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Court Rules in Favor of OSEE in Lawsuit Against City of Orinda

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After over a year of legal wrangling, on Aug. 22, the Contra Costa Superior Court issued a peremptory writ of mandate, commanding the city to “set aside the certification of the Plan Orinda Environmental Impact Report (EIR), the adoption of the Statement of Overriding Considerations challenged in this case, and approval of the Downtown Precise Plan [DPP].”

The ruling gives the City 60 days to comply and outlines several other actions that must be taken along with associated timelines.

Why Did OSEE File the Lawsuit?

On March 4, 2023, the group Orindans for Safe Emergency Evacuation (OSEE) filed a lawsuit against the City of Orinda, challenging their Plan Orinda Environmental Impact Report (EIR) as inadequate.

According to the OSEE website orindasee.com, “The Evacuation Analysis,

prepared by a planning and design firm for the City, did not include the expected traffic from build-out of the 1,618 housing units in Plan Orinda. This left the EIR with a very limited ‘qualitative’ analysis of how the added traffic would impact evacuation.”

Michele Jacobson, one of the founders of OSEE said, “I realized [the City] had not addressed wildfire evacuation and emergency response capability as they should have per California Environmental Quality Act (CEQA) law. It was missing.

“They looked at current existing conditions, and then they did a kind of guesstimate of what might happen in the future. They didn’t study how placing that many homes in the choke point of downtown would affect the ability of people to evacuate from the community.”

The City disputes this and attests that the EIR assessed all of the housing units in the Housing Element, including 1,618 units in the Downtown Precise Plan.

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Was Plan Orinda's EIR Evacuation Analysis Adequate?

Plan Orinda is the master citywide planning document that includes proposed rezoning to meet state housing requirements and an EIR that identifies significant environmental effects of a project and reasonable mitigations.

Who is OSEE?

Former Orinda resident Michele Jacobson formed OSEE in early 2023 to address concerns about the impact of additional planned housing downtown on evacuation in the case of a wildfire. Jacobson has over 30 years of experience in planning. She served on the boards of The Orinda Association and Orinda Vision, raised her family in Orinda and volunteered for several organizations.

Other members of the OSEE leadership team are Orinda residents Kathleen Jenkins, Tom Lavin and Arran Schultz, Jacobson's daughter. According to Jacobson, about 30 people have contributed money to the organization and 50-60 have expressed support of their efforts.

The question of whether "wildfire modeling" should have been included in the analysis has been raised by OSEE and was also a concern of David Winnacker, who

was the MOFD fire chief at the time the analysis was done.

In an email to the planning director and city manager dated Nov. 1, 2022, Winnacker writes, "The fire scenarios do not appear to include modeled spread. In the absence of an understanding of both the spatial and temporal factors associated with a dynamic event, the analysis appears incomplete as it may not include impacts to the very evacuation routes that are being analyzed."

Wildfire modeling, however, was not a requirement of the EIR. When preparing the EIR, the City undertook an AB 747 Evacuation Analysis, "which at the time was the only state guidance about evacuation," said City Manager David Biggs.

The City concluded that adding new housing "to an already constrained system would have a significant and unavoidable impact on emergency evacuation and response."

With that knowledge, the City Council approved the EIR with a Statement of Overriding Considerations contending the beneficial aspects of the project outweighed the adverse impacts, which they have the legal right to do.

However, the court ruled that the City didn't have enough information to make that decision.

From page 10 of the Minute Order, dated Feb. 22, 2024:

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“Because the EIR provides ambiguous information on the impacts on evacuation in WFR-1 and does not provide the public and decision-makers with sufficient information to understand the magnitude of the impacts of the Project on evacuation in the face of wildfire hazards, the City did not have sufficient information to balance the benefits of the Project against its adverse impacts, after mitigation, and the City’s Statement of Overriding Considerations is therefore not supported.”

The City’s Evacuation Planning Efforts

The gist of the lawsuit is about evacuation planning in case of a wildfire. To read about Orinda’s evacuation planning efforts, go to question number 34 at <https://bit.ly/3XNqEAu>.

Vice-mayor Latika Malkani accepts the ruling, although she does not agree with it. “As a councilmember I personally feel like we did have enough information,” she said. “But, obviously, the judge disagreed and we’re going to make every effort to completely comply.”

State Housing Requirements and Orinda Plans

California set Orinda’s Regional Housing Need Allocation (RHNA) at 1,359 new units to be zoned by 2031 – 587 of which were designated as low or very low income. The state also recommends a 25% buffer of those 587 units (147 units) to comply with the “No Net Loss Law” for a total of 1,509 housing units to be planned for in Orinda’s Sixth Cycle Housing Element.

Plan Orinda also includes a Downtown Precise Plan (DPP), outlining development

of retail, restaurants, parking and housing downtown.

Although Orinda proposed up to 698 new units downtown for this cycle, because of development constraints and other factors, the total number of units accepted by the state was just 421.

Looking to the future, beyond this cycle, the DPP could allow for up to 1,618 units if all sites were rezoned.

In addition, opportunity sites outside of downtown (church sites, Miramonte, and Caltrans gateway site) totals 765 units.

Why Did Orinda’s EIR Assess More Housing than Required by the State?

The Plan Orinda EIR analyzed 2,383 total possible new housing units, as a conservative scenario, with acknowledgment that reaching the maximum allowable capacity most likely will not occur within the current Housing Element period.

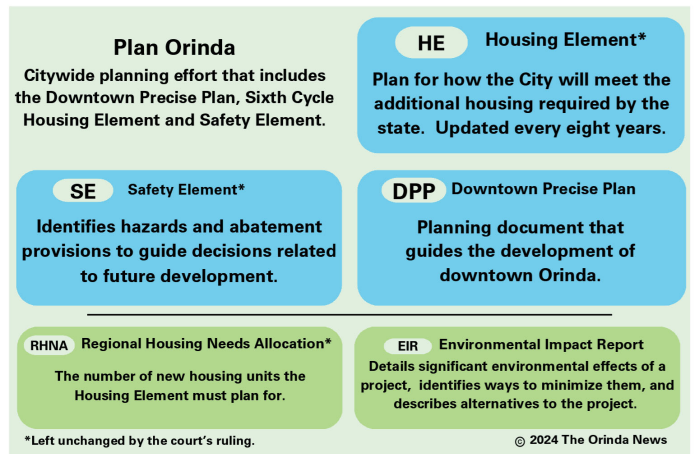
Thus, the EIR and the DPP would give the Council the option to potentially rezone beyond the minimum required for the certified Housing Element. The final determination of how much of the downtown to rezone will be considered when the downtown sites are brought forward for consideration.

The City included this large number of housing sites in the EIR to give them maximum flexibility in the case that some of the initially proposed housing is not rezoned due to public sentiment or other factors outside of their control.

“Because it costs time and funds and delays rezoning [if sites are eliminated from consideration] ideally you want to include anything that potentially might need to be rezoned in the initial EIR,” said Malkani.

Did OSEE and the City Attempt to Settle the Lawsuit?

Although statements on social media platforms (which by nature are not fact-



checked) assert that non-binding arbitration was offered and rejected by the City, neither OSEE nor the City can legally comment on mediation efforts.

“When parties to a lawsuit propose or participate in mediation, those settlement discussions, including any discussion about whether or not to participate in mediation, generally, are confidential under the law,” said Malkani, an attorney. “No parties to the lawsuit are allowed to disclose whether there was an actual offer of non-binding mediation or if there was a response.

“What we can confirm is that the City and OSEE engaged in settlement discussions. There was a good faith attempt to resolve the litigation on the City’s side. We devoted significant time to the pursuit of a settlement.”

How Much Did Orinda Spend on the Lawsuit?

A statement on the City’s website reports it has spent over \$700,000 on attorney and consultant fees on the lawsuit. This amount includes reimbursement of the OSEE’s attorney’s fees of \$283,569.30. Insurance did not cover any of these fees.

What are the Revisions to the EIR and Next Steps?

The City has described the necessary changes to the EIR as “small technical difficulties” and “minor revisions.”

In response, the OSEE provided the following statement to The Orinda News: “The Court’s criticism is definitely not a ‘minor technical issue’ as characterized by the City. Given that the issue of wildfire evacuation is such a critical public safety issue, such a dismissive characterization is even more disturbing.”

City Manager Biggs disagrees. “If you look at what was brought up in the litigation

overall, there were many arguments made by the petitioners that were not validated by the court,” he said. “Ultimately the court found the EIR primarily deficient with regard to the language and explanation it used in regard to the mitigation measures.”

Biggs declined to provide specific changes and said, “We’re not prepared to identify those at this point in time. We’ll have our revisions coming out soon. Our commitment is we’re going to make a good faith effort to comply with the judge’s order as we understand what the judge wants.”

CalTrans Site

Orinda included the CalTrans site in its Sixth Cycle Housing Element. The state rejected it to count against Orinda’s required housing for this cycle and directed the City to “decertify and rezone” the site. Orinda is working toward that goal. More information is available on the City’s website at: <https://bit.ly/4ecGhH9>.

Look for a more in-depth article about the potential viability of the CalTrans site in a future issue of The Orinda News.

The City Council plans to rescind the certification of the EIR, the Statement of Overriding Concerns and the DPP as ordered by the court. They will then release the revisions to the public for review and comments, and afterward, the City Council will make a decision about readopting the DPP. The City has 60 days from Aug. 22 to take these actions.

“People are asking us exactly what [the added housing] will look like,” said Malkani. “But that’s not the public process. First of all, we’re not building anything. The City doesn’t build. It just rezones and we haven’t rezoned yet. Rezoning will happen as part of a public process.” ■