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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ADVOCATES FOR BETTER
COMMUNITY DEVELOPMENT,

Plaintiff and Appellant,

v.

CITY OF PALM SPRINGS et al.,

Defendants and Respondents;

WESSMAN DEVELOPMENT
COMPANY, INC. et al.,

Real Parties in Interest and
Respondents.

E066193

(Super.Ct.No. PSC1405677)

OPINION

APPEAL from the Superior Court of Riverside County. Craig Riemer, Judge.

Dismissed.

Law Office of Babak Naficy, Babak Naficy, and Jamie Garretson for Plaintiff and
Appellant.

Woodruff, Spradlin & Smart, David A. DeBerry, and Ricia R. Hager for Defendants and Respondents.

Blasdell Guinan Lawyers, Diane Christine Blasdel; and Law Office of Emily Perri Hemphill and Emily Perri Hemphill for Real Parties in Interest and Respondents.

Advocates for Better Community Development (ABCD) appeal the trial court order denying their petition for a writ of mandate, which challenged the decision of respondent City of Palm Springs (the city) to approve changes to a planned development in downtown Palm Springs proposed by real parties in interest and respondents Wessman Development Company, Inc. and Palm Springs Promenade, LLC (the developers).

At bottom, ABCD's arguments attempt to challenge the city's approval of changes to the development plan that allow the developers to swap uses between two parcels, one of them originally designated to be open space, the other for commercial development. ABCD argue approving the changes violated land use provisions in the Government Code because they are inconsistent with the specific plan. (Gov. Code, §§ 65455 & 65867.5, subd. (b).) They also argue approving the changes was improper under the California Environmental Quality Act (CEQA) because the changes were substantial and therefore required additional environmental review. (Pub. Resources Code, § 21166.) The trial court denied ABCD's writ of mandate, and ABCD raise the same arguments on appeal.

We conclude the issues ABCD raise on appeal are moot. After the trial court ruled on the petition and after considering an amendment to the environmental impact report, the city council passed a new ordinance amending the specific plan to incorporate the changes. The new specific plan is now the applicable planning and zoning law and therefore moots the question whether the plan as approved was inconsistent with the old specific plan. It also moots the issue whether the prior decisions to approve changes to the development plan without additional environmental analysis violated CEQA.

Accordingly, we will dismiss the appeal.

I

FACTUAL BACKGROUND

A. The Original Plan for Open Space Within the Project

On December 2, 2009, the Palm Springs City Council (City Council) passed ordinance No. 1764, which found the Museum Market Plaza Specific Plan (specific plan) consistent with the city's General Plan and adopted it. The City Council had certified the Museum Market Plaza Specific Plan Final Environmental Impact Report (EIR) before adopting the specific plan.

The Museum Market Plaza development (development), as proposed, was to be located near Palm Springs' central business district, bounded by Belardo Road on the north, Tahquitz Canyon Way on the south, Museum Drive on the west, and North Palm Canyon Drive on the east. The development site covered a total of 18.5 acres and was occupied, in large part, by the Desert Fashion Plaza, an enclosed shopping mall and

associated surface and underground parking. As originally conceived, the development entailed demolishing the shopping mall. The city sought to “provide retail and office commercial space, public plazas, professional office space and residential development in a cohesive, master planned setting envisioned to bring life back to the center of Palm Springs.” After completion, the site would cover city blocks identified as blocks A through K.

Even before the City Council approved the specific plan, the economic crisis of 2008 had raised for the developer doubts about the project’s economic viability as originally conceived. To address those concerns, the developer presented an alternative “renovation plan,” which proposed renovating (instead of demolishing) a significant portion of the existing shopping mall. The City Council directed planning staff to modify the specific plan to find the renovation plan consistent with the specific plan. As revised, the specific plan found the developer’s renovation plan to be consistent with the policy of the specific plan and also set out a “conformity review” process to govern the evaluation of any other renovation plans that may later be proposed.

Central to this dispute, even after those changes, the specific plan said Block B was to contain limited development and consist mainly of open public space. “Block B provides the public open space for the Plaza and the built form should therefore remain entirely subordinate to that of the blocks abutting, allowing views across the Plaza in all directions. So that the unimpeded views and predominance of landscaping that typically characterize public open spaces can prevail, buildings shall be visually permeable and not

exceed one story in height. They are limited to a maximum total area of 3,000 square feet and should be massed to the east and west of the block, gently framing a central open space.” The section on public open spaces said, “The Main Plaza is fundamental to the creation of a distinctive sense of place and it will be a definitive space, forming the nucleus of the Museum Market Plaza . . . Built form within the Plaza will remain limited and subordinate; wide views should exist in all directions.”

B. Approval of the Revised Open Space Plan

On October 3, 2012, the developer presented revised site plans which proposed to shrink the overall project and switch the open space portion from Block B to another block. The revised plan covered 13.2 acres within the boundaries of the specific plan. Instead of .82 acres of open space on Block B and commercial and residential development on Block E, the revision proposed two mixed use commercial/office buildings on Block B and a larger outdoor open space entertainment venue on Block E.

The city completed an addendum to the EIR (addendum) to evaluate the potential effects of the new uses compared to the uses analyzed in the approved EIR. “The 1.3-acre event space will serve the needs of residents and visitors in the form of urban open space and as a venue for cultural and social activities.” “The changes to the street grid and the relocation of the public space from Block B to Block E re-arranges the distribution of development spaces within the project area, increasing the development potential of Block B and creating a larger outdoor entertainment venue on Block E.” The addendum concluded the revised project would not result in any new significant impacts,

would not substantially increase the severity of previously identified significant impacts, and would not require new mitigation measures or alternatives requiring major revisions of the EIR. Thus, it concluded the city did not need to conduct further environmental analysis to comply with CEQA.

On October 17, 2012, the City Council conducted a public hearing, after which it adopted resolution No. 23238 approving the addendum to the EIR and the second amendment to the project financing agreement, which incorporated the revised site plans. Resolution No. 23238 says the addendum “represents the independent judgment and analysis of the City. By these findings, the City Council confirms, ratifies, and adopts the findings and conclusions of the Addendum, as presented . . . [and] certifies that the certified Specific Plan EIR and the Addendum together are adequate to support approval of each component of the proposed Downtown Palm Springs project.” Regarding “the revised renovation plan comprised of the site and development plans,” the City Council concluded they “conform to the goals and objectives of the . . . Specific Plan.” Thus, it concluded the revised plan satisfied the specific plan’s conformity review requirement.

Later, the City Council took up certain component applications needed to implement the project, including approval of the major architectural application (the application) for the development of Block B. The application said, “There will be two buildings on the site; Building B1 includes retail and restaurant, Building B2 includes retail space and restaurant,” a description which matches the site plan the City Council approved on October 17, 2012. On December 19, 2012, the City Council approved the

application for Block B in resolution No. 23268. Resolution Nos. 23238 and 23268 both indicate the City Council conducted a conformity review on October 17, 2012, and the approved plans were means of implementing the project the City Council approved for CEQA purposes on October 17, 2012.

C. The 2013 Petition: The First Challenge to the Revised Open Space Plan

On February 19, 2013, ABCD filed a petition for peremptory writ of mandate challenging the City Council's approval of the project revisions. The petition, after amendment, alleged two causes of action. First, it alleged adoption of the addendum EIR violated CEQA. Second, it alleged approving the revised plan was inconsistent with the specific plan, and therefore violated planning and zoning laws. (Gov. Code, §§ 65455 & 65867.5, subd. (b).) The second claim rested largely on the contention the specific plan required Block B to be used for open space. ABCD also objected to the City Council's use of the conformity review process in the specific plan to find the latest revised plans consistent with the goals of the specific plan.

On October 24, 2013, the trial court sustained a demurrer on the CEQA claim as time barred. On April 15, 2014, the trial court denied the petition in its entirety on the ground any claims the City Council violated the planning and zoning laws or conducted an improper conformity review should have been, but was not, brought within 90 days of the city's adoption of resolution No. 23238 on October 17, 2012, when the City Council approved the addendum to the EIR and approved the revised plan. ABCD did not appeal the trial court's denial of this petition.

D. Approval of Changes to Implementation of the Plan

In 2014, the developer put forward a revised major architectural application (the revised application) and a fourth amendment to the project financing agreement (revised project agreement). The revised application proposed changes to the design for a two-story building that had already been approved for Block B. The new design proposed to reduce setbacks, building height, and square footage and alter stepbacks—all by small amounts—compared with the most recently approved design.

The revised project agreement proposed, among other things, to demolish a building on Block A that had been designated for renovation, and instead build two new buildings on that block. The revised project agreement also proposed the city would purchase the event area on Block E rather than have the developer retain it. It did not change the land use plan; it kept commercial and retail development on Block B and the event area on Block E. On September 17, 2014, the City Council considered and approved the revised project agreement.

Meanwhile, the city's Architectural Advisory Committee (September 8, 2014) and Planning Commission (September 10, 2014) held noticed public meetings to consider the revised application, and both recommended approval. ABCD appealed the approval to the City Council.

ABCD argued the approval should have occurred at a public hearing allowing public comment rather than at a public meeting, development plans for the revised application should have been but were not available for public review, and the

Architectural Advisory Committee meeting should not have been scheduled until city staff had deemed the revised application complete. ABCD did not argue the revised application for Block B was inconsistent with the specific plan.

On October 15, 2014, the City Council rejected ABCD's arguments and denied the appeal. The City Council concluded a public meeting was sufficient, it was sufficient that the development plans were available for public review at the meetings, the agenda items were available for public inspection, and the commission in fact allowed public comment at the hearing.

E. The 2014 Petition: The Second Challenge to the Revised Open Space Plan

On October 22, 2014, ABCD filed the petition for writ of mandate which gave rise to this appeal. The petition challenged the City Council's approval of the revised application and the revised project agreement. Specifically, ABCD argued (i) the city violated CEQA by failing to conduct further environmental analysis of the revisions of the project in the revised project agreement and (ii) the city violated Government Code sections 65455 and 65867.5, subdivision (b) because both the revised project agreement and the revised application are inconsistent with the specific plan.¹

On April 1, 2016, the trial court denied the writ. First, the court concluded challenges to the project as described in the project finance agreement approved in 2012 were no longer timely, and so limited itself to the question whether the changes to the

¹ ABCD also alleged the city improperly convened public meetings instead of public hearings, and improperly did so before the application was complete, but has abandoned those contentions on appeal.

project since 2012 were significant enough to require further environmental analysis. The court concluded the city did not abuse its discretion by concluding the potential environmental effects of those changes would not be substantially greater than under the prior plan, triggering the requirement to prepare a subsequent or supplemental EIR.

Second, the trial court found ABCD did not show the project, as modified by the revised project agreement, was inconsistent with the mandatory provisions of the specific plan. The court again emphasized the issue presented was whether substantial evidence supported the city's finding in 2014 that the changes proposed in the revised project agreement are consistent with the specific plan. In so holding, the trial court refused to allow ABCD to relitigate the decision to move the open space uses initially planned for Block B to Block E. Because the latter point was the focus of ABCD's arguments and evidence, the court concluded they had "failed to carry [their] burden to demonstrate that the project as defined by [the revised project agreement] is inconsistent with the mandatory provisions of the Specific Plan." The court entered judgment on April 13, 2016. On June 9, 2016, ABCD filed a notice of appeal.

F. *Subsequent Amendment of the Specific Plan*

On April 20, 2016, after final judgment but before ABCD had filed their notice of appeal, the City Council considered and adopted ordinance No. 1889.² The new

² We grant respondents' request and take judicial notice of a certified copy of ordinance No. 1889 and court filings related to ABCD's challenge to the ordinance. We also grant ABCD's request and take judicial notice of the city's Department of Planning Services Memorandum dated December 9, 2015. (Evid. Code, § 452; *Reserve Insurance*

ordinance amended the specific plan at issue in this appeal. Among other things, the new specific plan provides for open space on Block E in the form of the event area, and commercial development on Block B, with development standards consistent with the revised application approved for Block B.

The new specific plan explains the original specific plan “and the corresponding Environmental Impact Report (EIR) were originally adopted in November of 2009. Following its initial approval, the Desert Fashion Plaza was demolished, and parking structures on the site improved. A number of implementing applications were made for various improvements on the site, including buildings on individual Blocks and project infrastructure. Proposed changes in the layout of Specific Plan uses were approved by the City Council through an Addendum to the SP/EIR in October 2012. A primary purpose of the Addendum was to exchange the land uses proposed in Block B (originally proposed public plaza) and Block E (originally proposed for mixed use). The result of the exchange was the expansion of the proposed public park space from 0.82 acres in Block B to 1.36 acres in Block E and a corresponding net reduction in the total square feet of development. [¶] The City has since approved plans for the development of blocks A, B, C-1, C-2, and D.”

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Co. v. Pisciotta (1982) 30 Cal.3d 800, 813 [appellate court may take judicial notice of subsequent events mooted an issue.]

The new ordinance approved the specific plan proposals to, among other things, change the land uses for “Block B to allow for residential, commercial and hotel uses for a Block previously considered for Open Space/Plaza land uses” and the land uses for “Block E to allow for Open Space/Plaza land uses for a Block previously considered for residential, commercial and hotel land uses,” both changes “consistent with the changes made in the 2012 Project and EIR Addendum.” The new specific plan also modified “the building height allowed on Block B from 16 feet to 40 feet for commercial uses; change[d] the building height for Block B-1 to 60 feet for commercial and residential uses, and 69 feet for hotel uses; the building height allowed on Block E from 60 feet to 17 feet.”

The City Council had directed a second addendum EIR as part of updating the specific plan. The second addendum concluded the new plan reduced densities and use intensities within the project area, and therefore would reduce environmental impacts compared to the uses studied in the original EIR. The City Council approved the second addendum to the EIR at the same time it adopted the new specific plan.

ABCD filed a petition for writ of mandate in the trial court challenging the City Council’s latest action. In claim one, ABCD alleged the City Council did not comply with CEQA in adopting the ordinance and approving the revised specific plan. In claim two, ABCD alleged the specific plan amendment was internally inconsistent in that it increased the height of a hotel on Block B to 69 feet and violated its own terms by failing to undertake an analysis of the parking demand of the event area on Block E.

Respondents challenged the petition on timeliness grounds, and, ultimately, ABCD sought voluntary dismissal without prejudice.

II

DISCUSSION

ABCD makes two arguments for reversal. First, they argue the City Council’s approvals of the revised application and the revised project agreement were improper “because allowing commercial development on Block B is inconsistent with specific, objective and mandatory provisions of the Specific Plan.” As such, they argue, the approvals violate existing planning and zoning laws. (Gov. Code, §§ 65455 & 65867.5, subd. (b).)

Second, they argue their challenge to the revised project agreement allows them to reopen their challenge to the City Council’s decision in 2012 to approve shifting open space from Block B to Block E. In 2012, the City Council treated the change as being part of a “renovation plan” subject to minimal “conformity review” under the specific plan. That was true because the revised plans called for the renovation—rather than demolition—of an existing building on Block A. However, the revised project agreement changed the plan and called for demolition of the building and construction of two new buildings in its place. They argue allowing demolition of the building on Block A removed the rationale for approving the shift of open space uses via minimal conformity review and triggered the requirement for further environmental review.

Respondents contend the City Council adoption of ordinance No. 1889 has mooted the issues ABCD raise in this appeal. We agree.

An appeal is moot if events while the appeal is pending render it impossible for the appellate court to grant appellant effective relief. (*La Mirada Avenue Neighborhood Assn. of Hollywood v. City of Los Angeles* (2016) 2 Cal.App.5th 586, 590 (*La Mirada*)). Subsequent legislation can render a pending appeal moot. (*Ibid.*, quoting *Equi v. San Francisco* (1936) 13 Cal.App.2d 140, 141-142).) Because appellate courts will decide only actual controversies, “an action which originally was based upon a justiciable controversy cannot be maintained on appeal if the questions raised therein have become moot by subsequent acts or events.” (*La Mirada*, at p. 590, quoting *Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 10).)

Both the issues on appeal ask us to evaluate the City Council’s actions with respect to the original specific plan adopted in 2009. ABCD ask us to decide whether approving the development changes was inconsistent with existing planning and zoning laws. However, the prior specific plan no longer constitutes the existing planning and zoning law for the site. When the City Council passed ordinance No. 1889, the amended specific plan became the governing land use regulation within the site. (Gov. Code, § 65455 [“No local public works project may be approved, no tentative map or parcel map for which a tentative map was not required may be approved, and no zoning ordinance may be adopted or amended within an area covered by a specific plan unless it is consistent with the adopted specific plan”].) The new ordinance adopted the changes

made to the development plan in 2012 and 2014, which ABCD challenges in this appeal. It follows, those aspects of the development plan are now consistent with the operative planning and zoning law. It would make no difference were we to conclude the changes approved in the revised application and project agreement are inconsistent with the now obsolete law. In other words, we are unable to provide effective relief, so the appeal of that issue is moot. (*La Mirada, supra*, 2 Cal.App.5th at p. 590.)

The same conclusion follows for the CEQA issue. ABCD asks us to decide whether the changes to the distribution of open space as originally set out in the original specific plan were so substantial as to require a subsequent or supplemental EIR. However, even assuming ABCD can now challenge the City Council's decision in 2012 to permit the developer to switch the open space use from Block B to Block E without conducting further environmental analysis, we could not enjoin development. The City Council passed a new ordinance adopting a new specific plan which incorporates the decision to switch the developments primary open space from Block B to Block E. The City Council also evaluated whether the switch required additional environmental analysis and concluded it did not. Those decisions control whether the development may proceed, and nothing we say about the City Council's actions in 2012 will affect the validity of its actions in 2016. The issue is therefore moot. (*La Mirada, supra*, 2 Cal.App.5th at p. 590.)

ABCD argue the appeal is not moot because the adoption of the new specific plan “was based entirely on actions that Appellant has challenged through this lawsuit,” and

concludes “a Court order invalidating the City’s approval of the 2014 [revised project agreement], including the 2014 development plan, as well as the [revised application] for Block B, would necessarily result in the invalidation of the Specific Plan Amendments.” Not so. As we noted above, the City Council ordered a second addendum to the EIR to evaluate whether further environmental analysis was required. The addendum concluded the new plan reduced densities and use intensities within the project area, and therefore would reduce environmental impacts compared to the uses studied in the original EIR. The City Council approved the second addendum to the EIR on the basis of that analysis.

ABCD also argue we should reach the merits because the case presents a matter of continuing public interest that is likely to recur and evade review. We disagree. ABCD argue we should address the city’s use of the conformity review process for approving changes under the specific plan because it is still available under the current plan. We conclude that is too specific an issue to be of public interest. And at any rate, ABCD or other citizens may challenge the city’s use of conformity review should they abuse the process in the future.

ABCD also argue a ruling “that the appeal has been rendered moot in this case would be against public policy” because it would “reward[] the City’s effort to evade judicial review of its unlawful approvals.” But this is not a case where the City Council attempted to evade an unfavorable judgment; the City Council prevailed against two petitions in the trial court seeking to stop the development. The city’s decision to clean up the specific plan, putting the whole thing through another round of review, should lend

confidence in the final product, not cause suspicion that the City Council was trying to evade judicial review. Moreover, the City Council did not in fact evade judicial review.³ ABCD could have challenged the City Council's actions by filing a timely petition for writ of mandate in the trial court challenging the amendment. Indeed, it attempted to do so, but appears to have brought the petition too late.⁴

III

DISPOSITION

We dismiss the appeal as moot. The parties shall bear their own costs on appeal.

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³ *Woodward Park Homeowners Assn. v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, 888-889, does not support ABCD's position. There, the trial court ordered the city to obtain an EIR before approving construction of a car wash. The owner ignored the order and began operating while the appeal was pending. The Court of Appeal held the case was not moot because "a decision upholding the court's order directing the preparation of an EIR could result in modification of the project to mitigate adverse impacts or even the removal of the project altogether." (*Id.* at p. 888.)

⁴ In addition, had the amendment occurred before the trial court ruled on ABCD's petition, they could have moved to amend their pleading to include claims that the City Council did not follow the law in adopting the new specific plan.

SLOUGH
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.