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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| PEPI WEITZMAN,<br>Plaintiff and Appellant,<br>v.<br>CITY OF DANA POINT,<br>Defendant and Respondent;<br>HEADLANDS RESERVE, LLC,<br>Real Party in Interest and Respondent. | G036199<br>(Super. Ct. No. 04CC00716)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, Jonathan H. Cannon, Judge. Requests for judicial notice. Judgment affirmed. Requests denied.

Evans & Associates and Patrick J. Evans for Plaintiff and Appellant.

Rutan & Tucker, John A. Ramirez and A. Patrick Muñoz for Defendant and Respondent.

Latham & Watkins, Christopher W. Garrett, Kelly E. Richardson and Elidia C. Dostal for Real Party in Interest and Respondent.

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Plaintiff Pepi Weitzman appeals from a judgment denying her petition for an administrative writ of mandate that challenged defendant City of Dana Point's approval of a project named the Headlands Development and Conservation Plan (Headlands project). She contends defendant could not approve the Headlands project because the city's general plan lacked a housing element. She also claims the project's approval failed to adequately provide for affordable housing. We conclude the first claim is untimely and the latter claim lacks merit.

## FACTUAL AND PROCEDURAL BACKGROUND

### *1. Background*

This appeal concerns the continuing saga over development of a 12-acre piece of coastal property commonly known as the Headlands which is currently owned by real party in interest Headlands Reserve LLC and located in Dana Point. After years of litigation, defendant and real party in interest reached settlement on the Headlands project. The project called for over 68 acres of parks, trails, and open space on the Headlands, plus the construction of a hotel, a hostel, a commercial area, and 125 single family homes. Implementation of the settlement required defendant to amend the land use, urban design, circulation, public safety, conservation and open space, and public facilities and growth management elements of its general plan, revise the city's zoning code to designate the Headlands as a planned development district, plus seek an amendment to the city's local coastal program from the California Coastal Commission.

Defendant's city council certified the environmental impact report for the proposed project in January 2002. In part, the report noted "[t]he proposed project is consistent with the [c]ity's goals of providing additional housing opportunities to meet

the existing and future demand for housing in the [c]ity," including its policy of "[p]rovid[ing] a variety of housing opportunities for all income levels . . . ."

As noted, the Headlands project included a local coastal program amendment that needed to be reviewed and approved by the California Coastal Commission. The Commission issued its approval in 2004 but with modifications to the proposed local coastal program amendment not contained in proposed settlement.

Defendant's city council held a hearing on whether to approve the project with the Coastal Commission's amendments on September 22, 2004. Patrick Evans, plaintiff's attorney, appeared identifying himself as representing "residents at the Dana Point Marina Mobile Home Estates." Evans objected to the project, both orally and in writing, on the ground defendant "does not have a valid General Plan," noting "there is no Housing Element." After an inquiry by a city council member, defendant's city attorney disagreed with Evans declaring, "We have a General Plan and it has a Housing Element." Defendant's city council approved the project.

Subsequently, defendant's city council approved a master coastal development permit, which included, as conditions for approval, that: (1) "A minimum of 12 residential units within the project . . . provide employees' quarters that are available for occupancy by . . . employees who qualify as low or moderate income persons or families . . . "; and (2) "[a]ny residential unit that does not provide for such an employees' quarters shall be required to participate in the [c]ity's affordable housing in-lieu fee program by paying $2,500 to the [c]ity prior to the issuance of a building permit for that residential unit."

*2. The Present Litigation*

On December 20, 2004, plaintiff petitioned for an administrative writ of mandate to set aside defendant's adoption of the Headlands project. Plaintiff alleged she is "a person of low income" residing in Dana Point. The petition alleged defendant's "approval of the Headlands [p]roject . . . was improper and void," because it either "has not adopted a Housing Element" or "does not have an adequate Housing Element," and "[w]ithout an adequate Housing Element, the [c]ity could not make a decision involving a 125 home project on the [c]ity's last large parcel of vacant land." The petition also alleged defendant "did nothing to comply with the requirements of [Government Code] Section 65590[, subdivision] (d)" because it approved "new housing in the Coastal zone without requiring affordable housing . . . ."

The trial court initially consolidated the hearing of this matter with two cases brought by other city residents that challenged unrelated actions by the city council involving other parcels within the city. (*Traphagen v. City of Dana Point* (Case No. 04CC00676); *Seitz v. City of Dana Point* (Case No. 04CC00691).) The consolidation was limited to resolving an issue asserted in all three cases; whether defendant's general plan is invalid due to the lack of the housing element.

According to the record, after its incorporation in 1989, defendant approved a general plan that included a housing element. By state law, it was required to revise the housing element in 2000. (Gov. Code, § 65588, subd. (b).) In May 2000, defendant's Community Development Department (department) held a workshop to update the housing element. The department completed a draft of the revised housing element by June 30 and, pursuant to statute, sent a copy of the draft to the California Department of Housing and Community Development (HCD). (Gov. Code, § 65585, subd. (b).)

HCD responded on October 6 with a letter and an attached appendix proposing changes to the draft that HCD believed were "needed to bring the draft . . . into compliance" with state law. The department then prepared an addendum to the draft

"[i]n response to HCD's review . . . ." At a November 1 meeting, defendant's planning commission reviewed the draft and addendum and adopted a resolution recommending the city council approve the proposed revised housing element.

The next day, the department sent a copy of the addendum to HCD along with a cover letter, stating "[t]o meet the year-end deadline to have our updated Housing Element certified, we are requesting that your office provide us with an expedited review and response on the Addendum by November 20, 2000. The City Council is scheduled to act on the General Plan Update to the Housing Element on November 28, 2000, the last available Council meeting of the year."

HCD did not file a response before the city council's November 28 meeting. At that time, the city council approved the revised housing element. On December 18, HCD sent a response to the department, suggesting some revisions it believed were "still needed for the element to comply with [the] State housing element law . . . ." HCD's letter neither mentioned the department's request for an expedited review nor explained HCD's delay in responding to the addendum.

After receiving briefs from all of the parties, the trial court found "the city has substantially complied" with the law governing revision of its housing element, and its "general plan does contain a housing element . . . ." Subsequently, respondents moved for judgment on the balance of the present petition's allegations. The court granted their motion and entered judgment denying plaintiff's petition.

## DISCUSSION

*1. Plaintiff's Claim that Defendant Lacked a Valid General Plan is Untimely.*

The trial court concluded defendant substantially complied with the Planning and Zoning Law's requirements when it revised its housing element in 2000. (Gov. Code, §§ 65000, 65585 & 65588.) However, the first issue presented is

respondents' claim, asserted both in the trial court and again on appeal, that plaintiff's attack on the validity of defendant's general plan is barred by the applicable statute of limitations. (Gov. Code, § 65009.) Since we conclude respondents' latter argument is meritorious and a "judgment or order will be affirmed regardless of the correctness of the grounds upon which the court reached its conclusion," when "the *decision* of the lower court is right," (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 340, p. 382), we need not consider the correctness of the trial court's substantial compliance finding.

Government Code section 65009, which is part of the Planning and Zoning Law, declares, "no action or proceeding shall be maintained in any of the following cases by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body's decision: [¶] . . . [¶] (D) To attack, review, set aside, void, or annul the decision of a legislative body to adopt, amend, or modify a development agreement." (Gov. Code, § 65009, subd. (c)(1)(D).) As we recently recognized "[t]he legislative policy behind . . . Government Code section 65009 . . . is the prompt resolution of challenges to the decisions of public agencies regarding land use. [Citations.]" (*Royalty Carpet Mills, Inc. v. City of Irvine* (2005) 125 Cal.App.4th 1110, 1121.) Consequently, "After expiration of the limitations period, 'all persons are barred from any further action or proceeding.' [Citations.]" (*Id.* at p. 1119; see also Gov. Code, § 65009, subd. (e).)

Plaintiff timely filed and served her petition after defendant's September 22, 2004 approval of the Headlands project. But while the petition purported to challenge the Headlands project's approval, for the most part plaintiff did not attack that decision on its merits. Rather, she primarily focused on defendant's purported inability to approve any land use decision because its general plan allegedly lacked a housing element. In this regard, Government Code section 65009's 90-day limitations period also applies when an action seeks "[t]o attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a general or specific plan" "on the basis that" the "general plan

or mandatory element thereof . . . is inadequate." (Gov. Code, § 65009, subd. (c)(1)(A).) The only exception in this latter instance is where "an action is brought based upon the complete absence of a general plan or a mandatory element thereof . . . ." (*Ibid.*)

On appeal, plaintiff alternately argues defendant's general plan "did not have a housing element," (bold and capitalization omitted), or it "did not have an adequate Housing Element . . . ." The record reflects defendant did, in fact, prepare a revised housing element in 2000 and attempted to adopt it in compliance with state law. Thus, the real focus of plaintiff's argument concerns the revised housing element's alleged procedural and substantive deficiencies, i.e., its inadequacy. Since even if the trial court erroneously concluded defendant substantially complied with the statutory requirements for revising its housing element, the result at best would only mean that element was inadequate. Consequently, plaintiff's petition is untimely with respect to the adoption of the 2000 housing element revision.

To overcome this obstacle plaintiff argues housing was the primary focus of the Headlands project, thereby establishing a nexus between the Headlands project's approval and the alleged inadequacy of defendant's housing element. In *Garat v. City of Riverside* (1991) 2 Cal.App.4th 259, disapproved on another ground in *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743, fn. 11, the court construed Government Code section 65009, subdivision (c) in light of the statute's express purpose of "provid[ing] certainty for property owners and local governments regarding decisions made pursuant to this division" (Gov. Code, § 65009, subd. (a)(3)). First, *Garat* concluded the statute "precludes the possibility of an action being brought to challenge the validity of a general plan on the ground of 'inadequacy' in the absence of a 'triggering event' such as the adoption or amendment of that plan." (*Garat v. City of Riverside, supra,* 2 Cal.App.4th at p. 289, fn. omitted.) Second, "Inasmuch as an adoption of, or amendment to, a general plan is needed to 'trigger' the . . . 'window of opportunity' within which challenges to the general plan based on inadequacy can be

brought, it follows that only those portions of the general plan which are impacted or influenced by the adoption or amendment can properly be challenged in the action which is brought." (*Id.* at pp. 289-290.)

Here, the appellate record establishes defendant did have a housing element in its general plan when it approved the Headlands project and that the 2002 environmental impact report for the development found the project was consistent with that housing element. While the Headlands project amended several elements of defendant's general plan, it did not amend the city's housing element. Finally, contrary to plaintiff's assertion, the Headlands project reflects it is much more than a mere housing development.

In *A Local & Regional Monitor v. City of Los Angeles* (1993) 16 Cal.App.4th 630, the court applied Government Code section 65009, subdivision (c) in a context similar to this case. There, the plaintiff attacked a city's approval of a project environmental impact report. In part, the plaintiff argued the report "is inconsistent with the city's general plan because the general plan is allegedly legally inadequate in that it lacks the necessary circulation, land use, and housing elements." (*Id.* at p. 648.) Citing Government Code section 65009, subdivision (c) and *Garat*, the appellate court held "to the extent that plaintiff's arguments are a thinly veiled challenge to the claimed inadequacy of the city's circulation, housing, and land-use elements, they are also time-barred by Government Code section 65009, subdivision (c). . . . The administrative record establishes the circulation and land-use elements were initially adopted in 1974 and were amended most recently in February 1991. This action was not filed until January 13, 1992, well . . . after the general plan was adopted in 1974 and the most recent amendment in February 1991 . . . ." (*Id.* at pp. 648-649.)

The same reasoning would apply here. Plaintiff's superficial attack on defendant's approval of the Headlands project amounts to little more than "a thinly

veiled" and untimely "challenge" to the city's approval of the 2000 housing element revision. (*A Local & Regional Monitor v. City of Los Angeles, supra,* 16 Cal.App.4th at p. 648.) Consequently, plaintiff's petition was untimely to the extent it challenged the Headlands project on the ground defendant's allegedly inadequate housing element invalidated its general plan.

*2. Plaintiff's Mello Act Violation Lacks Merit.*

Since the Headlands project calls for residential development along the coast, defendant's approval of it needed to comply with the Mello Act. (Gov. Code, § 65590 et seq.; *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 738-739, 740.)

In granting respondents' motions for judgment, the trial court noted, "There is no mention in either the first or second cause of action [that] the approval of the project was wrongfully based on the [c]ity's failure to meet the Mello Act requirements with regard to low income housing . . . ." While the trial court's summary of the allegations contained in each cause of action is correct, the petition's factual allegations do assert defendant failed to comply with the Mello Act in approving the Headlands project. "[T]he allegations of the complaint must be read in the light most favorable to the plaintiff and liberally construed with a view to attaining substantial justice among the parties" so as "to determine whether it alleges facts sufficient to state a right to relief under any legal theory. [Citations.]" (*Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1557.)

Nonetheless, plaintiff's Mello Act noncompliance arguments fail on their merits. Since the Headlands project involves the development of vacant land, it is governed by Government Code section 65590, subdivision (d): "New housing developments constructed within the coastal zone shall, where feasible, provide housing units for persons and families of low or moderate income . . . . Where it is not feasible to

provide these housing units in a proposed new housing development, the local government shall require the developer to provide such housing, if feasible to do so, at another location within the same city or county, either within the coastal zone or within three miles thereof. In order to assist in providing new housing units, each local government shall offer density bonuses or other incentives, including, but not limited to, modification of zoning and subdivision requirements, accelerated processing of required applications, and the waiver of appropriate fees." (Gov. Code, § 65590, subd. (d).) In addition, the statute further provides, "No provision of this section shall be construed as increasing or decreasing the authority of a local government to enact ordinances or to take any other action to ensure the continued affordability of housing." (Gov. Code, § 65590, subd. (i).)

Contrary to respondents' objections, plaintiff's attorney raised the affordable housing issue before the city council during its September 22, 2004 hearing. But his sole complaint was that "[t]he law is very specific, when you develop residential housing in the coastal zone you must make provision for affordable housing. And as far as we can tell that wasn't done with respect to the Headlands."

The record reflects this criticism is factually incorrect. The Headlands project requires that at least 12 of the new homes, approximately 10 percent of the project's residential development, must have quarters available for employees of low or moderate income. In addition, building permits for any new home built on the Headlands parcel that does not provide qualifying employee quarters, will require the payment of $2,500 to defendant, which will be placed in a fund used to provide for or develop affordable housing in the city.

Plaintiff challenges the Headlands project's approval on the ground "there is no evidence, no findings, and no analysis as to how $2,500 per lot and employee housing for twelve . . . moderate or low income persons met the Mello Act." But nothing in the statute requires the presentation of evidence or the issuance of findings when an

agency's land use decision concerning new coastal zone housing includes affordable housing requirements. Nor does plaintiff cite any legal authority for her argument. Finally, the foregoing conditions are in compliance with the requirements of defendant's housing element that the city require new residential developments to include "a specific percentage of affordable housing units" of between "10% to as high as 25%," and a "'per market rate in lieu fee'" ranging between "$2,000 to $3,500."

Consequently, we conclude plaintiff's Mello Act claims lack merit.

## DISPOSITION

The judgment is affirmed. The requests for judicial notice are denied. Respondents shall recover their costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.

SILLS, P. J., Concurring.

I agree with and have signed the majority opinion. Nevertheless I am forced to write separately about the relatively glaring problem of whether a $2,500 "in lieu of" fee can really be said to satisfy the Mello Act requirements set forth in Government Code section 65590, subdivision (d)[1] for provision of commensurate affordable housing nearby. As our Supreme Court noted a few years ago, "when a new housing development is constructed within the coastal zone, it [the Mello Act] seeks to provide commensurate affordable housing nearby." (See *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 738.) As I write in the winter of 2006-2007, we could practically take judicial notice of the fact that $2,500 is such a paltry sum that it would not even buy a single month's rent in any of the housing units contemplated by the Headlands project. (Cf. *Coalition of Concerned Communities, Inc. v. City of Los Angeles, supra,* 34 Cal.4th at p. 741 (conc. opn. of Moreno, J.) ["The coastal zone offers some of the choicest, and most expensive, land. The housing market, left to itself, might well make the coastal zone, or portions of it, the 'domain of a single class of citizens,' i.e., the wealthy, contrary to the public policy of access embodied in the Coastal Act and transplanted in slightly different form into the Mello Act." (Footnote omitted.)].)

However, as Justice Rylaarsdam's opinion correctly notes, the issue of Mello Act compliance was framed without much specification at the administrative level -- merely whether the project had made *some* "provision for affordable housing." And as a matter of administrative exhaustion, framing the issue that way simply was not specific enough. For example, in *City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, a city attacked the approval of a plan to build a large apartment complex on adjacent *county* land (the

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[1] Quoted at pages 9-10 of the slip opinion expressing the views of the entire court.

city, in that case, playing the part of the nimby.[2]) The city argued -- *on appeal* -- that the project was too dense to comply with the county's general plan, and specifically that the project exceeded a limitation of 660 units. But the appellate court held that the city had not properly raised the issue. Just raising the "general issue of density" (*id.* at p. 1020) in the context of the city's own plan, which was its position at the administrative level, was not enough. The city was also obligated to "confront" the county with the "660 limitation question," which the court considered a "totally different issue" than the density issue as it related to the city's plan. Thus, it was "evident that the county was never given the opportunity to meet this issue at the administrative hearings." (*Ibid.*)

I grant that in the case before us the oblique reference to "affordable housing" in the "coastal zone" probably comes a little closer than the appellant-city came in *City of Walnut Creek*. Nevertheless, the reference did not give the City of Dana Point here adequate notice to justify its (to an outsider, ridiculously low) "in lieu of" fee. I take it as a given that if such "in lieu of" fees may *possibly* -- if high enough -- satisfy the Mello Act requirements, the question of *whether* the fee is high enough is one that must be specifically raised at the local level. Who knows what affordable rabbits might be drawn from what appears to an outsider to be the city's otherwise empty hat? Here, however, the City of Dana Point was not "given the opportunity" to work any such magic.

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[2] The word, based on the "acronym not in my backyard" has already made it into the on-line version of the Oxford English Dictionary. I hasten to add that, though, that I do not intend the usual vaguely pejorative connotation here -- I use the word in what is increasingly becoming a neutral generic meaning as simply "the opponent of a given property development," though the project at issue in *City of Walnut Creek*, being literally adjacent to the city's own land, surely did qualify for the metaphor "backyard."

Tempting as it is to pre-empt the issue on the basis of what "everybody knows" about the Orange County coastal housing market, fair play requires that the city have had the first crack at the administrative level at justifying the level of its "in lieu of" fee.

SILLS, P. J.