

**Twain Harte Homeowners Assn. v. County of Tuolumne
(1982) 138 Cal.App.3d 664 , 188 Cal.Rptr. 233**

[Civ. No. 6664. Court of Appeals of California, Fifth Appellate District. December 27, 1982.]

TWAIN HARTE HOMEOWNERS ASSOCIATION, INC.,
Plaintiff and Appellant, v. COUNTY OF TUOLUMNE et al.,
Defendants and Respondents.

(Opinion by Morony, J., with Franson, Acting P. J., and
Andreen, J., concurring.)

OPINION

MORONY, J.

Statement of the Case

This appeal arises out of challenges to the sufficiency of the Tuolumne County General Plan and to the adequacy of the environmental impact report prepared in connection with adoption of the general plan. "The Planning and Zoning Law (Gov. Code, tit. 7, div. 1, commencing with ' 65000) requires[s] ... that the board of supervisors of each county adopt a general plan for the 'physical development' of the county, pursuant to section 65300; that the plan be prepared and adopted according to standards established in section 65300.5 and 65301; and that it include each of nine 'elements' enumerated and described in section 65302." (Camp v. Board of Supervisors (1981) [123 Cal.App.3d 334](#) , 340 [176 Cal.Rptr. 620], fn. omitted.) fn. 1

On August 18, 1980, the Tuolumne County Board of Supervisors held a hearing at which time they certified the completion of the EIR (also referred to as the MEIR) for the new county general plan. Also on August 18, 1980, the board

approved several changes to the wording of the draft general plan and its [138 Cal.App.3d 672]action was referred back to the planning commission for recommendation. Thereafter, on August 26, 1980, James Nuzum, Tuolumne County Planning Director, informed the board that the proposals approved by the board for changes in wording of the draft general plan were consistent with the existing environmental impact report which had been certified and approved by the board on August 18. On that date the board adopted the present Tuolumne County General Plan.

Appellant contends:

2. That the general plan is legally inadequate in that its land use, circulation, and housing elements do not substantially comply with the requirements of Government Code section 65302.

The General Plan.

Government Code section 65301.5 provides that, "The adoption of the general plan or any part or element thereof or the adoption of any amendment to such plan or any part or element thereof is a legislative act which shall be reviewable pursuant to Section 1085 of the Code of Civil Procedure." (Added by Stats. 1980, ch. 837, ' 2, p. 2617.)

*** As stated in *Karlson v. City of Camarillo*, supra, [100 Cal.App.3d 789](#) , 798: "Actions taken by an administrative agency in its legislative capacity are reviewable under Code of Civil Procedure section 1085, the traditional writ of mandate. Judicial review is limited to an examination of the proceedings before the agency to determine whether its action has been arbitrary or capricious, or entirely lacking in evidentiary support,

or whether it has failed to follow the procedure and give the notices required by law. (Strumsky v. San Diego County Employees Retirement Assn. [1974] [11 Cal.3d 28](#) , 34, fn. 2 [112 Cal.Rptr. 805, 520 P.2d 29].)"

Our inquiry will thus extend to whether the general plan "substantially complies" with the requirements of the Government Code. (Camp v. Board of Supervisors (1981) [123 Cal.App.3d 334](#) , 348 [176 Cal.Rptr. 620].) "'Substantial compliance, as the phrase is used in the decisions, means actual compliance in respect to the substance essential to every reasonable objective of the statute,' as distinguished from 'mere technical imperfections of form.' [Citations.]" (Ibid) Since such determination is a matter of law, this court need not give deference to the trial court's findings. (Id at p. 362.)

It is clear that in reviewing the determination of the board of supervisors the court may not probe the merits of the general plan. (Selby Realty Co. v. City of [138 Cal.App.3d 675] San Buenaventura (1973) [10 Cal.3d 110](#) , 118 [109 Cal.Rptr. 799, 514 P.2d 111]; Camp v. Board of Supervisors, supra, 123 Cal.App.3d at p. 348.)

2. The General Plan.

a. Land use element.

Appellant contends that the general plan fails to meet statutory requirements in several of its elements. Initially, appellant contends that the land use element of the general plan does not comply with statutory requirements of Government Code section 65302, subdivision (a).

Section 65302, subdivision (a), provided in 1980 that a general

plan mandated by section 65300: "shall include ... [&] A land use element which 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. The land use element shall include a statement of the standards of population density and building intensity recommended for the various districts and other territory covered by the plan. ..." (Italics added.)

The initial task faced by this court in determining the adequacy of the land use element is to determine the meaning of the terms "population density" and [138 Cal.App.3d 697]"building intensity." These terms are not defined in the relevant statutes, regulations or guidelines. The parties have cited no authority to assist this court in determining what the statute requires in this regard.

The general plan states "densities" for "urban residential" uses in terms of the maximum number of "dwelling units per gross acre." With respect to nonurban designations of "residential/agricultural," and "resource" lands, densities are stated in terms of minimum lot sizes. fn. 7 No densities are provided for areas designated "commercial," "open space," "industrial," "park and recreation," or "public/institutional/school."

In *Camp v. Board of Supervisors*, supra, [123 Cal.App.3d 334](#) the court held that the land use element of the Mendocino County General Plan was invalid, but did not discuss the meaning of the terms "population density" or "building intensity." In *Camp*, figures of population density were stated

for only two "areas" whereas several areas were classified and described in the general plan. According to the court, a table in the plan recited "density standards" of population in terms of "persons per square mile," but the figures were tabulated for each of four "land use categories" which did not apparently relate to the classified types of "area" which were described and mapped in the general plan. Nor did the descriptions of the "areas" appear to have any connection with the "land use categories" for which density standards were stated. Therefore, the court found that it was impossible to relate any tabulated "density standard" of population to any location in the county. Moreover, the court found that the general plan "states nothing at all of 'building intensity' standards in any of the classified types of 'area,' nor in any of the tabulated but undescribed 'land use categories,' nor at any location in the County." (At p. 350.) For those reasons, the court held that the land use element was not in substantial compliance with the requirements of section 65302, subdivision (a).

The County contends in the instant case that the measurement of dwelling units per acre meets the requirement for a statement of standards for population density and that the omission of a statement of population density for "commercial," "industrial" and "open space" land use designations reflects the fact that no residential development is permitted on those lands. **[138 Cal.App.3d 698]**

In a planning context, statements of population density might reasonably be related to residency rather than to the extent of intensity of use of all classifications.

For census purposes "population density" has been calculated as "the number of persons per square mile of land area ..." and "[e]ach person enumerated was counted as an inhabitant of his

usual place of abode" (U.S. Dept. of Commerce, Bureau of the Census, 1970 Census Users' Guide (Oct. 1970) at p. 93.)

Cases in the zoning context have referred to measures of population density in terms of numbers of people per dwelling unit. (See *Village of Belle Terre v. Boraas* (1974) 416 U.S. 1, 19 [39 L.Ed.2d 797, 810, 94 S.Ct. 1536] (dis. opn. of Marshall, J.).)

The term "population density" has also been used to refer to maximum numbers of people living in a residential development. (See, e.g., *Trinity Episcopal School Corporation v. Romney* (S.D.N.Y. 1974) 387 F.Supp. 1044, 1080.)

Confronted with the requirement of subdivision (b) of Government Code section 65302 that the circulation element must be "correlated" with the land use element, it would not be unreasonable to interpret the term "population density" as relating not only to residential density, but also to uses of nonresidential land categories and as requiring an analysis of use patterns for all categories.

Given the variety of legitimate ways of interpreting the term "population density," it appears sensible to allow local governments to determine whether the statement of population standards is to be tied to residency or, more ambitiously, to the daily useage estimates for each land classification.

It could be argued that in the planning arena standards of population density might most usefully be stated in terms of dwelling units per acre where some relationship between an average number of people per household has been established and where distinctions based upon factors such as the size and type of dwelling (e.g., single family residences, multiple family residential, mobilehome) are supported in the plan.

Nevertheless, we cannot believe that the Legislature intended the terms "population density" and "building intensity" to be

synonymous. [10] It is a well established principle of statutory construction that "[t]he courts presume that every word, phrase, and provision of a statute was intended to have some meaning and perform some useful function" (58 Cal.Jur.3d, Statutes, **[138 Cal.App.3d 699]** 105, p. 480.) "A construction implying that words were used in vain, or that they are surplusage, should be avoided." (Id, at pp. 480-481, fns. omitted; *Morro Hills Community Services Dist. v. Board of Supervisors* (1978) [78 Cal.App.3d 765](#) , 773 [144 Cal.Rptr. 778].) [11] In addition, "where different words are used in the same connection in different parts of the statute, it will be presumed that the legislature intended different meanings." (58 Cal.Jur.3d, supra, at ' 127, p. 521, fn. omitted.)

[12] It appears that the reasonable interpretation of the term "population density" as used in Government Code section 65302 is one which refers to numbers of people in a given area and not to dwelling units per acre, unless the basis for correlation between the measure of dwelling units per acre and numbers of people is set forth explicitly in the plan. fn. 8

In the instant case, no statement relating dwelling units to numbers of people is presented in the general plan. Thus, we conclude that appellant's land use element is deficient insofar as it lacks an appropriate statement of standards for population density based upon numbers of people.

With respect to the requirement that the land use element must contain a "statement of the standards of ... building intensity recommended for the various districts and other territory," there is no statement of building intensity for uses designated in the plan as "commercial," "residential/agricultural," "open space," "industrial," "park and recreation" or "public/institutional/school." At most, the "urban residential"

designation with its statement of maximum dwelling units per acre is the only land use designation with any building intensity standard. Minimum lot sizes set for "residential/agricultural" and "resource" areas are not sufficient as a statement of a building intensity. Nor are general use captions such as "commercial-neighborhood," "commercial-shopping center," "commercial-visitor serving," "light industrial" and "heavy industrial," which provide only the vaguest picture of the intensity of development to be permitted in those areas and provide no standards at all as to possible restrictions such as height or size limitations, restrictions on types of buildings or uses to be permitted within a designated area. We therefore conclude that the land use element of the Tuolumne County General Plan does not comply with the requirements of Government Code section 65302 as it fails to set forth an adequate statement of standards of population density and building intensity recommended for the various districts and other territory covered by the plan. **[138 Cal.App.3d 700]**

b. Circulation element.

Appellant further contends that the general plan is deficient for its failure to comply with the mandates of Government Code section 65302, subdivision (b) which requires in pertinent part that the plan include "[a] circulation element consisting of the general location and extent of existing and proposed major thoroughfares, transportation routes, terminals, and other local public utilities and facilities, all correlated with the land use element of the plan." (Italics added.)

The trial court specifically found that the circulation element of the new general plan contained all of the factors required by subdivision (b) of Government Code section 65302. However, appellant asserts that the circulation element is not correlated

with the land use element as required by the statute.

County contends that perfect correlation is not required and that in adopting the element it must be presumed to have determined that the correlation was sufficient to accommodate local conditions and circumstances. (Gov. Code, ' 65300.7.) County further contends that "appellant has not demonstrated that the correlation in the general plan is not locally relevant." The court in *Camp v. Board of Supervisors*, supra, [123 Cal.App.3d 334](#) evaluated the circulation element of the Mendocino County General Plan and found it deficient where the element did not expressly show any relationship between the "facilities" mentioned and the "land use element of the plan." According to the court, the relationship could not be determined by construction because the land use element itself was utterly deficient. The court concluded that the circulation element therefore fell short of compliance with section 65302, subdivision (b), because the facilities shown in it were not "correlated with the land use element of the plan." (123 Cal.App.3d at p. 363.)

Insofar as the Tuolumne County General Plan is concerned, the circulation element is contained in chapter VI: 2-3 and VI: 5 and on the display map which outlines existing and proposed roads designated as "arterial," "major collector," or "minor collector." fn. 9 [**138 Cal.App.3d 701**]

The MEIR documentation does contain a description of the existing road system and existing public transportation obtained from the Tuolumne County Regional Transportation Plan, prepared by Cal Trans, September 12, 1978. (MEIR documentation V:21-V:26.) Moreover, the MEIR documentation also contains a table listing "typical trip generation rates by type of land use." The types of use and the daily generation rate

(number of trips per dwelling unit or per acre) were taken from a document entitled "1982-87 Traffic Volumes in the City of Pittsburg."

[13] Assuming that the information contained in the above sources constituted an adequate description of existing roadways and facilities, it does not appear that the circulation element is in any substantial way correlated with land use, despite the trial court's finding to the contrary.

In the present case it can be seen that the circulation element does not attempt to describe or discuss the changes or increases in demands on the various roadways or transportation facilities of the County as a result of changes in uses of land which will or may result from implementation of the decision system and the general plan. As stated in a letter from several individuals commenting upon the draft general plan, "The [MEIR] and the MDGP do not address the important issues such as the demographic center of the county, the population centers, the movement habits of users or the traffic counts of the main roads and intersections."

Although the Government Code does not explicitly require that a circulation element contain an inventory and data analysis followed by a locally derived program to solve problems identified in the inventory, and we do not so hold, it seems apparent from a review of the general plan, the supporting MEIR, and the MEIR documentation that there is no way to determine whether in fact the circulation element is correlated with the proposed land use element. **[138 Cal.App.3d 702]**

The state Office of Planning and Research pursuant to Government Code section 65040.2 has adopted guidelines to assist the local governments in preparing general plans and the general plan guidelines, issued September 10, 1980, although

merely advisory, do state that "[t]he policies and plan proposals of the circulation element should: [c]oordinate the transportation and circulation system with planned land uses" (Id, at p. 112.) The guidelines go on to recommend assessment of the adequacy of the existing street and highway system and the need for expansion and improvements; trends in vehicle registration (by total and household average); trends in nonlocal traffic related to tourism, employment and shopping; and trends in traffic volume in relation to street and highway capacities (e.g., average daily traffic, peak hour volumes, seasonal fluctuations). (Id, at p. 155.) Although these guidelines are merely advisory and not mandatory, they provide assistance in determining whether the County's circulation element substantially complies with the requirements of section 65302. (See *Camp v. Board of Supervisors*, supra, [123 Cal.App.3d 334](#), 351.) The requirement of Government Code section 65302, subdivision (b), is that the land use element be correlated with the circulation element. The Tuolumne County General Plan does not comply with the statutory requirements in this regard.

c. Housing element.

Government Code section 65302, subdivision (c), provided at the time of adoption of the general plan that the general plan "shall include": "A housing element, to be developed pursuant to regulations established under Section 50459 of the Health and Safety Code, consisting of standards and plans for the improvement of housing and for provision of adequate sites for housing. This element of the plan shall make adequate provision for the housing needs of all economic segments of the community. Such element shall consider all aspects of current housing technology, to include provisions for not only site-built housing, but also manufactured housing, including mobile

homes and modular homes." (As amended by Stats. 1979, ch. 591, ' 1, p. 1846.) fn. 10

Appellant contends that the housing element of respondent's general plan is defective and fails to meet statutory requirements in that it does not contain a current assessment of housing needs for various income groups, and because it does not include an "action" program. Therefore, appellant concludes that the housing element fails to make adequate provisions for the housing needs of all economic segments of the community as required by the applicable statute. **[138 Cal.App.3d 703]**

[14] However, in fact it appears that the housing inventory in respondent's general plan (III:7-III:36 of the "MEIR documentation") is most complete. An assessment of needs is found at pages III:7 through III:23 of that documentation. Both the inventory and the needs assessment is based upon 1970 federal census data, a 1974 Special Census for Tuolumne County, and other documents prepared more recently, including the "areawide housing element (1978) prepared by the Central Sierra Planning Council for its member counties and cities (including Tuolumne County)." (MEIR documentation III:4-5.) The inventory and the needs analysis appearing in the MEIR documentation appear adequate. The inventory of existing housing analyzes that information both in terms of specific area needs (see, e.g., MEIR documentation III:18-III:21) and in terms of age, ethnic composition, income and other variables. The inventory and needs assessment, despite the lack of 1980 federal census data at the time the plan was adopted, appear to be thorough and reasonable attempts to forecast housing needs in the future based upon the best available data. The plan itself provides for updating the assessment when the 1980 data is available (MEIR documentation III:23). The MEIR

documentation contains the following statement with regard to its projections of Tuolumne County's 1985 housing needs based upon households expected and the anticipated numbers of low income households:

"These figures were obtained by applying the percentage of households which in 1974 had incomes below 80 [percent] of the 1974 median income (51.7 [percent]) to the population and household estimates for the County prepared by the Department of Finance in 1979. It should again be stated and recognized that more current data are necessary to validate these hypotheses. Cross-tabulations of household income and actual housing costs, by family size, are needed to determine if below-median income households are in fact paying more than 25 percent of their incomes for shelter.

"According to the Housing element guidelines, Tuolumne County should address the needs of the anticipated 1985 lower income households. This anticipated total of 6,924 households should be viewed with caution, as it does not represent the number of households who may be in need of housing because of overpayment in rental charges or mortgages. No determination of future needs was possible given the status of earlier information on this condition through Federal or state censuses or surveys. Tuolumne County should use the 6,924 households figure as a target household figure in their housing action program. A realistic assessment of the proportion of that figure that really needs housing program attention will have to await more detailed analysis available through the 1980 Census. No further breakdown is possible at this time.**[138 Cal.App.3d 704]**

"Finally, the County will address a Specific Action Program to achieve progress toward the needs of lower income households

following the adoption of the revised General Plan." (MEIR documentation III:23, original italics.)

Despite appellant's contention that *Camp v. Board of Supervisors*, supra, [123 Cal.App.3d 334](#), requires the housing element to be based upon current data, we do not find that the lack of 1980 census data renders the housing element deficient in this case. In *Camp*, the housing element was briefly outlined in a separate pamphlet published in 1970. The cover page of the pamphlet was labeled "The Housing Element of the General Plan" but its text repeatedly described it as the initial housing element. There was no indication in that "Housing Element" that the more current 1970 census data was ever prepared or pursued. The general plan was adopted in 1978 and therefore the information utilized in the housing element was more than 10 years old at the time of adoption of the general plan, despite the fact that 1970 census data had been available since 1971. (Id, at p. 351.) The court held that other deficiencies in the housing element, combined with its "obsolescence in point of time," rendered the housing element inadequate and not in substantial compliance with the requirements of section 65302, subdivision (c). However, in the instant case the failure of the County to incorporate 1980 census data which was unavailable at the time of adoption of the general plan in 1980 does not render the housing element inadequate.

A more difficult contention exists with respect to the declaration contained in the MEIR documentation that any adoption of an action program would follow the adoption of the general plan. The statute does require adequate provision for the "housing needs of all economic segments of the community." However, to the extent that the requirement of an action provision in the housing element was set forth in guidelines issued by the State

Department of Housing and Community Development, such action program has been held to be advisory and not mandatory (see *Bownds v. City of Glendale* (1980) [113 Cal.App.3d 875](#) , 885 [170 Cal.Rptr. 342]; *Stevens v. City of Glendale* (1981) [125 Cal.App.3d 986](#) , 997-998 [178 Cal.Rptr. 367]).

In analyzing the adequacy of the housing element presented as part of the Mendocino County General Plan the court in *Camp v. Board of Supervisors*, supra, [123 Cal.App.3d 334](#) , was concerned with the total inadequacy of the housing element in that case. In this case we do have a comprehensive and complete inventory of housing, based on the best data available at the time, and a thorough needs analysis. In *Bownds v. City of Glendale*, supra, [113 Cal.App.3d 875](#) , the court held that the housing element of a city's master plan, which contained a comprehensive analysis of the existing housing inventory and future needs, was an "honest and reasonable effort to comply with the state's statutory requirements" and that failure to discuss in specific terms the [138 Cal.App.3d 705] subject of condominium conversion in the general plan did not render the plan inadequate despite guidelines which required such discussion. The court held that in the absence of more specific legislation it would not interpret the guidelines as requiring a specific "action" program for the creation of housing "under the guise of declaring an otherwise complete and comprehensive plan to be inadequate, basing its decision on nothing more than a subjective interpretation of such nonspecific language." (Id, at p. 884; see also *Stevens v. City of Glendale*, supra, [125 Cal.App.3d 986](#) , 997-998.)

Therefore, insofar as appellant here contends that in 1980 when the general plan was adopted it was required to contain a specific "action" program in order for the housing element to

meet the requirements of Government Code section 65302, subdivision (c), appellant's argument fails.

Moreover, it appears that the general plan does contain several policies and implementation measures designed to increase the available supply of housing, particularly lower cost housing. (See general plan IV:2-9.) Such implementation measures include the use of development density incentives requiring developers to include specific percentages of low and moderate income units in their development of inclusionary ordinances requiring a specific percentage of units within a new residential development be made available to low and moderate income purchasers or tenants. (General plan IV:8.) In addition, it is arguable that the entire decision system for the general plan and the policy and implementation measures contained in the general plan are aimed at making available more land for urban and residential uses. The EIR itself recognizes that the plan has designated more property as compatible for urban and residential development than in fact is likely to be developed within the next 20 years. However, it states that "[t]his characteristic of the MDGP is intended to allow for sufficient choice in locating new urban development, and to avoid unacceptable increases in the cost of land which could be caused by unduly constraining the supply of land available for development." (MEIR p. 5.)

For the foregoing reasons this court holds that the housing element of the Tuolumne County General Plan meets the statutory requirements set forth in Government Code section 65302, subdivision (c).

d. Conclusion.

Thus we conclude that the land use and circulation elements of the general plan do not substantially comply with the

requirements of Government Code section 65302, subdivisions (a) and (b). **[138 Cal.App.3d 706]**

Disposition

The judgment is reversed with directions to the trial court as follows:

- a. To issue a writ of mandate in accordance with the views herein expressed;
- b. To conduct further proceedings concerning attorney's fees consistent with this opinion; and **[138 Cal.App.3d 707]**
- c. To consider, if deemed appropriate, appellant's request for injunctive relief prayed for in its amended petition.

Franson, Acting P. J., and Andreen, J., concurred.

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