

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION
50 California Street • Suite 2600 • San Francisco, California 94111 • (415) 352-3600 • Fax: (415) 352-3606 • www.bcdc.ca.gov

Agenda Item #13

January 3, 2013

TO: Commissioners and Alternates
FROM: Lawrence J. Goldzband, Executive Director (415/352-3653 larryg@bcdc.ca.gov)
Tim Eichenberg, Chief Counsel (415/352-3655 time@bcdc.ca.gov)
SUBJECT: SPRAWLDEF v. San Francisco Bay Conservation and Development Commission
(For Commission consideration and possible vote on January 17, 2013)

Attached is Judge Beeman's November 29, 2012 ruling in SPRAWLDEF v. San Francisco Conservation and Development Commission, et al., No. FCS039863, directing BCDC to vacate its approval of the expansion of the Potrero Hills Landfill on October 21, 2010 in Appeal No. 1-05. A writ of mandate ordering BCDC to vacate its approval and return to the court to certify compliance with the writ by January 24, 2013, has been submitted for signature and filing to Judge Beeman, but he has not signed them at this time. Unless the Landfill or the Commission appeals the judgment, the Commission must vote to vacate its October 21, 2010 approval of BCDC Permit No. 3-10(M) at its January 17, 2013 meeting.

Therefore, unless an appeal is filed or the writ and final judgment have not been issued and served before the Commission's January 17, 2013 meeting, the Commission must adopt the following resolution:

The Commission hereby vacates its October 21, 2010 decision in Appeal No. 1-05, to approve BCDC Permit No. 3-1-(M) authorizing the expansion of the Potrero Hills Landfill within the secondary management area of the Suisun Marsh, in an unincorporated area of the Solano County approximately two miles southeast of the City of Fairfield authorized by Revision No. 2 to Solano County's Marsh Development Permit MD-88-09 (U-88-33), approved by the Solano County Board of Supervisors on September 13, 2005 (Resolution No. 2005-203).

The Commission also directs staff to notify Solano County and all other interested parties that the permit has been vacated.



ENDORSED FILED
Clerk of the Superior Court

NOV 29 2012
D. CALLISON

By _____
DEPUTY CLERK

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SOLANO
DEPARTMENT ONE

SPRAWLDEF, etc., et al.,
Petitioners,

NO. FCS039863

RULING RE:
WRIT OF MANDATE

vs.

Hearing Date: Oct. 4, 2012

SAN FRANCISCO BAY CONSERVATION
AND DEVELOPMENT COMMISSION,
etc., et al.,

Respondents.

WASTE CONNECTIONS, INC., etc.,

Real Party in Interest.

_____ /
The Petition for Writ of Mandate and Declaratory Relief came on regularly for hearing on October 4, 2012 before the Honorable Paul L. Beeman, Judge Presiding. Kelly T. Smith, Esq., appeared as counsel for Petitioners SPRAWLDEF. Christina Tiedemann, Esq. appeared as counsel for Respondent San Francisco Bay Conservation and Development Commission. Lily N. Chinn, Esq., James B. Slaughter, Esq., and Scott W. Gordon, Esq., appeared as counsel for Real Party in Interest Waste Connections, Inc. The Court issued its tentative ruling on October 3, 2012, to which oral argument was timely requested. The Court heard the arguments of

1 the parties, and thereafter the matter was submitted for decision. Now, therefore,
2 based on the pleadings and records on file and the arguments of counsel, the Court
3 now enters the following ruling.

4 In CEQA litigation, if the project would have unmitigatable significant
5 environmental consequences avoided by a project alternative, the lead agency can
6 dismiss the project alternative only on grounds of infeasibility. California Native Plant
7 Society v. City of Santa Cruz (2009) 177 Cal.App.4th 957, 982; Citizens of Goleta
8 Valley v. Board of Supervisors (1988) 197 Cal.App.3d 1167, 1183 ("Goleta I").

9 The Suisun Marsh Preservation Act ("Marsh Act"), at Public Resources Code
10 §§29000 et seq., and resulting plans and regulations establish an even higher
11 standard for preserving the land within the Marsh.

12 The Solano County Local Protection Plan includes a Grading and Erosion
13 Control Ordinance requiring that "every effort must be made to preserve natural
14 channels and drainageways". §31-300(n). [AR3206]

15 The BCDC, through its Staff Recommendation report ["Report", AR3143 et
16 seq.] and later permit which adopted verbatim the recommendations to reject the
17 reduced size project alternative, states that this Plan "therefore requires every effort to
18 be made to preserve natural channels and drainageways, and allows filling, grading or
19 excavating watercourses or removing riparian vegetation only if there are no
20 reasonable alternatives, and only the minimum amount of modification necessary in
21 such cases". [AR3206 (Report); AR3384 (Permit)]

22 The assumption which appears to underlie the "every effort must be made to
23 preserve natural waterways" requirement is that any man-made alteration will at least
24 temporarily disrupt the sensitive ecostructure of the Marsh. While those disruptions
25 may be somewhat mitigatable, through construction of concrete channels and
26 relocation of affected riparian habitat and wildlife, the Marsh Act and its authorized
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1 plans and regulations express an absolute preference for alternatives that would
2 cause no such disruptions.

3 BCDC therefore was limited to rejecting the reduced size project alternative
4 only on grounds of infeasibility.

5 "Feasible" is defined by 14 C.C.R. 15364 as "capable of being accomplished in
6 a successful manner within a reasonable period of time, taking into account economic,
7 environmental, legal, social, and technological factors."

8 In general terms, a finding of economic infeasibility of an alternative requires a
9 comparison of the costs and profits of the alternative to the costs and profits of the
10 project.

11 An environmentally superior alternative cannot be deemed infeasible
12 absent evidence the additional costs or lost profits are so severe the
13 project would become impractical. Kings County Farm Bureau v. City of
Hanford (1990) 221 Cal.App.3d 692, 736.

14 It is therefore not enough for the proponent of a commercial project to show that
15 the project alternative would be less profitable than the proposed project.

16 [I]t is not sufficient to show that further reductions in project size would
17 render the project infeasible . . . The fact that an alternative may be more
18 expensive or less profitable is not sufficient to show that the alternative is
19 financially infeasible. What is required is evidence that the additional
costs or lost profitability are sufficiently severe as to render it impractical
to proceed with the project. Goleta I, supra, 197 Cal.App.3d at 1181.

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21 Certainly, showing that a project could not be funded, or if funded would not
22 generate any profits, would be enough to establish economic infeasibility. Association
23 of Irrigated Residents v. County of Madera (2003) 107 Cal.App.4th 1383, 1401 [huge
24 dairy farm project; reduced herd size alternative economically infeasible because
25 evidence showed the lender would not provide needed loan for project of reduced
26 size, and economic analysis showed elimination of all profits from a reduced size
27 herd].

1 In most cases examining the economic feasibility of a project alternative, profit
2 and cost estimates for the project and the project alternative must be presented
3 somewhere in the record, so that the agency (and the court) can compare them, to
4 determine whether a reasonable project proponent would have proceeded with the
5 project alternative. Uphold Our Heritage v. Town of Woodside (2007) 147 Cal.App.4th
6 587 [court found insufficient evidence of financial infeasibility of a project alternative
7 when financial evidence as to the cost of the project alternative was presented, but
8 there was no evidence as to cost of the project itself]; Burger v. County of Mendocino
9 (1975) 45 Cal.App.3d 322 [failure to compare income and expenditures of 64 unit
10 alternative to planned 80 unit hotel]; Goleta I, supra, 197 Cal.App.3d 1167 [financial
11 information regarding 514 unit hotel project insufficient to properly evaluate economic
12 feasibility of 340 unit scaled-down alternative].

14 There may be some situations in which courts are willing to extrapolate cost or
15 profit information about an alternative from that provided for the project itself, and find
16 it sufficient to determine the alternative is economically infeasible. However, this
17 appears to depend upon the circumstances of the particular case. Sequoyah Hills
18 Homeowners Assn. v. City of Oakland (1993) 23 Cal. App. 4th 704, 715 [project whose
19 primary objective was affordable housing properly found economic and legal
20 infeasibility based upon project sponsor's comments that lower density houses would
21 necessarily be more expensive]; cf. Goleta I, supra, 197 Cal.App.3d at 1181 [court
22 might be able to infer construction costs per room increase as hotel project size is
23 reduced, but without more evidence, could not reasonably conclude that increased
24 costs or lost profitability was sufficiently severe to render it impractical to proceed with
25 the project].
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1 A finding of economic infeasibility of a reduced size project alternative may not
2 require a showing that it would necessarily eliminate all profits. It would appear that a
3 reasonably prudent person could decide not to go forward with a project of limited
4 profit, if the profit margin were low enough to risk loss due to market variances and
5 other risks, or produced a return on investment lower than could be obtained through
6 other use of the capital required to undertake the project.
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8 In the present case, BCDC considered a project alternative which would have
9 left intact the current Spring Branch Creek, instead of the diversion of part of the creek
10 into a prefabricated concrete channel.

11 The proposed landfill expansion would encompass 167 acres. The project
12 alternative that avoids any effect on the Spring Branch Creek is 127 acres. The
13 project proponent presented evidence that adoption of the project alternative would
14 result in a loss of 30% of the (expanded) landfill capacity, to reduce the expected life of
15 the expanded landfill area from 30 years to 20 years, but generate cost savings of only
16 10%. This would yield a reduction in gross revenues of 45%.
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18 While the project proponent provided estimates of total capital costs for both the
19 project and the alternative, it did not provide sufficient direct or indirect evidence as to
20 projected net profits for the project or the alternative, either as numbers, or annual
21 rates of capital return. The only evidence provided by the project proponent regarding
22 profits was the overall 9% rate of return it has achieved as to the entirety of its
23 operation, inclusive of other landfills, as well as the overall rate of return of competitors in
24 the solid waste industry. The limited evidence provided by the project proponent
25 regarding costs, relative costs of the project compared to reduced size project
26 alternative, and relative capacity of project to reduced size project alternative is
27 insufficient to establish the projected rate of return for either the project or the reduced

1 size project alternative.

2 The court is mindful that the project proponent is in a competitive business, and
3 that some information relevant to profitability, such as costs charged to high-volume
4 customers other than members of the public or public agencies, may not be readily
5 known or accessible by competitors, and thus could qualify for "trade secret"
6 protection. Furthermore, this court is not sure it can or should require the project
7 proponent to choose between keeping such sensitive information confidential, or
8 proceeding with the project. Nevertheless, there must be evidence that the project
9 proponent could disclose relevant to profit and/or rate of return for the proposed
10 project and/or this reduced size project alternative, which would not reveal, directly or
11 indirectly, trade secret protected information. Alternatively, as suggested by
12 Petitioner, BCDC could have retained an independent consultant, who could have
13 been provided confidential access by the project proponent to the information
14 necessary to determine projected rate or return, so that it could be compared to the
15 rate of return already identified by the project proponent as necessary to stay
16 competitive within its industry.
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19 The court here finds the evidence within the administrative record to be
20 insufficient to constitute "substantial evidence" that the reduced size project alternative
21 is economically infeasible.

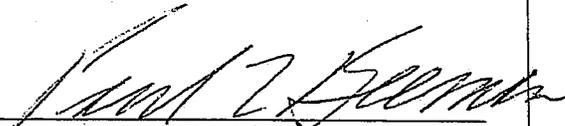
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1 Petitioner is therefore directed to prepare and circulate to counsel for the
2 project proponent and BCDC a proposed writ of mandate, directing BCDC to vacate its
3 approval of the subject project. The writ shall also direct BCDC to return to the court
4 to certify compliance, by a date certain, with the parties to meet and confer to
5 determine the appropriate return deadline for inclusion within that writ.

6 IT IS SO ORDERED.

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DATED: November 29, 2012



PAUL L. BEEMAN
Judge of the Superior Court

1 SOLANO COUNTY COURTS
STATE OF CALIFORNIA
2 Hall of Justice, 600 Union Avenue, Fairfield, CA

3 CERTIFICATE AND AFFIDAVIT OF MAILING NO. FCS039863

4 I, Donna Callison, certify under penalty of perjury that I am a Judicial Assistant
5 of the above-entitled Court and not a party to the within action; that I served the
6 attached by causing to be placed a true copy thereof in an envelope which was then
7 sealed and postage fully prepaid on the date shown below; that I am readily familiar
8 with the business practice for collection and processing of correspondence for mailing
with the United States Postal Service; that this document was deposited in the United
States Postal Service on the date indicated. Said envelopes were addressed to the
attorneys/parties and any other interested party as indicated below.

9 Document Served: Ruling Re: Writ of Mandate

12 Kelly T. Smith, Esq. THE SMITH FIRM 1541 Corporate Way, Suite 100 14 Sacramento, CA 95831	Christina Tiedemann, Esq. Supervising Deputy Attorney General Post Office Box 70550 Oakland, CA 94612-0550
15 Lily N. Chinn, Esq. BEVERIDGE & DIAMOND 456 Montgomery Street, Suite 1800 17 San Francisco, CA 94104-1251	Scott W. Gordon, Esq. LAW OFFICE SCOTT GORDON 1990 N. California Blvd., Suite 940 Walnut Creek, CA 94596
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23 DATED: November 29, 2012

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25 _____
26 Donna Callison

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Ruling Re: Writ of Mandate