Beverly Hills Unified Sch. Dist. v. Fed. Transit Admin., et al., Case No. CV-18-716-GW
Tentative Rulings on: (1) Plaintiff Beverly Hills Unified School District's Motion for Summary Judgment, (2) Defendant Federal Transit Administration's Motion for Summary Judgment, and (3) Defendant Los Angeles County Metropolitan Transportation Authority's Motion for Summary Judgment

The Court and parties are familiar with the history of this litigation, the similar lawsuit that preceded it, and the tentative/further rulings the Court issued in this action on June 27 and August 20, 2019. *See* Docket Nos. 125, 149. Given that familiarity, as the Court stated in its August 20, 2019 "Further Ruling,"

> [f]ully-cognizant of both the length and depth of its consideration to this point, the need to achieve a resolution in the case as expeditiously as possible, and of the fact that, upon appeal, the Ninth Circuit Court of Appeals would review this Court's decision, and the issues in general, *de novo*, *see N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1152 (9th Cir. 2008); *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 523 (9th Cir. 1994),

the discussion here will be brief.

With respect to the sole remaining issue up for discussion at this point – the decision of the Federal Transit Administration ("the FTA") and Los Angeles County Metropolitan Transportation Authority ("Metro") (collectively, "the Agencies") to move away from their earlier selection of 1950 Avenue of the Stars as a "staging area" – in its August 20, 2019 "Further Ruling" on the summary judgment motions, the Court wrote as follows:

> [A]s to the "hard look" at 1950 Avenue of the Stars and Staging Area 1 as an alternative to use of Staging Areas 2 and 3 and the impacts use of those staging areas will entail, the Court would still find that, while the Defendants may in fact have taken such a "hard look," the record does not reflect that they did. If the Court rules in that fashion, the question arises as to what should be done next. Should the Court allow the record to be supplemented with the necessary material? In the interim, should the Court enjoin the operations at Staging Areas 2 and 3 until that is done?

Docket No. 149, at pg. 7. Following that ruling, among other things, the Agencies submitted additional extra-record material on September 13, 2019, and plaintiff Beverly Hills Unified School District ("Plaintiff") engaged – with the Court's permission, *see* Docket Nos. 166, 174 – in a limited measure of discovery.

The Agencies argue here that the "hard look" standard does not apply to the

particular issue remaining before the Court, but that instead they merely had to "briefly discuss" why 1950 Avenue of the Stars was not selected as the staging area. The National Environmental Policy Act ("NEPA") and its regulations certainly impose at least that requirement. *See* 40 C.F.R. § 1502.14(a) (obligating agencies, in the "Alternatives" section of an Environmental Impact Statement ("EIS") to "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated"); *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005) (noting that, in an EIS, an agency "must explain why it has eliminated an alternative from detailed study," and then concluding that "[s]o long as 'all reasonable alternatives' have been considered and an appropriate explanation is provided as to why an alternative was eliminated, the regulatory requirement is satisfied"); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1207 (9th Cir. 2004) ("The rule of reason 'guides both the choice of alternatives as well as the extent to which the [EIS] must discuss each alternative.' '[F]or alternatives which were eliminated from detailed study, [the EIS must] briefly discuss the reasons for their having been eliminated.'") (omitting internal citations and quotation marks) (quoting *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997) and *Am. Rivers v. FERC*, 201 F.3d 1186, 1200 (9th Cir. 2000)); *Laguna Greenbelt*, 42 F.3d at 524; *see also Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1180 (9th Cir. 1990) ("Nor must an agency consider alternatives which are infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area.").

If the Agencies are correct that this is the limit of their obligation insofar as consideration of 1950 Avenue of the Stars as a staging area is concerned, the Court would agree with them that they satisfied the obligation and that their determination was not arbitrary or capricious. *See* AR107053, AR107110, AR112930-31; *see also Japanese Village, LLC v. Fed. Transit Admin.*, 843 F.3d 445, 467 (9th Cir. 2016) (indicating that "arbitrary or capricious" standard applies to infeasibility determinations). But even if they are incorrect, and the Court can appropriately assess their work under the "hard look" requirement, the Court agrees – after including in the administrative record the information provided via declarations submitted on September 13, 2019, at Docket Numbers 156 and 158 (along with the exhibits attached to those declarations), portions of the declaration

submitted that day at Docket Number 160, and an exhibit to the declaration submitted that day at Docket Number 161[1] – that the Agencies' work was sufficient.

Plaintiff, the party who strove to take discovery to test Metro's rationale for its ultimate rejection of 1950 Avenue of the Stars as a staging area, now argues that the Court should look no further than the original administrative record filed in this case. It believes that record demonstrates the absence of a "hard look." But the Court agrees with the Agencies that supplementation of the administrative record is appropriate here with respect to assessment of the staging area selection issue. *See Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006) (recognizing that, in reviewing an agency decision, a court may allow "extra-record materials . . . if necessary to determine whether the agency has considered all relevant factors and has explained its decision"); *Midwater Trawlers Coop. v. Dep't of Commerce*, 393 F.3d 994, 1007 (9th Cir. 2004) ("We have permitted an agency to supplement an inadequate administrative record where [a court] has found that the existing record is insufficient to explain the agency's decision."). The extra-record information they have provided is not a new rationalization, but instead insight into the efforts and analysis they actually undertook in reaching their conclusion that 1950 Avenue of the Stars was an inappropriate or infeasible option as a staging area. Once the Court examines the history on this topic that is reflected in that material – and discussed *thoroughly* in the six lengthy briefs filed in advance of this hearing – it is clear to this Court that the Agencies sufficiently examined the issue.

Once again, this action does not present the question of whether this Court would have reached the same conclusion as the Agencies did here. Whether or not an agency "got the analysis right" or whether or not the Agencies made choices a plaintiff or a court would have made when supplied with the information gleaned through the process is simply *not* the issue. *See Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 878 F.3d 725, 730 (9th Cir. 2017) ("NEPA is concerned with process alone and 'merely prohibits uninformed – rather than unwise – agency action.'") (quoting *Robertson v. Methow Valley*

[1] Specifically, this includes the Declaration of Ashok Kothari in Support of Local Defendants' Remedy Brief (and attached exhibits), the Declaration of Tiffany K. Wright in Support of Local Defendants' Remedy Brief (and attached exhibits), paragraphs 14-17 of the Declaration of Patrick J. Meara in Support of Local Defendants' Remedy Brief, and Exhibit 1 (located at Docket No. 161-1) to the Declaration of Tiffany K. Wright Correcting Prior Declaration re Administrative Record.

Citizens Council, 490 U.S. 332, 351 (1989)). Thus, Plaintiff is mis-directed in its assertion that "[e]ven if the Proposed Supplement were to be accepted [for inclusion in the administrative record], it does not credibly explain how [the property owner's] development plans *justify the Agencies' conclusion* in the FSEIS that the property was unavailable." Docket No. 211, at 13:12-14 (emphasis added); *see also* Docket No. 216, at 1:6-7 ("These materials also do not explain or justify their conclusion that the property was or is unavailable."). Whether the Agencies' ultimate decision is *justified* is not for this Court to decide; the question is thoroughness of process, not wisdom of outcome. *See Robertson*, 490 U.S. at 350 ("NEPA itself does not mandate particular results, but simply prescribes the necessary process").

One reason Plaintiff believes the Agencies got the decision on this point wrong – which, again, is not the issue before the Court in a NEPA case – is that the Agencies *initially selected* 1950 Avenue of the Stars as the staging area. Thereafter, despite – in Plaintiff's view of the evidence – nothing meaningful changing about that property's availability, the Agencies later concluded selection of that property would be infeasible. For Plaintiff to prevail with respect to this contention, the Court would have to conclude that the Agencies necessarily *had* to conclude that the property was available, feasible and appropriate when they first planned to use it – in other words, that they could *not* reasonably have reached *any other conclusion*. Thus, their decision to the contrary later could not be justified. But it is not at all clear to this Court that the Agencies would not have been justified in reaching the conclusion *initially* that the property was *infeasible*, even if that is not the conclusion that they actually reached. Seen in that light, their later change to a conclusion that the property *was* infeasible – after more-strenuous and continued opposition from the owner of that property, and further thought into the difficulties any attempted property acquisition would entail – was not unjustifiable, Plaintiff's beliefs and arguments to the contrary notwithstanding.

Plaintiff also has not substantiated any proposition that NEPA's "hard look" requirement obligated the Agencies to have attempted to acquire – or to take internal steps leading up to such an attempt – 1950 Avenue of the Stars, either completely or by virtue of a temporary construction easement. Plaintiff cites to back-and-forth between the Court and the FTA's counsel at oral arguments held last year, but that questioning was an attempt

to understand what had happened (and what could still happen), not a recognition (much less an order or precedent) establishing what NEPA and its "hard look" standard *required*. *See* Declaration of Jennifer S. Recine (Docket No. 211-2), Exh. V (Docket No. 211-3) at 305-06, 308-11; *id.*, Exh. X (Docket No. 211-3) at 321-22.

Similarly, though Plaintiff frequently pejoratively refers to a "secret deal" between Metro and the owner of 1950 Avenue of the Stars that it believes it uncovered in the course of discovery,[2] the Court sees nothing nefarious about that "deal" – to refrain from pushing-through on the staging-area issue in exchange for the property owner's cooperation in locating the actual station and/or "station portal" there – nor any reason why its existence would interfere with the Agencies' ability to do what NEPA required of them. Again, having complied with the "hard look" requirement, it was for the Agencies to reach the ultimate decisions, both in terms of policy and otherwise, about what was the right course for them to take with respect to the selection of the staging area.

Having reached this conclusion, and incorporating its thoughts, analysis and explanations reflected in Docket Numbers 125 and 149, the Court grants summary judgment in favor of the Defendants and denies Plaintiff's motion for summary judgment.[3]

[2] Plaintiff actually takes the position that the administrative record should not be enlarged by any of the information learned through discovery. The Court agrees.

[3] Although it has zero impact on the Court's thinking on these motions, the Court can take judicial notice of the fact (reflected in the parties' briefs) that, due to the ongoing impact of the coronavirus/Covid-19, Beverly Hills High School is closed (and would be about to begin the Summer vacation period even if it were not closed). The Court would encourage the parties to act with all appropriate haste (and care) to accomplish as much construction activity adjacent to, or impacting upon, the high school as is possible during this unusual situation.