

But the only "activity" before the City is the modification of the building's façade. There is no fair argument that such an activity will have a significant effect on the environment or that modification of the building's exterior constitutes any unusual circumstances.

III.

Venturans contend the City violated city and county requirements.

(a)

Venturans argue the project is inconsistent with the general plan. The City found the project is consistent.

Venturans cite Action 7.21 of the Ventura General Plan, Policy 7D. Action 7.21 provides: "Require analysis of individual development projects in accordance with the most current version of the Ventura County Air Pollution Control District Air Quality Assessment Guidelines and, when significant impacts are identified, require implementation of air pollutant mitigation measures determined to be feasible at the time of project approval." But the only "development project[ ]" before the City is WINCO's application to alter the exterior of the building and a sign variance. The City's conclusion that alterations to the exterior of the building and a sign variance complies with the air quality provisions of the general plan is supported by the record. There simply will be no "significant impact[ ]." (*Ibid.*)

(b)

Venturans contend the project conflicts with the county's air quality guidelines and the City's air quality ordinance.

Venturans' contention, like most of its other contentions, is based on the theory that the project includes use of the premises as a grocery store. It does not. The only project before the City is limited to alterations to the building's exterior.

(c)

Venturans contend the project violates conditions of approval.

The conditions of approval for Mervyn's Department Store allowed a maximum of 100 square feet of sign area. WINCO, however, has obtained a variance for 360 square feet of sign. Venturans argue that while a variance may allow a deviation from the municipal code, it does not change the conditions of approval. Venturans cite no authority for the proposition that a variance does not affect the conditions of approval. There appears no valid reason why it does not.

(d)

Venturans contend the grant of the sign variance is not supported by substantial evidence.

SBMC section 24.535.140 provides:

"In order for the design review committee to approve a sign variance, it must make all of the following findings:

"1. The proposed sign is in conformance with the purposes of chapter 24.420; [2]

"2. The proposed sign will enhance the unique character and visual appearance of the city;

"3. The proposed sign is an integral and well-designed portion of the overall building or site;

"4. Strict compliance with the provisions of chapter 24.420 would be detrimental to the design of the sign, architectural characteristics of the building, or design of the site; and

"5. The granting of a sign variance would not constitute the granting of a special privilege to the applicant, nor would it grant an undue advantage to the applicant."

***5** Venturans argue the finding that granting of the sign variance would not constitute the granting of a special privilege or undue advantage to the applicant is not supported by substantial evidence.

But the opinions of planning staff constitute substantial evidence upon which the City may rely to support its findings. (See *City of San Diego v. California Coastal Commission* (1981) 119 Cal.App.3d 228, 232.) Here the DRC staff reported: "In staff's analysis, the proposed sign is significantly larger than allowed by the Zoning Regulations and the existing Mervyns sign (44 sq. ft.). However, as the sign letter heights are consistent with other stores in other shopping centers in the vicinity and reflects Winco's standard corporate sign format, staff determined the sign is consistent in scale with the proposed changes to the façade and recommends the DRC approve the Sign Variance as submitted." That is sufficient to support the DRC's finding.

Venturans cite *Orinda Association v. Board of Supervisors* (1986) 182 Cal.App.3d 1145, 1166, for the proposition that the DRC's finding of consistency with recently approved signs in the area must be supported by

" 'comparative data.' " Venturans' reliance on *Orinda* is misplaced.

Orinda concerns a variance from a general zoning ordinance, not a sign variance. In granting the variance, the county found that similar variances have been granted on several occasions. In discussing the lack of evidence to support such a finding the court noted that no specific examples are provided, and, in fact, the record indicates that every previous request for a variance had been denied. (*Orinda Assn. v. Bd. of Supervisors, supra,* 182 Cal.App.3d at p. 1166, fn. 11.) The court did not hold that such a finding must be supported by comparative data.

The judgment is affirmed. Costs are awarded to respondents.

We concur:

YEGAN, J.

PERREN, J.

All Citations

Not Reported in Cal.Rptr.3d, 2013 WL 3093788

Footnotes

1 All references to "Guidelines" are to Title 14 of the California Code of Regulations.

2 SBMC chapter 24.420 regulates the use of all signs within the City.

Exhibit B: Notice of Decision

COMMUNITY DEVELOPMENT AGENCY
DEVELOPMENT SERVICES DIVISION

http://www.edcgov.us/DevServices/

PLACERVILLE OFFICE:
2850 Fairlane Court, Placerville, CA 95667
BUILDING
(530) 621-5315 / (530) 622-1708 Fax
bldgdept@edcgov.us
PLANNING
(530) 621-5355 / (530) 642-0508 Fax
planning@edcgov.us

LAKE TAHOE OFFICE:
3368 Lake Tahoe Blvd., Suite 302
South Lake Tahoe, CA 96150
(530) 573-3330
(530) 542-9082 Fax
tahoebuild@edcgov.us

NOTICE OF DECISION

County of El Dorado Planning Services has approved the following project:

DR14-0005-S/BLA14-0055/DOLLAR GENERAL GEORGETOWN – Submitted by SIMON CRE ABBIE, LLC a Staff Level Design Review/Lot Line Adjustment-Merge to: 1) Design review request to allow the construction of the following: A) 9,100 square foot retail structure with two wall identification signs; B) Eight-foot tall, 32 square-foot wooden monument sign; C) Parking lot containing 31 off-street parking spaces, including two ADA compliant spaces; D) Drop off and loading area; E) One bicycle rack containing three bicycle parking spaces; F) Perimeter and parking lot landscaping and irrigation; G) Six exterior wall mounted lantern-style lighting fixtures and three 13-foot tall pole lights, containing a total of four lighting fixtures, with a concrete base that is 2 feet above natural grade; H) Eight-foot high retaining wall with railing; I) A covered trash enclosure; J) Drainage improvements to accommodate both on- and off-site flows; K) An advanced treatment system for wastewater treatment consisting of an aerobic treatment unit and subsurface drip system; L) Sidewalk improvements along the project frontage on Main Street and School Zone crosswalk improvements at the intersection of Main Street and Harkness Street; and, M) A paved driveway encroachment onto Main Street. 2) Lot line adjustment/merge request to create one parcel from the three project parcels; 3) Finding of Consistency with General Plan Policy 7.3.3.4 to allow a reduction of the wetland setback from 50 feet to no setback with construction and structures within the required setback to allow the fill of an approximately 0.05 acre wetland; 4) Site clearing and removal of three on-site existing canyon live oak trees, the removal of which would be exempt from the retention standards of General Plan Policy 7.4.4.4 Option A as the project site is greater than an acre and oak canopy covers less than one percent of the site; and, 5) An irrevocable offer to dedicate in fee, a 25 foot wide (1/2 width) right-of-way along the entire frontage of Harkness Street or an offer of dedication in the form of an easement for "Road, Slope, Drainage, Pedestrian and Public Utility purposes." The property, identified by Assessor's Parcel Numbers 061-362-01, 061-362-02 and 061-362-04, is zoned Commercial-Design Community (C-DC), consists of 1.2 acres, and is located on the southeast side of Main Street between intersections with Orleans Street and Harkness Street in the Georgetown area. (Mitigated negative declaration prepared)**

**This is a notice of intent to adopt the negative declaration or mitigated negative declaration that was prepared and previously advertised for this project and which may be reviewed and/or obtained in the County of El Dorado Community Development Agency, Development Services Division-Planning Services, 2850 Fairlane Court, Placerville, CA 95667, during normal business hours or online at http://edcapps.edcgov.us/Planning/ProjectInquiryDisplay.asp?ProjectID=20215. A negative declaration or mitigated negative declaration is a document filed to satisfy CEQA (California Environmental Quality Act). This document states that there are no significant environmental effects resulting from the project, or that conditions have been proposed which would mitigate or reduce potential negative effects to an insignificant level.

The decision to approve this project may be appealed to the Planning Commission by submitting the approved appeal form and applicable fee to the County of El Dorado Community Development Agency, Development Services Division-Planning Services within the appeal period. The appeal period is ten working days starting on October 29, 2015 and ending at 5:00pm on November 12, 2015.

Any questions regarding the project may be directed to the County planner, Rob Peters, at (530) 621-5355. The project file, including the Conditions of Approval, is located at the County of El Dorado Community Development Agency, Development Services Division-Planning Services, 2850 Fairlane Court, Placerville, CA 95667 and may be viewed during normal business hours.

COUNTY OF EL DORADO PLANNING SERVICES
ROGER TROUT, Development Services Division Director
October 28, 2015