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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PARKS LEGAL DEFENSE FUND et al., Plaintiffs and Appellants, v. THE CITY OF HUNTINGTON BEACH et al., Defendants and Appellants.	G043109 (Super. Ct. No. 30-2008-00051261) O P I N I O N

Appeals from a judgment of the Superior Court of Orange County, David C. Velasquez, Judge. Affirmed in part, reversed in part.

Jennifer McGrath, City Attorney, Scott F. Field, Assistant City Attorney and John M. Fujii, Deputy City Attorney; Greines, Martin, Stein & Richland and Alison M. Turner for Defendants and Appellants.

Poole & Shaffery, Law Office of Mark J. Skapik, Mark C. Allen III and Geralyn L. Skapik for Plaintiffs and Appellants.

* * *

Parks Legal Defense Fund and a number of individuals (collectively Parks) filed a petition for a writ of mandate (petition) seeking injunctive and declaratory relief challenging the City of Huntington Beach's (the City) decision to build a senior center on open land in Central Park. The petition contained four causes of action. As to the second cause of action, the superior court denied petitioner's request to require the voters to approve the project a second time, as time-barred. The court granted Parks' request for relief on the remaining causes of action. Parks and the City each appeal from the part(s) of the judgment adverse to their position.

I

FACTS

In June 2005, the City hired an architectural firm to study the feasibility of constructing and operating a new senior center based upon the growth of the City's senior population. The City anticipated a 64 percent increase in the senior population to over 50,000 by 2010. The March 2006 feasibility study concluded a building in excess of 45,000 square feet would be required to meet the needs of the senior community. The preferred site for the senior center is in the City's Central Park.

Before the City may construct in a city park any building in excess of 3,000 square feet or at a cost of more than $100,000, the City Charter requires an "affirmative vote of at least a majority of the electors voting on such proposition at a general or special election at which such proposition is submitted." (H.B. Charter, § 612(b).) On July 17, 2006, the City ordered Measure T placed on the ballot. The ballot measure read: "Shall a centrally located senior center building, not to exceed 47,000 square feet, be placed on a maximum of five acres of an undeveloped 14-acre parcel in the 356-acre Huntington Beach Central Park, generally located west of the intersection of Goldenwest Street and Talbert Avenue, between the disc golf course and Shipley Nature Center, following City Council approval of all entitlements and environmental review?" (Italics

omitted.) The Huntington Beach voters passed the measure on November 7, 2006. The City subsequently began its environmental impact study.

Earlier that year, on October 16, 2006, the City entered into an agreement with the developer of the Pacific City Project, Makalon Atlanta Huntington Beach, LLC. (developer), whereby the developer would construct the proposed senior center with in-lieu fees assessed pursuant to the Quimby Act. (Gov. Code, § 66477 et seq.) Under the Quimby Act, a city may require a developer to dedicate an amount of land or pay fees in-lieu thereof for park or recreational purposes as a condition to the approval of a tentative map or parcel map. (Gov. Code, § 66477, subd. (a).) The Pacific City Project involved the proposed construction of a 165 room boutique hotel, 163,000 square feet of retail stores, 12,000 square feet of restaurants, a 2.0 acre open space/park, and 516 condominium units in the "Main-pier sub-area of the Huntington Beach Redevelopment Project" adjacent to Pacific Coast Highway. The proposed senior center location is a straight-line distance of 2.95 miles from the northwest corner of the Pacific City Project.

On February 20, 2007, the City contracted EIP Associates/PBS&J to prepare an environmental impact report (EIR) for the new senior center on a five-acre site within the 356-acre Huntington Central Park. The City gave notice on September 17, 2007, that a draft EIR had been prepared for an approximately 45,000 square feet senior center on undeveloped land within Central Park and of the public comment period. The location was zoned as a low intensity recreation area, which permitted "barbeque and picnic amendities, a restroom, tot-lot, open turf area, and parking uses."

A number of individuals voiced their opposition to the project and EIR. Opposition grounds included the failure to consider alternative sites and that the proposed in-lieu funding violated the Quimby Act.

The City's planning commission certified the final EIR and approved a conditional use permit (CUP) on December 11, 2007. The final EIR consisted of the draft EIR with text changes and responses to comments. The mayor appealed the

decision. On February 4, 2008, after a public hearing on the appeal, the city council voted to approve the resolution certifying the final EIR and approved the CUP for the senior center.

Parks filed a petition on March 4, 2008. The petition alleged the City's certification of the EIR violated the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.),[1] inter alia, in that it failed to consider "a reasonable range of alternatives" including possible school sites that became available after the draft EIR was prepared, but before certification of the final EIR.

The second cause of action alleged the City violated CEQA and City Charter section 612 by purporting to approve the project without voter approval as required by the City Charter. The petition alleged the voters' action in approving Measure T in 2006 was not final approval. The third cause of action alleged the City violated its general plan and failed to modify the general plan or its zoning ordinance to accommodate the proposed senior center. The fourth cause of action sought declaratory relief and alleged the City's intended use of park in-lieu fees to fund construction of the proposed senior center violated the Quimby Act.

The superior court bifurcated the trial on the petition. On February 10, 2009, the court held the second cause of action was time-barred under section 21167, subdivision (a) and Government Code section 65009, subdivision (c)(1). It found that in certifying the EIR the City abused its discretion by failing to proceed in the manner provided by law and the City's findings regarding the lack of feasible alternative sites lacked substantial evidence. The court also found the EIR failed to discuss the consequences to the City of open space park land and the loss of funds to replace the land because the City planned to divert the in-lieu funds to finance the senior center rather than replenish the lost open space. The court also found the CUP was issued in violation

[1] All further statutory references are to the Public Resources Code, unless otherwise stated.

of the City's general plan. Lastly, the court found that use of in-lieu funds from the Pacific City project to finance the senior citizen center violated the Quimby Act because (1) the funds were not intended to be used to provide for park and open space land, and (2) using the entire in-lieu fee to pay for 100 percent of the cost of building the senior citizen center bore no reasonable relationship to the degree to which the future inhabitants of the Pacific City project would use the center. The court found that in all other respects, the City did not abuse its discretion in certifying the EIR.

The court directed the City to set aside and vacate the EIR for the proposed senior center in Central Park, all actions of the city council on Feburary 4, 2008 regarding the proposed senior center, and the issuance of the CUP. The court further found the senior center may not be funded by the in-lieu fees without violating the Quimby Act and the City's enabling ordinance, Huntington Beach Municipal Code section 254.08.

II

DISCUSSION

A. *Rules Applicable to CEQA Review*

"CEQA is a comprehensive scheme designed to produce long-term protection to the environment. [Citation.]" (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 112.) The Legislature has enacted CEQA Guidelines to be followed in the process. (Cal. Code Regs., tit. 14, § 15000 et seq.)[2] "These Guidelines are binding on all public agencies in California." (Guidelines, § 15000.) CEQA requires "that major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian." (§ 21000, subd. (g).) The public policy behind CEQA includes the idea "that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects

[2] All references to "Guidelines" are to the State CEQA guidelines, which implement CEQA. (Cal. Code Regs., tit. 14, § 15000 et seq.)

of such projects . . . ." (§ 21002.) CEQA therefore requires the public agency to "mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so." (§ 21002.1, subd. (b).)

The "heart and soul of CEQA" is the EIR. (*Planning & Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 911.) "Whenever a project may have a significant and adverse physical effect on the environment, an EIR must be prepared and certified. [Citations.]" (*Mountain Lion Foundation v. Fish & Game Com.*, *supra*, 16 Cal.4th at p. 113.) The EIR's function is "to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided." (§ 21002.1, subd. (a).)

Additonally, the EIR "inform[s] the public and its responsible officials of the environmental consequences of their decisions *before* they are made. Thus, the EIR 'protects not only the environment but also informed self-government.' [Citation.]" (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 (*Goleta II*).) Our review of the City's certification of the EIR for the senior center is "limited to deciding 'whether there was a prejudicial abuse of discretion . . . [which] is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.' [Citation.]" (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 823.) "Generally speaking, an agency's failure to comply with the procedural requirements of CEQA is prejudicial when the violation thwarts the act's goals by precluding informed decisionmaking and public participation. [Citations.]" (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist*. (2006) 139 Cal.App.4th 1356, 1375.) "'Substantial evidence is defined as 'enough relevant information and reasonable inferences from [the information supplied by the EIR] that a fair argument can be made to support a conclusion, even though other conclusions might

also be reached.'" [Citations.] . . . "Substantial evidence shall include facts, reasonable assumptions predicated on facts, and expert opinion supported by facts."' [Citation.] 'In determining whether substantial evidence supports a finding, the court may not consider or reevaluate the evidence presented to the administrative agency. [Citation.] All conflicts in the evidence and any reasonable doubts must be resolved in favor of the agency's findings and decision. [Citation.] [¶] In applying that standard, rather than the less deferential independent judgment test, "the reviewing court must resolve reasonable doubts in favor of the administrative findings and decision."' [Citation.]" (*Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 596.) In any action reviewing a public agency's decision relating to a CEQA determination, "the court shall not exercise its independent judgment on the evidence but shall only determine whether the act or decision is supported by substantial evidence in the light of the whole record." (§ 21168.)

"[A] court's proper role in reviewing a challenged EIR is not to determine whether the EIR's ultimate conclusions are correct but only whether the EIR is sufficient as an informational document. [Citation.]" (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 407 (*Laurel Heights*).) "We may not, in sum, substitute our judgment for that of the people and their local representatives. We can and must, however, scrupulously enforce all legislatively mandated CEQA requirements." (*Goleta II*, *supra*, 52 Cal.3d at p. 564.)

B. *Sufficiency of the EIR*

1. *Alternative Sites*

"The core of an EIR is the mitigation and alternatives section." (*Goleta II*, *supra*, 52 Cal.3d at p. 564.) The petition asserted and the superior court found that the EIR failed to adequately discuss feasible alternative sites for the senior center. The draft EIR considered the following possible alternatives to the project: (1) continued uses

allowed by the general and master plans, which would prohibit building the senior center in the park; (2) reducing the size of the proposed senior center from 45,000 to 30,000 square feet and building the center at the location of the Rogers Senior Center; (3) development of "multiple, smaller-scale senior centers throughout the City"; and (4) an alternative site for the senior center, again in Central Park, at the northwest corner of Ellis Avenue and Goldenwest Street. The proposed location for the senior center and the alternative site each consist of open space in Central Park. Although the initial feasibility study conducted in 2006 acknowledged the potential use of closed school sites as alternative locations for the senior center, the EIR did not discuss the use of such sites as alternative locations.

A number of citizens voiced their concern about the draft EIR's failure to consider closed school sites, including the Kettler School property, as possible alternative locations for the senior center. The 2006 initial feasibility study specifically discussed the Kettler School site. The study noted that "[g]iven the significant amount of acreage, the option exists to develop either the main campus . . . or the school play fields adjacent to Edison Park, . . ." The response (see Guidelines, § 15088, subd. (a)) to the suggestion of the citizens was: "The school district board has not yet declared the Kettler School property surplus. Therefore, the City does not have the option to purchase the property under the Naylor Act. Consequently, the Draft EIR did not evaluate this property as an alternative site because the City's ability to purchase it is speculative."

"An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project, and evaluate the comparative merits of the alternatives." (Guidelines, §§ 15126.6, subd. (a), 15364.) "'A local agency must make an initial determination as to which alternatives are feasible and which are not. [Citation.] If an alternative is identified *as at least potentially feasible*, an in-depth discussion is required. [Citation.] On the other hand, when the infeasibility of an alternative is readily apparent, it "need not

be extensively considered."' [Citation.] 'Even as to alternatives that are rejected, however, the "EIR must explain why each suggested alternative either does not satisfy the goals of the proposed project, does not offer substantial environmental advantages[,] or cannot be accomplished."' [Citation.]" (*Center for Biological Diversity v. San Bernardino* (2010) 185 Cal.App.4th 866, 883, italics added.)

The Kettler School site had aspects that recommend it as a possible alternative site for the project. According to the City's 2006 initial feasibility study, Kettler School would accommodate the proposed building, exterior programs, and future expansion. It has parking, would benefit from being close to Edison Park, is adjacent to compatible park uses, has significant vegetation, mature trees, and has potential compatibility with the Edison Community Center. Because it has already been developed, building the senior center at the school site would arguably reduce certain adverse environmental impacts that would occur with building the center in the park. (§ 21002; Guidelines, § 15126.6, subds. (a), (b).) "[T]he discussion of alternatives shall focus on alternatives to the project or its location which are capable of avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly." (Guidelines, § 15126.6, subd. (b).) Thus, if feasible, the EIR should have discussed the alternative in detail. (*Goleta II*, *supra*, 52 Cal.3d at p. 566 [EIR must consider alternative location which offers substantial environmental advantage and may be feasibly accomplished].)

The question then, is whether the Kettler School was a feasible alternative site within the meaning of CEQA. More specifically, given the favorable information relating to that site in the initial feasibility study, did the fact that the school district had not declared Kettler School as surplus property at the time of the draft EIR make the site infeasible?

The Naylor Act (Ed. Code, §§ 17485 et seq., formerly Ed. Code, §§ 39390 et seq.) "governs the disposal of certain kinds of surplus school property." (*City of Moorpark v. Moorpark Unified School Dist.* (1991) 54 Cal.3d 921, 923.) "The net effect of the Act is to make surplus school property available to local communities at less than present market value, while assuring that participating school districts recover at least the cost of acquiring the property." (*Id*. at pp. 923-924) If a school district decides to sell or lease surplus property, that land must first be offered to the city in which it is situated. (Ed. Code, § 17489, subd. (a).) With certain allowances, the sale price may not exceed the school district's cost of acquisition, and may be as low as 25 percent of market value. (Ed. Code, § 17491, subd. (a).)

For CEQA purposes, "'[f]easible' means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (§ 21061.1.) The fact that the City did not own a particular parcel of property at a given moment does not necessarily make the location an infeasible alternative. CEQA does not require the alternative be immediately available, only that it be "capable of being accomplished in a successful manner within a reasonable period of time." (§ 21061.1.) Whether an alternative site is owned by the proponent of the project is "simply a factor" to be considered in determining feasibility. (*Goleta II*, *supra,* 52 Cal.3d at p. 575, fn. 7; Guidelines, §15126.6, subd. (f)(1) [whether site is owned by proponent is "[a]mong the factors that may be taken into account when the feasibility of alternatives"].) In *Goleta II*, the court recognized that even in situations where the proponent of a project is a private party that owns the proposed location of a project, there still may be cases "in which the consideration of alternative sites is necessary and proper." (*Goleta II*, *supra*, 52 Cal.3d at p. 575.) Those instances are necessarily increased when the proponent is a governmental agency. "Understandably, the government's power of eminent domain and access to public lands suggest that alternative sites may be more feasible, more often, when the developer is a public rather

than a private agency." (*Id*. at p. 574.) The guidelines require the EIR to discuss "acquisition" when relevant. (Guidelines, § 15126; see *San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 751 [EIR defective for failure to discuss possibility of land trade between private developer and United States Forest Service].)

The City argues the possibility of acquiring any of the school sites was too speculative to require in-depth discussion by the EIR, because the school district had not offered to sell surplus property and the City's ability to purchase such property, even at (well) below market rates was uncertain. Had the City inquired of the school district and been informed the locations are not for sale, the point might be well taken. However, it does not appear the City ever inquired. The latter claim — the City's ability to purchase school sites at below market rates was uncertain — rings hollow, given the City's December 3, 2007 decision to approve its November 2007 surplus school property purchasing plan, which included a recommendation to purchase 7.73 acres of the Kettler School property, a total of 24.6 acres from three other school sites, and directed the City's staff to update the plan as new sites are identified as surplus.

Given the fact that the Kettler School site may have been available at well below market value — not to mention the fact that the site had been considered as a potential site in the initial feasibility study — it must be concluded the site was at least "potentially feasible." The EIR's failure to discuss the Kettler site, as well as the other closed school sites that may have been available as alternative locations rendered the EIR deficient as an informative document. (*Goleta II*, *supra*, 52 Cal.3d at p. 564.) As a result, the City's certification of the final EIR was a prejudicial abuse of discretion, requiring the certification be set aside.

2. *Failure to Consider Loss of Open Land or Purchase of Open Land*

The superior court found the EIR failed to accurately describe the project in that the City incorrectly presumed the land in Central Park upon which the senior center is to be constructed "has no value, is underused land, is surplus land, or is vacant land. However, the City's General Plan and its Central Park Plan demonstrate the importance to the City of park land and open space land within the city." The court noted that if the City were to use all the in-lieu funds from the Pacific City project to build the senior center, the net result is a loss of open space not only within Central Park, but also within the City as a whole. The EIR failed to discuss the environmental impact to the park and the city caused by the redirection of the in-lieu funds away from the purchase of open space toward construction of the senior center.

We agree with the City that the EIR adequately described the loss of open space in Central Park. The EIR did not, however, discuss the loss of open space throughout the City, caused by the City's use of all the Quimby Act funds to construct the senior center instead of creating more open space. (See Guidelines, § 15131.)

With regard to the loss of open space, the EIR states: "Currently, 231 acres, or 65 percent, of Central Park are developed or planned for use as passive recreational areas. The change from passive to active at the project site would represent a 2 percent reduction of passive recreational space in Central Park . . . ." It also observed that building the senior center in the park would "reduc[e] the amount of undeveloped open space within Central Park" and concluded, "[t]his would be considered a significant cumulative impact of the proposed project."

As noted above, the City did approve a plan in December 2007 to purchase surplus school property. The purchase of 10.6 acres for park open space was included in the plan. That plan which might have provided an alternative site for the senior center was not included in the EIR. The EIR should have addressed whether use of all the in-lieu fees from the Pacific City project ($20 to $25million) as funding for the senior center

was likely to affect the City's ability to acquire open land to replace the acreage lost by building the senior center.

3. *The Raptors* (*Birds of Prey*)

The EIR found "[d]evelopment of the proposed project would have a substantial adverse impact to raptor foraging habitat" and urged implementation of a mitigation measure that included "dedication as open space, conservation and/or enhancing areas of raptor foraging habitat at a ratio of 1:1 for acres of impact on raptor foraging habitat to provide suitable habitat values and functions for raptors." The mitigation measure further provided that enhancement "would include, but not be limited to, the planting of native trees within and adjacent to conserved areas of raptor foraging habitat."

Parks contends that as it relates to the issue of the impact on raptors, the EIR was defective because there was no evidence the mitigation measure will mitigate the impact on the raptors. It is not the City's burden to demonstrate the mitigation measure was sufficient. As we have stated before, "Where an EIR is challenged as being legally inadequate, a court presumes a public agency's decision to certify the EIR is correct, thereby imposing on a party challenging it the burden of establishing otherwise. [Citations.]" (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 530.) Parks has not carried its burden on this issue.

C. *Measure T Statute of Limitations*

The second cause of action alleged the City violated CEQA and section 612 of the City's Charter by "purporting to finally approve the project without a vote of the people as required by" section 612 of the City's Charter. As noted above, the issue was put to the voters in 2006 as Measure T and was approved by the voters on November 7, 2006. That vote was without benefit of an EIR. If the vote was an approval

of a "project" for CEQA purposes, section 21167, subdivision (a) required any action to be filed within 180 days of the approval, a date that expired prior to the filing of the present petition.

As a public agency generated initiative, Measure T was not exempt from CEQA compliance. (*Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 171.) The vote committed the City to going forward with the project. The petition, claiming an EIR was required before putting the matter to a vote, was not filed until March 2008, and is untimely under section 21167. That section requires an action alleging "that a public agency is carrying out or has approved a project that may have a significant effect on the environment without having determined whether the project may have a significant effect on the environment shall be commenced within 180 days from the date of the public agency's decision to carry out or approve the project." (§ 21167, subd. (a).) To the extent the second cause of action challenges the CUP on the ground that the voters were not provided an EIR before Measure T was voted on, Parks challenges the City's "proceedings, acts or determinations taken, done, or made prior to" the issuance of the CUP. (Gov. Code, 65009, subd. (c)(1)(F).) That being the case, the cause of action accrued in 2006, when the City put Measure T on the ballot. Section 65009's time limit, 90 days, expired prior to the filing of the instant petition in 2008. (Gov. Code, § 65009, subd. (c)(1).) According, the trial court did not err in concluding the second cause of action was time-barred.

D. *The CUP and Violation of the City's General Plan*

Government Code section 65300 requires every city to "adopt a comprehensive, long-term general plan for the physical development of the . . . city." The general plan must include: "A land use element that designates the proposed general distribution and general location and extent of the uses of the land for housing, business, industry, open space, including agriculture, natural resources, recreation, and enjoyment

of scenic beauty, education, public buildings and grounds, solid and liquid waste disposal facilities, and other categories of public and private uses of land." (Gov. Code, § 65302, subd. (a).) As we observed in *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, "The general plan functions as a '"constitution for all future developments,"' and land use decisions must be consistent with the general plan and its elements. [Citation.]" (*Id*. at p. 782.) A project must be compatible with the policies and objectives of the general plan, but "[p]erfect conformity is not required." (*Ibid*.)

"We review decisions regarding consistency with a general plan under the arbitrary and capricious standard. These are quasi-legislative acts reviewed by ordinary mandamus, and the inquiry is whether the decision is arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair. [Citations.] Under this standard, we defer to an agency's factual finding of consistency unless no reasonable person could have reached the same conclusion on the evidence before it. [Citation.]" (*Endangered Habitats League, Inc. v. County of Orange*, *supra*, 131 Cal.App.4th at p. 782, fn. omitted.)

The superior court found the CUP violated the City's general plan. That plan requires "structures located in the City's parks and open spaces be designed to maintain the environmental character in which they are located" (Huntington Beach General Plan, LU 14.1.3, II-LU-44, and the City to acquire and develop its "parks in accordance with the Parks and Recreation Element of the General Plan." (Huntington Beach General Plan, LU 14.1.5, II-LU-44.) The recreation element of the general plan, recognizes "[a]ll designated park lands need to be preserved with proper land use designation." (Huntington Beach General Plan, III-RCS-6.) The recreation element further required development of system wide parks and recreation master plan "incorporate[ing] the Central Park Master Plan." (Huntington Beach General Plan, I-RSC 4, III-RCS-17.) The Central Park master plan in turn designated the land where the senior center is proposed to be built as a low intensity recreation area, which would

permit picnic and barbeque amenities, tot-lot, restrooms, open turf area, and parking uses. The project would result in high intensity use.

The City claims that while it recognizes the project is inconsistent with the low intensity designation by the Central Park master plan, the park's general plan is not part of the City's general plan, and an amendment of the park plan after issuance of the CUP to bring the CUP into compliance with the park general plan is permissible. It is not.

The City's general plan specifically required the parks and recreation master plan to incorporate the Central Park master plan. As stated above, a general plan functions as a constitution for all future developments, and compliance with the Central Park master plan was, in effect, constitutionally compelled. The government may not justify the violation of a constitutionally compelled provision because it intends to subsequently amend its constitution. It must comply with the law as presently enacted. The trial court properly found the CUP violated the City's general plan.

E. *Declaratory Relief* (*Quimby Act*)

Subject to conditions not present here, "[t]he legislative body of a city or county may, by ordinance, require the dedication of land or impose a requirement of the payment of fees in lieu thereof, or a combination of both, for park or recreational purposes as a condition of the approval of a tentative map or parcel map." (Gov. Code, § 66477, subd. (a).) "This section shall be known . . . as the Quimby Act." (Gov., Code, § 66477, subd. (g). The purpose of Quimby Act in-lieu fees is to "maintain and preserve open space for the recreational use of the residents of new subdivisions." (*Home Builders Assn. of Tulare/King Counties, Inc. v. City of Lemoore* (2010) 185 Cal.App.4th 554, 566.) The City's Quimby Act ordinance declares the City has determined "that the public interest, convenience, health, safety and welfare require five acres of property for

each 1,000 persons residing within the City be devoted to local park and recreational purposes." (Huntington Beach Zoning and Subdivision Ord., § 254.08C.)

As stated above, the City intends to fund construction of the new 45,000 square foot senior center, including banquet facilities and meeting rooms, with all or substantially all of the $20 to $25 million in-lieu fees from the Pacific City Project. The superior court granted Park's request for declaratory relief and held use of the in-lieu funds violates the Quimby Act for "for two reasons: Firstly, the funds are not intended by the City to be used to provide for park and open space, and secondly, using the entire [sum of] in lieu fees to pay for 100 [percent] of the cost to build the senior center bears no reasonable relationship to [the] degree to which the proposed senior center will be used by the future inhabitants of the Pacific City project." The court also found "the proposed senior center building and its intended usage does not satisfy the customary notion of a park." The City contends the Quimby Act does not require use of fees toward what would customarily be considered a park, the senior center is a recreational facility, the Quimby Act expressly authorizes use of in-lieu fees for the development of recreation facilities, and the senior center would serve Pacific City residents. We need not address these issues because we agree with the City's contention that Parks' declaratory relief action is time-barred.

Government Code section 66499.37 provides: "Any action or proceeding to attack, review, set aside, void, or annul the decision of an advisory agency, appeal board, or legislative body concerning a subdivision, or of any of the proceedings, acts, or determinations taken, done, or made prior to the decision, *or to determine the reasonableness, legality, or validity of any condition attached thereto*, including, but not limited to, the approval of a tentative map or final map, shall not be maintained by any person unless the action or proceeding is commenced and service of summons effected within 90 days after the date of the decision. Thereafter all persons are barred from any action or proceeding or any defense of invalidity or unreasonableness of the decision or

of the proceedings, acts, or determinations. The proceeding shall take precedence over all matters of the calendar of the court except criminal, probate, eminent domain, forcible entry, and unlawful detainer proceedings." (Italics added.)

The City issued the CUP for construction of the senior center on February 4, 2008. The trial court found the issuance of that CUP triggered the 90-day period under Government Code section 66499.37 and thus, Parks' petition was timely filed. Here the trial court erred. While the CUP was the triggering event for purposes of other issues raised in the petition, it was not the triggering event for purposes of determining the propriety of the Quimby Act provision imposed on the developer of the Pacific Center in 2006.

In *Timberidge Enterprises, Inc. v. City of Santa Rosa* (1978) 86 Cal.App.3d 873 (*Timberidge Enterprises, Inc.*), the City of Santa Rosa enacted a resolution adopting a school impact fee that could be imposed upon the city's approval of a subdivision map. The purpose of the fee was to alleviate overcrowding of schools caused by a new subdivision. The City of Santa Rosa imposed the fees on the plaintiffs as a condition of its approval of subdivisions to be developed by the plaintiffs. (*Id*. at p. 877.) The plaintiffs brought an action to declare the resolution and the fees imposed invalid. (*Ibid*.)

The City of Santa Rosa contended the action was untimely under Government Code section 66499.37. (*Timberidge Enterprises, Inc.*, *supra,* 86 Cal.App.3d at p. 885.) The superior court rejected that argument and concluded the statute did not commence to run until such time as the fees were paid. The appellate court reversed. It found the event that triggered the commencement of the time period set forth in Government Code section 66499.37 was the approval of the subdivision map with attached condition. (*Id*. at p. 886.) "If the condition, as here, shall be that school impact fees be thereafter paid upon applications for permits to build upon the subdivision's lots, the statute's plain requirement is that an attack on the validity of the City's decision, and its attending condition, be made within the designated period. Upon

failure of interested parties to do so, the validity of the condition is normally placed beyond legal attack. And here, it will be remembered, plaintiffs' claim of right to recover school impact fees paid is founded solely on the premise of the related condition's invalidity." (*Ibid.*)

Like the appellate court in *Timberidge Enterprises, Inc.*, "we discern a patent legislative objective that the validity of such decisions of a local legislative body, or its advisory agency, be judicially determined as expeditiously as is consistent with the requirements of due process." (*Timberidge Enterprises, Inc.*, *supra*, 86 Cal.App.3d at p. 886.) Indeed, since *Timberidge Enterprises, Inc.* was decided, the Legislature shortened the time frame in which challenges may be made to such decisions from 180 days to 90 days. (See Historical and Statutory Notes, 36E West's Ann. Gov. Code (2009 ed.) foll. § 66499.37, p. 382.)

In *Soderling v. City of Santa Monica* (1983) 142 Cal.App.3d 501, a developer challenged a condition imposed on the approval of a tentative tract map. The map and condition were approved on June 5, 1978, and the city subsequently gave the developer a 12-month extension of the tentative map. (*Id*. at pp. 503-504.) The developer's subsequent action challenging the city's 1980 denial of a final map, due to his failure to comply with the condition imposed in connection with the tentative map, was found to be untimely. (*Id*. at p. 505.) "The purpose of a conditional tentative map is to identify clearly the requirements to which a developer must conform; hence, he must demonstrate in his final map that he has resolved all of the deficiencies or problems enumerated in the tentative map. [Citation.] In other words, fulfillment of all tentative map conditions is, from the outset, a condition of final map approval. [Citations.]" (*Ibid.*)

On October 16, 2006, the City approved the owner participation agreement with the developer and the tentative tract map for the Pacific City development, a condition of which was the use of Quimby Act in-lieu funds for construction of a new

senior center on City owned property. If Parks was to challenge the in-lieu condition of that map, Government Code section 66499.37 required Parks to make the challenge within 90 days of the imposition of that condition, or not at all.

F. *Conclusion*

The certification of the EIR must be set aside because the EIR did not consider feasible alternative sites or whether the use of all the Quimby Act fees to fund construction of the senior center adversely impacts the City's ability to acquire open space within the City. The CUP must be set aside because it violates the City's general Plan. The challenge to the use of Quimby Act funds to finance construction of the senior center is time-barred, as is the challenge involving Measure T.

III

DISPOSITION

The judgment is affirmed except with regard to the declaratory relief action, which is reversed. Each party will bear their own costs on appeal.

MOORE, J.

WE CONCUR:

O'LEARY, ACTING P. J.

IKOLA, J.