SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 11/18/2015 TIME: 08:43:00 AM DEPT: C-71

JUDICIAL OFFICER PRESIDING: Gregory W Pollack
CLERK: Terry Ray
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT: L. Wilks

CASE NO: **37-2015-00008725-CU-TT-CTL** CASE INIT.DATE: 03/13/2015
CASE TITLE: **San Diego Transportaion Association vs San Diego Metropolitan Transit System [E-FILE]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Toxic Tort/Environmental

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EVENT TYPE: Ex Parte

APPEARANCES

There are no appearances by any party.

The Court, having taken the above-entitled matter under submission on 11/16/15 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

RULING AFTER ORAL ARGUMENT: The Court rules on petitioner San Diego Transportation Assn.'s (Petitioner) petition for writ of mandate as follows:

The Court's ruling will serve as the Court's Statement of Decision pursuant to California Rules of Court, rule 3.1590.

Petitioner is represented by John W. Howard of JW Howard/Attorneys, Ltd. and Michael F. Klein, Michael J. Hickman and Jane Ellison of Musick, Peeler & Garrett LLP.

Respondent San Diego Metropolitan Transit System (Respondent) is represented by Daniel F. Bamberg, Meghan Ashley Wharton, and Jenny K. Goodman of the Office of the City Attorney. The Intervenors Abdikadir Abdisalan and Abdullahi Hassan are represented by Wesley Hottot of the Institute for Justice and Julie Hamilton and Leslie Gaunt.

As a preliminary matter, Petitioner's requests for judicial notice are granted except with respect to Exhibits 6-7, 9-10 (printouts).

Petitioner challenges Respondent's decision, on February 12, 2015, to amend its Ordinance 11.

(Administrative Record (AR) 2782-2828.)

The Court has reviewed the record in light of the parties' briefs, oral arguments and the applicable law and makes the following ruling:

The Court finds that neither the City Council's amending Council Policy 500-2 nor the Respondent's subsequent amendment of Ordinance 11, lifting the cap on the number of taxi permits that Respondent can issue, constitutes an activity that is a "Project" under CEQA. The court further finds that the City, and not Respondent, was the lead agency, and that the City did conduct the required preliminary review. Neither the City nor MTS was required to prepare an Environmental Impact Report before the City Council amended Council Policy 500-2 or before MTS amended Ordinance 11. Finally, neither the City nor Respondent acted arbitrarily or capriciously in amending Policy 500-2 and amending Ordinance 11.

Accordingly, Petitioner's request for a writ of mandate and declaratory judgment is denied.

Standard of Review. "Whether a particular activity constitutes a project in the first instance is a question of law." (*Creed-21 v. City of San Diego* (2015) 234 Cal.App.4th 488, 503.) A lead agency must conduct a preliminary review to determine if the activity is a project as defined under CEQA. (CEQA Guidelines 15060(c)(3).) The determinations that an agency makes during a preliminary review are subject to judicial review under the abuse of discretion standard contained in Public Resources Code section 21168.5. *(Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 113.) "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." *(Id.,* citing Pub. Res. Code, §21168.5 and *Western States Petroleum Assn. v. Super. Ct.* (1995) 9 Cal.4th 559, 573.)

Standing. Pursuant to *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 170, the Court concludes that Petitioner has standing to pursue this action.

Exhaustion of Administrative Remedies. Petitioner is not permitted to raise arguments regarding impacts to "air quality, noise, light and glare, and to growth" (Moving Papers, p. 17 fn. 8) as well as MTS Policy 34 (*Id.,* at p. 26) since it did not raise these issues during the administrative proceedings. (*Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 594.)

MTS' Amendment of Ordinance 11. The Court agrees with Respondent that Petitioner is incorrect when it asserts that Respondent was the lead agency for the purpose of conducting a preliminary review under CEQA.

Given the language set forth in CEQA Guidelines sections 15051 and 15060, courts have concluded that the public agency that shoulders primary responsibility for creating and implementing a project is the lead agency, even though other public agencies have a role in approving or realizing it. *(Eller Media Co. v. Community Redevelopment Agency* (2003) 108 Cal.App.4th 25, 45-46; *Friends of Cuyamaca Valley v. Lake Cuyamaca Recreation & Park Dist.* (1994) 28 Cal.App.4th 419,426-429; *City of Sacramento v. State Water Resources Control Bd.* (1992) 2 Cal.App.4th 960, 971-973.) Moreover, when two or more agencies meet lead agency criteria, the agency that acts first on the project is the lead agency. (CEQA Guideline, §15051(c).) Thus, even if one were to assume for the sake of argument that both the City and Respondent meet lead agency criteria and the activity is a project, the City acted first and thus is the lead agency. Furthermore, where multiple agencies are involved, the agencies may simply agree among themselves which will be the lead agency. (CEQA Guideline, §15051(d).) Respondent's acceptance of

the City's determination on this issue evidences an agreement between the City and Respondent that the City would be the lead agency.

Here, the City is charged with implementing policy providing for entry into the taxicab industry. (Gov. Code, §53075.5(b)(1).) Pursuant to that directive, the City contracted with Respondent to implement City policies regarding taxicabs. (AR, 3, 9.) The City's contractual delegation of administrative oversight to Respondent did not negate the fact that the City was responsible for setting policy regarding taxicab regulations. In fact, the court in *County of Los Angeles v. Nesvig* (1965) 231 Cal.App.2d 603, 626, stated that only administrative functions may be delegated by a public agency. The Ninth Amendment to the City and Respondent's Agreement specifically states that the "CITY continues to set the fundamental public policy pursuant to regulation of taxicabs and other for-hire vehicles and services through Council Policy 500-02" and references Respondent's regulatory role in the process. (*Id.,* at 8.) More importantly, Petitioner failed to challenge the City's determination that the activity at issue was not a project and Petitioner failed to challenge that determination during the applicable statutory period.

Furthermore, Petitioner failed to cite any authority holding that taxicab regulations constitute a project as a matter of law. The fact that the San Francisco planning department conducted a second tier analysis to determine that the taxi cab regulations at issue were exempt under CEQA does not compel this Court to find that all taxi regulations are projects under CEQA. (Petitioner's Request for Judicial Notice (PRJN), Exh. 2.) On the other hand, Respondent points out that the PUC has found that regulations concerning for hire vehicles do not constitute a project under CEQA. (*Id.*, at Exh. 8, pp. 2-4; See *Wise v. Pac. Gas & Elec.* (1999) 77 Cal.App.4th 287, 297.) Petitioner's argument that the PUC Order supports its position ignores the fact that the PUC stated that it was not reasonably foreseeable that adverse environmental impacts would occur even if the regulations expanded the TNC industry. (PRJN, Exh. 8, p. 4.)

The Court also notes that Petitioner failed to present evidence of adverse environmental impacts. In addition, Respondent showed that its determination was made after the public, including representatives for Petitioner, was given the opportunity to air their opinions and grievances. (See AR 2607, 2611-2612, 2635, 2641.) The decision was not arbitrary and capricious, and was made only after an administrative process that included several City Council sessions, review and consideration by the PS&LN committee, review and consideration by the Taxicab Advisory Committee, and review and consideration of Respondent's Board of Directors. Finally, even assuming arguendo that Petitioner's MTS Policy 34 argument was not barred due to Petitioner's failure to raise the issue at the administrative level, the California Supreme Court stated in *Blotter v. Farrell* (1954) 42 Cal.2d 804, 811, that "the power to legislate generally includes, by necessary implication, the power to amend or repeal existing legislation." Thus, it cannot be said that not conducting economic studies before changing a policy is an arbitrary and capricious act.

Based on the foregoing, Respondent did not abuse its discretion when it amended Ordinance 11 to eliminate the cap on taxicab permits.

IT IS SO ORDERED.

Judge Gregory W Pollack