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FILED

MAR 07 2017 

SAN LUIS OBISPO SUPERIOR COURT
BY 
K. Martindelcampo, Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

PHILLIPS 66 COMPANY, a Delaware Corporation,

Petitioner,

v.

COUNTY OF SAN LUIS OBISPO; COUNTY OF SAN LUIS OBISPO PLANNING COMMISSION; COUNTY OF SAN LUIS OBISPO DEPARTMENT OF PLANNING AND BUILDING; DIRECTOR OF PLANNING AND BUILDING FOR THE COUNTY OF SAN LUIS OBISPO; and DOES 1 through 10,

Respondents.

COUNTY OF SAN LUIS OBISPO BOARD OF SUPERVISORS and DOES 1 through 10,

Real Parties in Interest,

ENVIRONMENTAL DEFENSE CENTER, COMMUNITIES FOR A BETTER ENVIRONMENT, SIERRA CLUB, CENTER FOR BIOLOGICAL DIVERSITY, STAND.EARTH, SURFRIDER FOUNDATION,

Intervenors.

Case No.: 16CV-0502

RULING ON RESPONDENTS' DEMURRERS AND ON PETITIONER'S REQUEST TO STAY PROCEEDINGS BEFORE THE BOARD OF SUPERVISORS

1 ESHA.” However, the Final EIR issued in December 2015, concluded that “the potential
2 for Unmapped ESHA” exists and the “the Project site ... appears to meet the definition of
3 Unmapped ESHA.”

4 On February 4, 2016, the Planning Commission held its first hearing on the
5 Project. The Department’s Staff Report prepared for that first meeting determined the
6 Project site did in fact have Unmapped ESHA.

7 Petitioner “commented on the Department’s belated Unmapped ESHA
8 determination in written comments and at Planning Commission hearings, explaining that
9 the Unmapped ESHA determination was precluded by ... [CZLUO] section 23.11.030’s
10 express mandate that any Unmapped ESHA determination must be made at or before the
11 time of application acceptance, or not at all.” (Petition, ¶ 39.)

12 The Planning Commission held eight (8) hearings on the matter until October 5,
13 2016, when it denied the Project application, and adopted the Department’s
14 recommended “Findings for Denial,” many of which incorporated the Unmapped ESHA
15 determination.

16 On October 19, 2016, Phillips 66 appealed the Planning Commission’s denial to
17 the San Luis Obispo Board of Supervisors (“Board”). That same day, Phillips 66 filed,
18 with this Court, a Petition for a Traditional Writ of Mandate and a Complaint for
19 Declaratory and Injunctive Relief against the Department, the Planning Commission, and
20 the County of San Luis Obispo (collectively, “County”).

21 The petition asks the Court for a writ of mandate directing (1) the Department to
22 vacate the Unmapped ESHA determination, and instead make a determination that the
23 property at issue has no Unmapped ESHA;¹ and (2) the Planning Commission to set aside

24
25 ¹ At the hearing on February 16, 2017, Phillips 66 clarified that it was not asking the Court to order the
26 Department to make a new determination but to merely set aside the Unmapped ESHA determination
27 made in the February 4, 2016 Staff Report. As explained in its supplemental brief, Phillips 66 argues
28 that setting aside that determination would mean the Project site would default to a “no Unmapped
ESHA” designation without any further action or exercise of discretion by the Department. (Supp.
Opp., p. 2, ll. 17-26.)

1 its denial and reconsider the Project on the basis the property has no Unmapped ESHA.

2 In addition, the complaint seeks (1) a declaratory judgment that the Unmapped
3 ESHA ordinance is unconstitutional because it deprives applicants of a significant
4 property interest and is unconstitutionally vague; and (2) a preliminary or permanent
5 injunction prohibiting Respondents from enforcing the Unmapped ESHA ordinance.

6 On January 12, 2017, the Court granted a request by six environmental
7 organizations,² to intervene as respondents and defendants.

8 The County and the Intervenor both filed demurrers to the petition, which were
9 heard by the Court on February 16, 2017. At the end of the hearing, the Court allowed
10 further briefing on whether the timeframe referenced in CZLUO section 23.11.030 was
11 mandatory or directory. Petitioner submitted its supplemental brief on March 2, 2017. In
12 light of this ruling, the County and the Intervenor are excused from filing supplemental
13 briefs, the deadline for which was March 9, 2017. (Minute Order, 03/02/17.)

14
15 **III. Exhaustion of Administrative Remedies**

16 “In the absence of any exception, ‘the exhaustion of an administrative remedy is a
17 *jurisdictional prerequisite* to resort to the courts.’ [Citation.]” (*Thomas v. Shewry* (2009)
18 170 Cal.App.4th 1480, 1485 [emphasis in original].) The exhaustion requirement applies
19 to both administrative and traditional mandate. (*Lopez v. Civil Service Com. of City &*
20 *County of San Francisco* (1991) 232 Cal.App.3d 307, 324-315.)

21 One reason for the exhaustion requirement is to prevent litigants from short-
22 circuiting the agency process, thereby avoiding an agency decision to which the court
23 might later give deference. (Asimow, et al, *Cal. Practice Guide, Administrative Law* (The
24 Rutter Group 2016) §15.15.) To dispense with the exhaustion requirement, “would enable
25 litigants to narrow, obscure, or even omit their arguments before the final administrative
26

27 ² The six organizations are (1) Communities for a Better Environment, (2) Environmental Defense
28 Center, (3) Sierra club, (4) the Center for Biological Diversity, (5) Stand.earth, and (6) Surfrider
Foundation (collectively, “Intervenor”).

1 authority because they could possibly obtain a more favorable decision from a trial
2 court.” (*Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577,
3 594.)

4
5 **A. Phillips 66 Has Not Exhausted its Administrative Remedies with Respect to**
6 **the Timing of the Department’s Unmapped ESHA Determination.**

7 CZLUO section 23.01.042(b)(1)(i) provides for an appeal of specific Planning
8 Commission decisions, including “[d]eterminations [by the Department] on the meaning
9 or applicability of the provisions of this title which are believed to be in error, and cannot
10 be resolved with staff.”³

11 The crux of Petitioner’s argument is that the failure to make an Unmapped ESHA
12 determination before or at the time of application acceptance is preclusive and means no
13 Unmapped ESHA exists. (Opp., p. 11, ll. 19-20 [“because the determination came *after*
14 application acceptance, the Department had no jurisdiction to make it ...”]; Petition, ¶4
15 [the Department had a “mandatory duty to make an Unmapped ESHA determination (if
16 at all) only before or at the time of application acceptance].)

17 The meaning and effect of the phrase “*at or before the time of application*
18 *acceptance*” as used in CZLUO section 23.11.030, and whether that timeframe is
19 mandatory or directory, and thus, whether the Department could determine in its
20 February 4, 2016 Staff Report that the Project Site had Unmapped ESHA, appears to be
21 exactly the type of appealable decision contemplated by CZLUO section
22 23.01.042(b)(1)(i).⁴

23 ///

24
25 ³ This section was cited as a ground for demurrer by the Intervenor (Intervenor’s Demurrer, p. 2, ll. 1-
26 2), but not the County. At the February 16, 2017 hearing, Phillips 66 argued the Intervenor failed to
27 develop this theory which prevented Phillips 66 from providing a meaningful response. Regardless,
28 Petitioner addressed this subsection in its opposition (Opp., p. 21, ll. 10-21), and at the hearing before
the Court.

⁴ The use of the word “County” in CZLUO section 23.11.030, which includes the Board of Supervisors,
also appears to be subject to interpretation under CZLUO section 23.01.042(b)(1)(i).

1 Regardless, even if that inquiry does not fall within the purview of CZLUO
2 section 23.01.042(b)(1)(i), Phillips 66 raised the issue with the Planning Commission in
3 both written comments and at Planning Commission hearings (Petition, ¶ 39), and
4 Phillips 66 has not exhausted its administrative remedies with respect to the Planning
5 Commission's decision.

6
7 **B. Phillips 66 Has Not Exhausted its Administrative Remedies with Respect to**
8 **the Planning Commission's Denial of the Project.**

9 At the Planning Commission level, Phillips 66 argued "that the Unmapped ESHA
10 determination was precluded by ... [CZLUO] section 23.11.030's express mandate that
11 any Unmapped ESHA determination must be made at or before the time of application
12 acceptance, or not at all." (Petition, ¶39.)

13 The Planning Commission nonetheless denied the Project and adopted the
14 Department's Findings for Denial, which incorporated the Unmapped ESHA
15 determination. Phillips 66 contends that by doing so, the Planning Commission ratified
16 the Department's invalid action (i.e., the untimely Unmapped ESHA determination).
17 (Petition, ¶47.)

18 "Any decision of the Planning Commission" may be appealed to the Board.
19 (CZLUO §23.01.042(b)(2).) Here, Phillips 66 has in fact appealed the Planning
20 Commission's decision to the Board (County RJN, Ex. C)⁵ and the matter is set for
21 hearing.

22 Petitioner's argument that the Planning Commission's denial of the Project was
23 based on an invalid finding (because the timeframe set forth in CZLUO section 23.11.030
24 is a mandatory deadline) is an issue that is pending before the Board and should be
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26
27 ⁵ For purposes of the demurrers, the Court takes judicial notice of Exhibit C of the County's request for
28 judicial notice as well as each party's request for judicial notice of the relevant CZLUO sections. The
remainder of the requests for judicial notice are denied as they are immaterial to the Court's ruling.

1 addressed at the administrative level before it is brought to this Court.⁶ (See *Yamaha*
2 *Motor Corp. v. Superior Court* (1986) 185 Cal.App.3d 1232, 1240 [exhaustion doctrine
3 “draws on administrative expertise and promotes judicial efficiency.”])

4
5 **C. Phillips 66 Has Not Exhausted its Administrative Remedies with Respect to**
6 **its As-Applied Constitutional Challenge.**

7 “[C]onstitutional challenges are frequently raised to the application of an
8 administrative statutory scheme, yet the courts typically require such issues be presented
9 to the administrative agency in the first instance.’ [Citation.]” (*McAllister v. County of*
10 *Monterey* (2007) 147 Cal.App.4th 253, 276.)

11 Phillips 66 does not contend otherwise, but instead repeats its argument that there
12 are no administrative remedies available in which to raise the as-applied constitutional
13 challenge. As discussed above, CZLUO section 23.01.042 provides a process for such
14 review; and the matter is in fact pending before the Board.

15
16 **D. The Exhaustion Requirement Does Not Apply to Facial Constitutional**
17 **Challenges.**

18 Exhaustion of administrative remedies is not required when a plaintiff makes a
19 facial challenge to a statute being applied by an agency. (*Sail’er Inn, Inc. v. Kirby* (1971)
20 5 Cal.3d 1, 6-7 [challenge to provision prohibiting women from serving as bartenders].)

21
22 ⁶ Petitioner’s argument that the exhaustion requirement is excused because “no official, department, or
23 agency has any authority to make an Unmapped ESHA determination after application acceptance”
24 (i.e., subject matter jurisdiction) is unavailing. (Opp., p. 24, l. 27-28.) The cases cited by Phillips 66
25 involved stronger jurisdictional arguments. (See *Coachella Valley Mosquito & Vector Control Dist. v.*
26 *Cal. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1081-1082 [statute of limitations had
run depriving agency of jurisdiction]; *Security Nat’l Guaranty, Inc. v. Cal. Coastal Com.* (2008) 159
Cal.App.4th 402, 422-423 [Coastal Commission exercised powers that Legislature has expressly
allocated to local government].)

27 In contrast, this case concerns interpretation of a local ordinance (i.e., the Unmapped ESHA definition)
28 which is within the purview of the Board; and the Board’s interpretation will be entitled to deference.
(*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12 [“agency is likely to be
intimately familiar with regulations it authored and sensitive to the practical implications of one
interpretation over another.”])

1 This is because the state's Constitution prohibits administrative agencies from declaring a
2 statute unconstitutional. (Cal. Const. Art. III, §3.5.)

3 The constitutional exception to the exhaustion of remedies requirement has been
4 held not to apply if an agency decision favorable to the litigant on a non-constitutional
5 issue would dispose of the case. (*Leek v. Washington Unified School District* (1981) 124
6 Cal.App.3d 43, 53.) Although the County cites the rule stated in *Leek, supra*, it does not
7 sufficiently explain how the rule applies to the facial constitutional challenge stated in the
8 second cause of action.

9 The demurrers to the facial constitutional challenge are therefore overruled.

10 11 **IV. Ruling on the County's and Intervenors' Demurrers**

12 The County's and the Intervenors' demurrers to the first cause of action are
13 sustained without leave to amend on the ground that Phillips 66 has not exhausted its
14 administrative remedies. The demurrers to the as-applied constitutional challenge in the
15 second cause of action are likewise sustained without leave to amend on the ground
16 Phillips 66 has not exhausted its administrative remedies.

17 The demurrers to the facial constitutional challenge are overruled. Petitioner is
18 instructed to file an amended petition which sets forth the facial challenge as a separate
19 cause of action as discussed at the hearing on February 16, 2017.

20 21 **V. Petitioner's Motion to Stay**

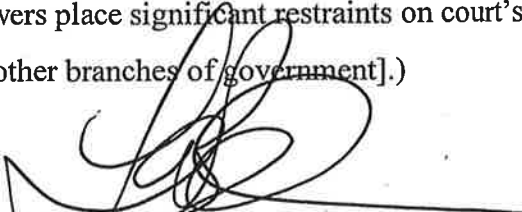
22 In its appeal to the Board, Phillips 66 requested a stay of the administrative
23 proceedings pending resolution of this litigation. Despite the request, the Board
24 scheduled a hearing on the matter for March 13, 2017, to continue through March 17,
25 2017, if necessary.

26 In response, Phillips 66 filed a motion with this Court asking it to stay the Board's
27 proceedings. The Court heard Petitioner's motion on March 2, 2017, and took the matter
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In light of the Court's ruling on the County and Intervenors' demurrers, the motion to stay is moot; and the Court will not interfere with the proceedings pending before the Board. (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1464 ["principles of comity and separation of powers place significant restraints on court's authority" to order injunctive relief against other branches of government].)

DATED: March 7, 2017



BARRY T. LA BARBERA
JUDGE

BTL:jn

**STATE OF CALIFORNIA, COUNTY OF SAN LUIS OBISPO
CERTIFICATE OF MAILING**

Phillips 66 Company vs. County of San Luis Obispo

16CV-0502

Paul James Beard II
ALSTON & BIRD LLP
1115 11th Street
Sacramento CA 95814

Roger Lin
1904 Franklin St Ste 600
Oakland CA 94612

Linda J Krop
906 Garden St
Santa Barbara CA 93101

Matthew William Christen
45 Fremont St Ste 2000
San Francisco CA 94105

I, Kathy Martindelcampo, Deputy Clerk of the Superior Court of the State of California, County of San Luis Obispo, do hereby certify that I am over the age of 18 and not a party to this action. Under penalty of perjury, I hereby certify that on **03/07/2017** I deposited in the United States mail at San Luis Obispo, California, first class postage prepaid, in a sealed envelope, a copy of the attached **RULING ON RESPONDENTS' DEMURRERS AND ON PETITIONER'S**

REQUEST TO STAY PROCEEDINGS BEFORE THE BOARD OF SUPERVISORS. The foregoing document was addressed to each of the above parties.

OR

If counsel has a pickup box in the Courthouse a copy was placed in said pickup box this date.

Dated: 3/7/2017

Michael Powell, Clerk of the Court

By: /s/ Kathy Martindelcampo Deputy Clerk
Kathy Martindelcampo