



OFFICE OF THE COUNTY COUNSEL
SOLANO COUNTY
675 TEXAS STREET, SUITE 6600
FAIRFIELD, CA 94533

Confidential/Attorney-Client Privileged

MEMORANDUM

TO: Michael Yankovich
FROM: Lee Axelrad, Deputy County Counsel *LA*
DATE: October 27, 2014
RE: Middle Green Valley Specific Plan – Measure L

The County has received a number of public comments regarding the relationship between the City of Fairfield's *Measure L* and the County's *Revised Recirculated Draft Environmental Impact Report for the Middle Green Valley Specific Plan* ("RRDEIR").

The gist of those comments is that Measure L imposes a limitation on the availability of potable water from the City.

At the present stage of environmental review of the Project, there is no reason for Measure L to be a further topic of comment or discussion. Comments concerning Measure L are no longer relevant to environmental review of the Project for several reasons, discussed below.

Comment 01-6

The comment says that "Per the Court's Ruling, the City of Fairfield's Measure L restricts the sale of the City's water to the Project on its face."

First, the sufficiency of the RRDEIR does not depend upon water being supplied by the City. The RRDEIR's analysis of water supply Option B points to a sufficient supply of groundwater. Option B does not involve the City of Fairfield. Comments concerning Measure L, therefore, could not undermine the RRDEIR's overall conclusion that a sufficient supply of water has been identified and analyzed. Even if Options A and C were somehow flawed due to Measure L, the viability of Option B would remain unaffected.

Second, although considerations concerning Measure L did have implications for the water supply analysis, those implications have already been addressed. Uncertainty associated with Measure L resulted in a need for the RRDEIR to analyze *one* alternative to water supply Option A, because Measure L raises questions about whether the City could legally supply water under Option A. But the RRDEIR not only analyzes one additional water supply alternative, it analyzes *two* more, for a total of three—Options A, B, and C. Further discussion and comment concerning Measure L at the present time would not somehow generate a still greater legal obligation for the RRDEIR to analyze four or more water supply options.

Third, the present comments regarding Measure L do not relate to an environmental issue. The RRDEIR is a document fulfilling legal requirements under the *California Environmental Quality Act* ("CEQA") and the water supply portion of the document is not required to focus on non-environmental issues such as the potential legal ramifications of Measure L.

Consequently, the comments received concerning Measure L no longer have any bearing on the required scope or overall sufficiency of the RRDEIR's water supply analysis.

Previously, Measure L was relevant, as it was discussed in the litigation concerning the EIR that was certified in July 2010.

In *Upper Green Valley Homeowners Association v. County of Solano* [Super. Ct. Solano County, 2011, No. FCS036446], the County's EIR for the Middle Green Valley Specific Plan was challenged on the ground that it had violated CEQA. Among other things, CEQA requires that the EIR, and now the RRDEIR, analyze the environmental effects of supplying water to the Project. The July 2010 EIR had analyzed only two options: groundwater (Option B) and City of Fairfield surface water (Option A). After hearing the case, the Court determined that the County's water supply analysis was legally inadequate.

In a ruling issued by the Superior Court on October 25, 2011, the County was directed to remedy the water supply analysis in the EIR. The Court's ruling pointed out that, under CEQA, "[w]here it is impossible to confidently determine that an anticipated water source will be available, an EIR must inform decision-makers, at least in general terms, of possible replacement sources and the consequences of using those replacement sources." (Ruling, at p. 4, citing *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 430-32.) The Court's ruling indicated that under this principle in some cases there may be a need for "finding of uncertainty[] and analysis of an alternative water supply," although the Court also emphasized that such a finding would not be needed concerning every type or degree of uncertainty. (Ruling, at p. 4.)

In the present case, with respect to Option A, the Court found that there was sufficient uncertainty to warrant a determination of uncertainty. More narrowly, although a sufficient quantity of water exists under Option A, the Court expressed concern regarding "legal uncertainty as to the ultimate availability of that water," due to Measure L. The Court's ruling stated that "While this Court offers no determination as to whether a legal challenge to such a sale of City of Fairfield water would be successful, the presence of Measure L creates such legal uncertainty as to the ultimate availability of that water that significant environmental review of an alternative water supply is required." (Ruling, at p. 5.) The Court thus ruled that "significant environmental review" of some water supply other than Option A is required to be included in the EIR.

The only other water supply option then appearing in the EIR, at the time of the Court's 2011 Ruling, was Option B (groundwater). The Court ruled that the analysis of groundwater that then appeared in the EIR was insufficient. The Court therefore ordered that a writ be issued directing the County set aside its approval of the EIR together with related approvals.

Following the Court's Ruling, the County then undertook significant revisions and improvements to the EIR's analysis of Option B (groundwater) and added a significant analysis of Option C (SID Surface Water), such that the EIR now provides significant environmental review of three water supply options, including two alternatives to Option A.

Measure L, therefore, was previously relevant as the consideration which led to at least one additional alternative source of water supply being analyzed. Now that two additional water supplies have *already* been analyzed in the RRDEIR, further discussion of Measure L at this time can have no meaningful purpose.

Accordingly, since the RRDEIR already provides significant environmental review of two alternatives to Option A, the comment has no bearing on the adequacy of the RRDEIR under

CEQA when the comment states that “Per the Court’s Ruling, the City of Fairfield’s Measure L restricts the sale of the City’s water to the Project on its face.”

Additionally, because the groundwater option (Option B) does not involve the City of Fairfield, Measure L would not represent an obstacle to supplying the Project with water, even if Measure L restricted the sale of City of Fairfield water to the Project. If it ultimately turned out later that there were some barrier to involving the City of Fairfield, due to Measure L or otherwise, the Project could pursue the groundwater option analyzed in the RRDEIR.

The RRDEIR discloses Measure L and its potential relationship to the Project. For example, the RRDEIR discloses Measure L, its effectiveness until 2020, the fact that the Urban Limit Line established under Measure L “can only be amended by the voters of the City of Fairfield or by the City Council under certain exceptions for open space land and provisions relating to Travis Air Force Base,” the fact that portions of the Specific Plan Area to be developed are outside Fairfield’s Urban Limit Line, and the fact that Measure L states that urban development requiring basic municipal services shall occur within the Urban Limit Line. (RRDEIR, § 16.1.2, at p. 16-24.)

The comment, however, suggests that the RRDEIR’s disclosure concerning Measure L is faulty because, according to the comment, “the ultimate decision-makers regarding whether water supply Option A is possible for the City are the City’s electorate.” The comment is there objecting to a passage in the RRDEIR which states that “City of Fairfield decision-makers will ultimately determine whether water supply Option A is possible for the City.” The comment suggests that the phrase “City of Fairfield decision-makers” is not accurate.

But the comment simply assumes, incorrectly, that the phrase “City of Fairfield decision-makers” necessarily excludes the electorate. However, in the same section on the same page that the phrase “City of Fairfield decision-makers” appears, the RRDEIR states that “[t]he Urban Limit Line can only be amended by the voters of the City of Fairfield or by the City Council under certain exceptions for open space land and provisions relating to Travis Air Force Base.” Both considered alone and read in the context of the remainder of the section, therefore, the phrase “City of Fairfield decision-makers” does not misstate Measure L’s status as a voter-approved initiative requiring a vote of the electorate of the City of Fairfield to change its express terms.

Moreover, the RRDEIR does not misstate who the ultimate “decision-makers” are, because the RRDEIR takes no position on that issue. Instead, the phrase “City of Fairfield decision-makers” is broad, and may encompass any person(s) with authority to “determine whether Option A is possible for the City.” CEQA does not require that the RRDEIR specify in greater detail who “City of Fairfield decision-makers” are or may be, and the phrase itself is not inaccurate in any way. The RRDEIR merely emphasizes that “Both the City’s initiative measures and the City’s general plan are matters for implementation by the City.” The RRDEIR, therefore, is not inaccurate.

The comment suggests that the RRDEIR fails to disclose that Measure L potentially restricts Options C1 and C2 because the City’s treatment of water is a “municipal service” within the meaning of Measure L.

The RRDEIR states that “The policy [i.e., Measure L] may pertain to Specific Plan water supply Option A, connection to the Fairfield municipal water supply, and the existence of the policy reduces the ability of the County to confidently determine that water supply Option A can occur (i.e., it creates uncertainty).” (RRDEIR, § 16.1.2, subd. (p), at p. 16-24.)

That disclosure's reference to Option A (City of Fairfield water) directly encompasses and applies to Option C2 as well. Option C2 merely combines SID surface water (Option C) for some units with City of Fairfield water (Option A) for other units. Therefore, as to Option C2, the comment is based on a mischaracterization of the RRDEIR.

The RRDEIR also discloses Measure L and its potential relationship to water supply for the project, including the fact that Measure L states that urban development requiring "basic municipal services" shall occur within the Urban Limit Line. (RRDEIR, § 16.1.2, at p. 16-24.) Therefore, Measure L and its relationship to the Project and the Project's water supply is adequately disclosed in a manner sufficient to facilitate meaningful review and public comment as required by CEQA, including comment as to whether there may be a potential relationship between Measure L and any water option involving the City, including both Options C1 and C2.

As with Option A, if Measure L did restrict Options C1 and C2, the result would be that, in addition to Options C1 and C2, the EIR would be required to analyze one additional source of water as an alternative or replacement source. The RRDEIR already goes further than that, however, and analyzes two additional sources of water: groundwater and City of Fairfield water. Because the RRDEIR analyzes three sources of water, and because groundwater does not involve the City of Fairfield in any way, the comment has no bearing on the adequacy of the RRDEIR under CEQA.

Having analyzed three water supply options, the RRDEIR could delete all mention of Measure L and would nonetheless comply with CEQA. As the Court pointed out earlier, the consequence of ignoring legal uncertainties in an EIR's analysis of one water supply source would be that the EIR "must provide a reasonable environmental analysis of a water supply alternative." (Ruling Regarding Motion for Reconsideration, at p. 3, citing *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412.) The RRDEIR already meets and exceeds that legal standard, having provided a reasonable environmental analysis of three water supply options.

Nonetheless, it may be further responsive to the comment for the passage on page 16-24 of the RRDEIR to being amended as follows:

- "The policy may pertain to Specific Plan water supply Option A, connection to the Fairfield municipal water supply, or the Option C options in which the City of Fairfield would treat SID water, and the existence of the policy reduces the ability of the County to confidently determine that water supply Option A or those Option C options can occur (i.e., it creates uncertainty)."

The comment states further that the County previously made certain arguments to the Court and suggests that the County is bound by "the law of the case." The doctrine of "law of the case" does not apply to the present situation, as there has been no appellate court decision concerning the Project, and "law of the case" only deals with the effect of an appellate court decision on a subsequent retrial or appeal. (9 Witkin, Cal. Procedure (5th Ed. 2008) Law of the Case, § 459, p. 515.) The principle of "law of the case" is a legal doctrine that applies when an appellate court issues an opinion in a case and states in its appellate opinion some principle of law that is necessary to that appellate decision, thereby rendering that legal principle "law of the case" which must be adhered to in all subsequent court proceedings, such as if the case is sent back to the trial court for further proceedings. The prior litigation in *Upper Green Valley Homeowners Association v. County of Solano* [Super. Ct. Solano County, 2011, No. FCS036446] resulted in a Ruling by the *Superior Court*, not by the Court of Appeal, and therefore does implicate the legal doctrine of "law of the case."

Moreover, even if the doctrine of “law of the case” were to apply, the Court’s Ruling in the prior litigation expressed no view regarding arguments that the County had made there as to Measure L’s constitutionality. The Court emphasized instead that “While this Court offers no determination as to whether a legal challenge to such a sale of City of Fairfield water would be successful, the presence of Measure L creates such legal uncertainty as to the ultimate availability of that water that significant environmental review of an alternative water supply is required.” (Ruling, at p. 5.) Later, after hearing a Motion for Reconsideration, the Court further emphasized that “this Court again confirms its intention not to rule on the constitutionality of Measure L.” (Ruling Regarding Motion for Reconsideration, at p. 2.)

The comment observes that the Court’s Ruling says that Measure L restricts the sale of the City’s water to the Project “on its face.” And the Court did say that Measure L “on its face restricts the ability of the City of Fairfield to provide water services beyond city limits.” (Ruling, at p. 5.) The Court’s Ruling, however, in no way prohibits the RRDEIR from analyzing the availability of water supply under options that involve the City of Fairfield. On the contrary, the Court’s Ruling required that the EIR *add* analysis of another option (not delete options involving the City). And the Court also emphasized that “this Court offers no determination as to whether a legal challenge to such a sale of City of Fairfield water would be successful” (Ruling, at p. 5.)

Comment 01-7

The comment states that Measure L is constitutional and that the City Fairfield must enforce Measure L unless the Court of Appeal rules that Measure L is unconstitutional.

The comment is not presently germane to any issue presented by environmental review of the Project under CEQA. Certification of the RRDEIR is an affirmation of the RRDEIR’s sufficiency under CEQA, not the unconstitutionality of Measure L. CEQA does not require that the RRDEIR express a view as to the constitutionality of Measure L, one way or the other, and it does not express any view on that point.

It is true, as the comment alludes, that the County made constitutional arguments about Measure L in litigation before the Superior Court, in the prior litigation concerning this Project, but those arguments have not been restated in the RRDEIR. Neither the EIR nor the RRDEIR takes a position concerning the constitutionality of Measure L.

The comment states “The County’s constitutional argument is misplaced in this setting.” The comment is not apt, since the County has made no constitutional argument “in this setting,” which is the consideration in the RRDEIR of an analysis of the Project’s environmental impacts under CEQA.

Although the County is silent in the RRDEIR on the constitutionality and legality of Measure L, that does not preclude the County from formulating and expressing a view at some future time as to the legality, constitutionality, or applicability of Measure L to the supply of water to the Project.

At such hypothetical future time, a discussion of Measure L might include a range of issues, which might include, for example, reference to: (i) Article XI, Section 9, of the California Constitution, which is a constitutional provision that cannot be removed by voter initiative, and which says that a municipal corporation may establish and operate public works to furnish its inhabitants with water and “may furnish those services outside its boundaries”; (ii) California Water Code section 382, subdivision (a), which says that “Notwithstanding any other provision of law, every local or regional public agency authorized by law to serve water to the persons or

entities within the service area of the agency may sell, lease, exchange, or otherwise transfer, for use outside the agency, . . . (1) Water that is surplus to the needs of the water users of the agency. (2) Water, the use of which is voluntarily foregone, during the period of the transfer, by a water user of the agency”; (iii) California Public Utilities Code section 1005, which says that “Whenever, in the operation of a utility, a municipality develops an excess of water . . . , over and above the amount which is necessary for the use of the municipality and its inhabitants, or such portion thereof as the legislative body of the municipality determines is to be supplied therewith, the municipality may sell, lease, or distribute the excess outside of its corporate limits.”

Other issues might include: (iv) the legal principle that an initiative may not interfere with the efficacy of an essential governmental power, including the power to manage fiscal affairs through administrative and executive acts (such as a city receiving payment for the provision/sale of water or water treatment services) a principle articulated in *Citizens for Jobs and the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311 and other cases; (v) the fact that Section SS.I-1 of the County General Plan, which voters confirmed through Measure T five years after voters adopted Measure L, states that the Middle Green Valley Specific Plan was to attempt to secure public water service “through a cooperative effort of property owners, residents, the County, and the City of Fairfield”; (vi) the fact that Measure L does not say that it applies to water sales or water treatment; and/or (vii) other arguments.

The comment refers to California Constitution Article 3, section 3.5, which provides that an administrative agency cannot declare a statute unconstitutional unless an appellate court has done so. That provision has no bearing on the certification of the RRDEIR because the certification of the RRDEIR is in no way an act of declaring Measure L unconstitutional or unenforceable. Also, in the case cited in the comment, *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, the Supreme Court said that the prohibition against administrative agencies declaring a statute unconstitutional may not apply in cases where the unconstitutionality of a statute is patent or clearly established, such as by prior judicial determinations in similar cases (an exception which may apply here). (*Id.* at p. 1102.) Additionally, the *Lockyer* case relates to local officials declaring state statutes unconstitutional, and the case may not address scenarios wherein local officials make determinations on the constitutionality of local ordinances in their own jurisdictions.

In any event, Article 3, section 3.5, does not prohibit a local official from considering whether a local ordinance would fail to comply with important general laws of the state that are statutory rather than constitutional. And, as indicated above, if the issue of Measure L became relevant later, there are numerous potential grounds other than constitutional grounds bearing on whether Measure L could be deemed to *not* limit City of Fairfield involvement in water supply for the Project, either based on Measure L’s express language or notwithstanding its express language.

The comment suggests that Option C is legally similar to Option A, and that Measure L restricts both. For the reasons explained above, the question of whether Measure L restricts any of the water supply options is not an issue that is presently relevant to the environmental review of the Project, because the RRDEIR now provides significant environmental review of three options for supplying water to the Project.

The comment suggests that Measure L is constitutional. For the reasons explained above, the constitutionality or unconstitutionality of Measure L is not an issue that is presently relevant to the environmental review of the Project, because the RRDEIR now provides significant environmental review of three options for supplying water to the Project.