

Compliance With FAA Regulations Provides Adequate CEQA Mitigation For Aviation Safety Impacts

Reliance on compliance with FAA regulations as a mitigation measure to reduce impacts to air safety to less than significant levels is appropriate under CEQA, according to the Court of Appeal in *Citizens Opposing A Dangerous Environment v. County of Kern*, 228 Cal.App.4th 360 (5th Dist. July 25, 2014). Two wind energy companies applied to Kern County for rezoning and a conditional use permit for mobile concrete batch plants that would be used to build and operate a wind farm in the Tehachapi Wind Resource Area. After performing an initial study, the county found that the wind farm project may result in significant impacts on the environment and that preparation of an EIR was warranted. The County's draft EIR indicated that the project might pose a significant safety hazard to aircraft and gliders using the nearby Kelso Valley Airport. The county consequently included a mitigation measure that required the project proponents to obtain a "Determination of No Hazard to Air Navigation" from the FAA for each wind turbine before the county would issue building permits. The board of supervisors found that the mitigation measure reduced impacts to aviation safety to less than significant levels, certified the final EIR, and approved the applications. Citizens Opposing a Dangerous Environment petitioned for writ of mandamus, challenging the county's certification of the final EIR and approval of the wind project. CODE claimed the mitigation measure's incorporation of compliance with FAA regulations was "legally infeasible," and did not adequately reduce hazards to aviation safety to less than significant levels. The court of appeal disagreed. CODE contended the mitigation measure was legally infeasible because it would not keep the project from causing adverse impacts to aviation safety, but rather the county hid "behind the fig leaf of a non-existent federal preemption." The court of appeal found, however, that the measure's reference to the FAA's hazard determination process was appropriate. Under this process, the project sponsors were required to submit Form 7460-1, "Notice of Proposed Construction or Alteration" to the FAA and obtain a no hazard determination from the FAA in response to that submission. If the FAA were to respond with a hazard determination, the mitigation measure required that the project proponents work with the FAA to remedy the hazard before the county would issue a building permit. As the court observed, "A condition requiring compliance with regulations is a common and reasonable mitigation measure, and may be proper where it is reasonable to expect compliance." Kern County also did not abdicate its responsibility to mitigate the impact to aviation safety by using compliance with FAA safety regulations as the benchmark. The court found that federal law "occupies the field of aviation safety," and exercises "sole discretion in regulating air safety." The relevant FAA regulations were enacted to establish standards for determining when a proposed structure would constitute an unsafe obstruction to aviation safety, and the process to make such an evaluation. As the court observed, these standards often apply to wind farms because the height of wind turbines often exceeds the reporting thresholds. That the FAA could not enforce the hazard/no hazard determination, because it does not have jurisdiction over land development, does not warrant finding the regulations inapplicable. Rather, the county, as the relevant land use authority, was required to do so by the mitigation measure through the exercise of its police power. Accordingly, the court found that the mitigation measure was legally enforceable, and suitably reduced any impact to aviation safety to less than significant levels.

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