

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

Date: 03/27/2007

Time: 02:45:28 PM

Dept: C-74

Judicial Officer Presiding: Judge Linda B. Quinn

Clerk: Lydia Johnson, Mary Jean Barham

Bailiff/Court Attendant:

ERM:

Reporter: Not Reported

Case Init. Date: 06/12/2006

Case No: GIC867378

Case Title: TAXPAYERS FOR RESPONSIBLE LAND USE vs CITY OF
SAN DIEGO

Case Category: Civil - Unlimited

Case Type: Writ of Mandate

Event Type:

Appearances:

EX- PARTE MINUTE ORDER AFTER ORAL ARGUMENT DATED MARCH 19, 2007.

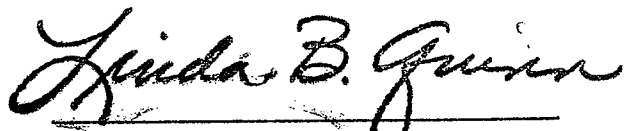
Following oral argument on Petitioners' Writ of Mandate under CEQA, the tentative ruling is confirmed. The Court sustains objections to Respondants' and Real Party In-Interests' Second Consolidated Application to correct or augment the Administrative Record filed February 27, 2007.

The Court denies Respondents' request for Judicial Notice filed March 19, 2007 as to Exhibits 1, 2 and 3, and grants the request as to Exhibit 4.

The Court sets **April 16, 2007 at 2:30 p.m.** for continued oral argument on Non-CEQA Writ of Mandate Application and requests each counsel confirm his/her availability by phone to the Court.

The Case Management Conference is also set for **April 16, 2007 at 2:30 p.m.**

MAR 27 2007


JUDGE LINDA B. QUINN

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

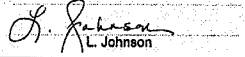
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SHORT TITLE: TAXPAYERS FOR RESPONSIBLE LAND USE vs CITY OF SAN DIEGO

CLERK'S CERTIFICATE OF SERVICE BY MAIL

CASE NUMBER:
GIC867378

I certify that I am not a party to this cause. I certify that a true copy of the attached was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at San Diego, California, on 03/28/2007.

Clerk of the Court, by:  _____, Deputy

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Superior Court
San Diego County, State of California

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The following is a TENTATIVE ruling for 03/19/2007 ,
Department 74, the Honorable Linda B. Quinn presiding.

Case Number GIC867378

1. Judicial Notice Requests And Extra-Record Evidence

The Court grants the parties' respective judicial notice requests.

The Court grants the request to augment the Administrative Record ("AR") filed jointly by defendants and respondents City of San Diego and City Council and real party Hillel of San Diego on February 2, 2007. The AR is augmented to include Exhibit 1054, the Real Estate Purchase and Sale Agreement, and Exhibit 1055, the transcript of defendant and respondent City Council's November 20, 2000 regular meeting. There is no objection by plaintiffs and petitioners to add Exhibits 1054 and 1055 to the AR.

The Court grants in part and denies in part the second request to augment the AR filed jointly by defendants and respondents City of San Diego and City Council and real party Hillel of San Diego on February 27, 2007. The AR is augmented to include Exhibit 1056, the final executed Planned Development Permit, Site Development Permit, and Lot Line Adjustment Parcel Map. There is no objection by plaintiffs and petitioners to add Exhibit 1056 to the AR. Exhibit 1057, the Power Point Presentation, is not added to the AR due to the well-taken concerns expressed in the objection filed by plaintiffs and petitioners on February 28, 2007.

2. Parties

Plaintiffs and petitioners are Taxpayers For Responsible Land Use ("TRLU"), an incorporated association, and La Jolla Shores Association ("LJSA"), a tax-exempt California 501(c)(4) non-profit corporation, collectively, "Petitioners." See, writ of mandate petition and complaint, paragraph 6.

TRLU was formed to oppose the Hillel Project at issue in this proceeding "and for the general purposes of promoting 'the protection and preservation of La Jolla's quality of life.'" LJSA's purpose is to protect its members' interests in land use proceedings involving the La Jolla Shores community. See,

San Diego Superior Court, Ruling for Case

petition-complaint, paragraphs 6-7.

Defendants and respondents are the City of San Diego and its governing body City Council, collectively, "City." City is the lead agency under the California Environmental Quality Act ("CEQA") for evaluating the environmental impacts of the Hillel Project. City is also responsible for approving all components of the Hillel Project. See, petition-complaint, paragraph ¶ 10.

Real Party in Interest Hillel of San Diego ("Hillel") is a religious student group and a California corporation. Hillel provides religious services, student programs, educational resources and facilities to the Jewish college community of San Diego. See, AR 1128, 3709.

3. *The Hillel Project*

The Hillel Project is the Project at issue in this proceeding and has two phases, Phase I and Phase II.

Phase I is the continued use of a single-family residence at 8976 Cliffridge Avenue for Hillel's religious offices until Phase II is completed. See, AR 0016, 1433.

Phase II is the development of a one-story, 12,100 square-foot religious center, and a 17,000 square-foot subterranean garage to accommodate 68 on-site parking spaces. See, AR 16. In addition, 10,000 square feet of the Hillel Project will be landscaped and maintained by Hillel to create a neighborhood amenity with pedestrian and bicycle paths for public use. See, AR 17, 3710-3711.

The Hillel Project is to be located on a vacant triangular-shaped parcel known as Site 653, at the intersections of La Jolla Village Drive, La Jolla Scenic Drive North, and La Jolla Scenic Way, south of the U.C.S.D. campus. See, AR 48. Site 653 is about 15,341 square-feet and an adjoining partial paper street (located along La Jolla Scenic Drive North), when-if vacated, will add 17,923 square feet to Site 653 to assemble a contiguous parcel totaling 33,264 square feet. See, AR 1335.

Site 653 is zoned single-family residential ("SF") in the La Jolla Shores Planned District within the La Jolla Community Plan boundary. See, AR 17. The SF zoning permits uses for churches, temples, and buildings of a religious nature. See, AR 17.

The Hillel Center to be built on Site 653 is for Jewish students attending the nearby U.C.S.D. and includes a worship space, meeting rooms, offices for clergy and staff, recreational areas, and a library. See, AR 1128, 3710. Several other religious organizations operate student religious centers in SF zoned neighborhoods surrounding U.C.S.D. See, AR 3710.

Single family residences are to the south of the Hillel Project and town-houses and a single family residence lie directly east of the Project. See, AR 7367-7375, 7759-7767. The area immediately east of the Hillel Project drops off 14-16 feet below grade level of Site 653. See, AR 673, 2161, 3960, 5176, and 7760.

4. Public Hearings And Environmental Review Process

On April 12, 2000, City's Land Use and & Housing Committee authorized City's Real Estate Assets Department ("READ") to issue a request for proposal ("RFP") for the potential sale or lease of Site 653 with a higher priority for student organizations based at U.C.S.D. See, AR 48, 1336.

City Staff received two responses to the RFP: (1) Hillel's proposal to develop and operate a student religious facility for the U.C.S.D. Jewish student community; and (2) the La Jolla Highlands Homeowners who proposed to maintain the property as an undeveloped landscaped area. See, AR 1336.

On November 20, 2000, City Council authorized READ to enter into exclusive negotiations with Hillel. See, AR 1336. Although City Council's November 20, 2000 Resolution R-294224 states "for the ground lease of Site 653" (see, Resolution at AR 7929), the "transcripts of the [City Council November 20, 2000] session clearly indicate either a lease or sale was acceptable and intended." See, AR 1336, 1775-1777, and 3708.

On May 9, 2006, City Council held a public session in La Jolla, to vote on the Hillel Project. City Staff recommended that City Council adopt Resolutions to: (1) certify that the Mitigation Negative Declaration ("MND") for the Hillel Project was in compliance with CEQA; (2) grant a Planned Development Permit and a Site Development Permit for the Hillel Project ; (3) grant a Lot Line Adjustment Parcel Map; (4) approve vacating portions of La Jolla Scenic Drive North, La Jolla Scenic Drive, and Torrey Pines Road, and dedicate General Utility Easements over parts of the vacated public-right-of-way to the Hillel Project; and (5) authorize the Mayor to execute a Real Estate Purchase and Sale Agreement and Grand Deed with Hillel for the sale of Site 653 to Hillel for \$940,000. See, AR 1335, 1651-1652, and 1656.

On May 9, 2006, City Council at the public session in La Jolla entertained testimony from City Staff, Hillel Project proponents, and Hillel Project opponents. See, AR 1668-1669 and 1674-1678. On May 9, 2006, City Council at the public session in La Jolla then voted 6-2 to adopt each proposed Resolution relating to the Hillel Project and authorized the sale of Site 653 to Hillel.

5. Petitioners' Writ of Mandate Applications And Opposition

Petitioners bring two separate writs of mandate applications.

The first writ of mandate application is brought under CEQA and requests an order that the Court set aside and void the MND that was certified and adopted on May 9, 2006 and require City to prepare an EIR. The same writ of mandate application also requests that the Court set aside and void the sale of Site 653 and all approvals under City complies with CEQA. The same writ of mandate is premised on the ground that there is substantial evidence to support a fair argument that the Hillel Project may have a number of significant environmental impacts on biology, parking, traffic, aesthetics, and construction.

The second writ of mandate application is not brought under CEQA. The second writ of mandate is brought under Code of Civil Procedure § 1085 and seeks to avoid the sale of Site 653 to Hillel on the ground City abused its authority or discretion in authorizing the sale of Site 653 pursuant to Resolution R-301436. The second writ of mandate is also brought under Code of Civil Procedure § 1094.5 and seeks to vacate the approvals for the Hillel Project on the ground that City abused its discretion in adopting the approvals.

City and Hillel jointly oppose both writs of mandate applications. In opposing the writ of mandate brought under CEQA, the joint opposition counters: (1) petitioners fail to show a fair argument that the Hillel Project may impact biological, parking, traffic, aesthetics, and construction since the writ of mandate relies solely on improper conclusions, arguments, speculation and unsubstantiated opinions; and (2) all potentially significant impacts have been identified and mitigated to a level of insignificance. In opposing the writ of mandate brought under Code of Civil Procedure §§ 1085 and 1094.5, the joint opposition counters that petitioners have not met their burden for the requested writ of mandate relief.

6. When Is An EIR Required?

A strong presumption in favor of requiring preparation of an EIR is built into CEQA. See, CEB, *Practice Under the California Environmental Quality Act*, § 6:29, page 273. This presumption is reflected in what is known as the "fair argument" standard, under which an agency must prepare an EIR whenever "substantial evidence" in the record supports a fair argument that a project may have a significant effect on the environment. See, *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1993) 6 Cal. 4th 1112, 1123.

The "fair argument" standard applies to agency decisions and to judicial review of those decisions. Agencies apply the "fair argument" standard as a substantive standard in deciding whether an EIR or a negative declaration is required. Courts apply the "fair argument" standard as a standard of review for agency decisions to adopt a negative declaration. See, CEB, *Practice Under the California Environmental Quality Act*, § 6:29, page 273.

Under CEQA, an EIR must be prepared where there is "substantial evidence" that a project may cause a significant effect on the environment. See, Public Resources Code §§ 21082.2(a), 21100, 21151. A project "may" have a significant effect on the environment if there is a "reasonable probability" that it will result in a significant impact. See, *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 83, n. 16. If any aspect of the project may result in a significant impact on the environment, an EIR must be prepared even if the overall

effect of the project is beneficial. See, 14 Cal. Code Regs. § 15063(b)(1).

An EIR may be dispensed with only if the lead agency finds no substantial evidence in the initial study or elsewhere in the record that the project may significantly affect the environment. Without such evidence, the agency must adopt a negative declaration. See, CEB, *Practice Under the California Environmental Quality Act*, § 6:29, page 274.

The "fair argument" standard is a "low threshold test." Evidence supporting a "fair argument" of a significant environment impact will trigger preparation of an EIR, even if the record contains contrary evidence. See, *Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 310.

Whether the administrative record contains a "fair argument" sufficient to trigger preparation of an EIR is a question of law, not a question of fact, and so under this unique test "deference to the agency's determination is not appropriate and its decision not to require an EIR can be upheld only where there is no credible evidence to the contrary." See, *Sierra Club v. County of Sonoma* (1992) 6 Cal. App. 4th 1307, 1318.

Case law states that the term "substantial evidence" does not mean overwhelming or overpowering evidence. Rather, "substantial evidence" is evidence that is of "ponderable legal significance ... reasonable in nature, credible, and of solid value." See, *Stanislaus Audubon Society v. County of Stanislaus* (1995) 33 Cal. App. 4th 144, 152.

CEQA defines the term "substantial evidence" as including "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." CEQA adds that argument, speculation, inaccurate information, unsubstantiated opinion, and social or economic impacts unrelated to environmental impacts are not "substantial evidence." See, Public Resources Code § 21080(e)(1)(2).

Significant effects" are "substantial or potentially substantial," adverse changes in physical conditions that exist within the area that will be affected by a proposed project. See, Public Resources Code §§ 21068, 21100 and 21151; also see, *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal. App. 4th 1597, 1604.

7. A Fair Argument That The Hillel Project May Have A Significant Impact On The Environment

The Court finds that the AR contains substantial evidence to support a fair argument that the Hillel Project may have significant environmental impacts related to biology and traffic. As such, the Court grants petitioners' CEQA writ of mandate application and sets aside the MND that was certified and adopted on May 9, 2006. City is thus required to prepare an EIR. In granting petitioners' CEQA writ of mandate the Court also sets aside the sale of Site 653 and all approvals until City complies with CEQA.

The Court deems petitioners' companion writ of mandate application brought under Code of Civil Procedure §§ 1085 and 1094.5 moot based on the grant of petitioners' CEQA writ of mandate application.

8. *Biological Impact*

The AR presents substantial evidence to support a fair argument that the Hillel Project may have a significant impact on biological resources.

This is exhibited by the personal observations of Penelope Bourke who frequently sees hawks and peregrine falcons on the four eucalyptus trees on Site 653 from her kitchen window. See, AR 817. This basic bird identification does not require special training. The Court permits petitioners to make an offer of proof that there is still one eucalyptus tree on Site 653.

In addition, there is the June 7, 2004 e-mail by City's Development Project Manager Laura C. Black. See, e-mail at AR 6702. This e-mail states a RECON biologist felt by virtue of a September 25, 2003 report that there were potential raptor (birds of prey) nests at the Hillel Project site and recommended that a focused raptor survey be conducted prior to clearing the eucalyptus trees, with construction limited to September 1st through January 31st. *Id.*

The Court notes that the September 25, 2003 RECON report is omitted from the AR without any explanation or excuse from City or Hillel.

9. *Traffic Impact*

The AR presents substantial evidence to support a fair argument that the increase in pedestrian traffic due to the Hillel Project may cause a significant environmental impact.

According to Hillel's traffic study, the Hillel Project "is designed to encourage pedestrian access." See, e.g., AR 1134, 1136-1138. Further, according to this traffic study, there may be 120 students crossing La Jolla Village Drive for the Friday night Shabbat. *Id.*

Hillel's traffic study did not take into consideration any increase in pedestrian traffic crossing La Jolla Village Drive from U.C.S.D. to use the Hillel Student Center for Friday night Shabbat. Hillel's traffic study did not take into consideration the potential impacts of pedestrians pushing the "walk signal" to cross La Jolla

Village Drive to attend the Hillel Student Center for Friday night Shabbat.

10. *Parking Impact*

The AR does not present substantial evidence to support a fair argument that the Hillel Project may significantly impact parking.

The personal observations and newspaper account of problems associated with shared parking agreements at other locations is improper opinion regarding the consequences of the shared parking arrangement for the Hillel Project. See, AR 737, 868, and 5560.

In addition, as noted by the joint opposition the Hillel Project provides the number of spaces required by the Municipal Code and the parking mitigations do not violate the Municipal Code. See, joint opposition memo, page 7:8-22. Moreover, numerous mitigation measures were imposed to ensure that potential impacts will not occur. See, e.g., AR 27, 29-30, and 339-341.

Also, besides the numerous mitigation measures, City imposed requirements to ensure that the mitigation measures are met by Hillel. For instance, before City will issue a building permit, Hill must provide a satisfactory shared parking agreement. See, AR 29-33. And if the shared parking agreement is cancelled at any time, Hillel is required to immediately cease any activities with more than 120 people in attendance. See, AR 30.

11. *Aesthetics Impact*

The AR does not present substantial evidence to support a fair argument that the Hillel Project may significantly impact aesthetics.

The Initial Study found that "[n]o such public view would be obstructed" and the "project would be compatible with surrounding development" and "consistent with the character of the area". See AR 314-316. In addition, the Hillel Project incorporates specific design features such as variations in height, texture, roof lines, landscaped berms, and the use of Torrey Pine Trees to screen the Project from the neighborhood and create a landscaped buffer from La Jolla Village Drive. See, AR 1435-1436, 1570-1571, 1575, 3095-3096, and 7180-7183. Moreover, "[o]bstruction of a few private views in a project's immediate vicinity is not generally regarded as a significant environmental impact." See, *Bowman v. City of Berkeley* (2004) 122 Cal. App. 4th 572, 586.

12. *Construction Impact*

The AR does not present substantial evidence to support a fair argument that the Hillel Project may significantly have a construction impact.

13. Petitioners' Companion Non-CEQA Writ of Mandate Application

As indicated, petitioners' companion non-CEQA writ of mandate application under Code of Civil Procedure §§ 1085 and 1094.5 is deemed moot by virtue of the Court's granting of plaintiffs' CEQA writ of mandate application. Nonetheless, the Court notes the following.

To the extent that petitioners move for relief under Code of Civil Procedure § 1085, petitioners failed to show that City abused its authority or discretion in authorizing the sale of Site 653 pursuant to Resolution R-301436.

To the extent that petitioners move for relief under Code of Civil Procedure § 1094.5, there is no showing that City abused its discretion in adopting the approvals for the Hillel Project. In fact, the joint opposition by City and Hillel adequately show: (1) City Council did not abuse its discretion in adopting Resolution R-301435 and vacating the public right-of-way (see, opposition memo, pages 9:11-12:25) and (2) City Council did not abuse its discretion in adopting Resolution R-301433 and approving the development permits for the Hillel Project (see, opposition memo, pages 12:26-17:17.)

14. Tentative Ruling

This ruling is a tentative ruling pursuant to CRC 3.1308. Unless modified or vacated following oral argument, the tentative ruling will become the final order of the Court. See, CRC 3.1308. Unless otherwise ordered, no further order is to be prepared after the hearing. The prevailing party is to prepare and serve notice of this ruling pursuant to Code of Civil Procedure § 1019.5.

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