

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL
MINUTE ORDER**

Date: 11/05/2009

Time: 10:00:00 AM

Dept: C-71

Judicial Officer Presiding: Judge Ronald S. Prager
Clerk: Kathleen Sandoval

Bailiff/Court Attendant: L. Wilks
ERM: Peter Stewart #3184

Case Init. Date: 11/17/2008

Case No: 37-2008-00095903-CU-TT-CTL Case Title: La Jolla Village Residents Association vs. City of San Diego

Case Category: Civil - Unlimited

Case Type: Toxic Tort/Environmental

Event Type: Hearing on Petition

Causal Document & Date Filed:

Appearances:

The Court, having taken the above-entitled matter under submission on 11/03/2009 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

RULING AFTER ORAL ARGUMENT: The Court rules on petitioner La Jolla Village Residents Assn.'s ("Petitioner") petition for writ of mandate as follows:

After taking the matter under submission, the Court affirms its tentative ruling.

The Court's tentative ruling shall serve as the Court's Statement of Decision pursuant to California Rules of Court, rule 3.1590.

Petitioner is a California non-profit public benefit corporation. Petitioner is represented by attorney Julie M. Hamilton.

Respondents are the City of San Diego ("City") and City Council of the City of San Diego ("City Council") (sometimes collectively "Respondents"). Respondents are represented by Jan I. Goldsmith, Andrew Jones, and Carmen A. Brock of the Office of the City Attorney. The Real Parties In Interest/Defendants are RK Development Partners and Michael Krambs ("Krambs") (sometimes collectively "RPIs"). The RPIs are represented by Christopher J. Connolly and Christopher R. Mordy of Peterson & Price, A.P.C.

As a preliminary matter, the Petitioner and City's requests for judicial notice are granted.

Petitioner challenges Respondents' decision, on October 14, 2008, to approve the Project. (Administrative Record ("AR") 00027-37, 02189, 02501:21-22.)

The Project is a three-story, 20,507 square foot mixed use project with seven commercial condominiums on the first floor and 11 residential condominiums on the second and third floors ("Project"). (AR 00027.)

The Court has reviewed the record in light of the parties' briefs and the applicable law and concludes the

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petition for writ of administrative mandamus and injunctive relief is granted for the reasons stated below.

The first issue is whether San Diego Municipal Code ("SDMC") sections 126.0604 subd. (a)(5) and 143.0410 unlawful due to vagueness.

The Land Development Code requires the following findings for a planned development permit ("PDP"): (1) the proposed development will not adversely affect the applicable land use plan, (2) the proposed development will not be detrimental to the public health, safety, and welfare, (3) the proposed development will comply with the regulations of the Land Development Code, (4) the proposed development, when considered as a whole, will be beneficial to the community, and (5) any proposed deviations pursuant to section 126.0602 subd. (b)(1) are appropriate for this location and will result in a more desirable project than would be achieved if designed in strict conformance with the development regulations of the applicable zone. (SDMC §126.0604(a).)

Petitioner contends that the PDP regulations provide no specificity other than to permit deviations to allow a project if it would be better than what could be built without the deviations.

In *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1013 (hereafter "Friends"), the court stated that "[i]n the interpretation of written laws, the intent of the legislative body is not gleaned solely from introductory statements such as a preamble, but is gleaned from the law as a whole, which includes particular directives. [Citation.] As a general rule, known as the canon of ejusdem generis, the enumeration of specific items or factors will be controlling over general statements placed before or after the list of specific items or factors. [Citation.] In other words, 'the general term or category is 'restricted to those things that are similar to those which are enumerated specifically.'" Although the Court found the general statement of purpose in the Davis City Code to be imprecise, it noted that the specific provisions in the City Code provided the required specificity. The same is true in this case.

Petitioner takes issue with the language set forth in the preamble-SDMC section 143.0401. However, SDMC section 143.0410 subd. (a)(3)(A)-(G) sets forth numerous limiting factors that would prohibit the grant of a deviation while SDMC section 143.0410 subd. (j)(1)-(10) sets forth the specific design criteria used to evaluate proposed developments in conjunction with the required findings. In addition, SDMC section 143.0410 subd. (a)(2) specifically states that a significant deviation would require a variance. Thus, like the provision at issue in *Friends*, the City set forth sufficiently specific standards that must be met in order to approve a deviation.

Therefore, the Court finds that the above noted sections are not too vague.

The second issue is whether the MND should be set aside due to the existence of substantial evidence to support a fair argument that the Project may have a significant effect on the environment.

Standard of Review. With respect to mitigated negative declarations, the court in *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 927-928 (hereafter "Pocket Protectors") stated that "a public agency must prepare an EIR whenever substantial evidence supports a fair argument that a proposed project 'may have a significant effect on the environment.'...If there is substantial evidence in the whole record supporting a fair argument that a project may have a significant nonmitigable effect on the environment, the lead agency shall prepare an EIR, even though it may also be presented with other substantial evidence that the project will not have a significant effect. [Citations.]...The fair argument standard is a "low threshold" test for requiring the preparation of an EIR. [Citations.] It is a question of law, not fact, whether a fair argument exists, and the courts owe no deference to the lead agency's determination. Review is de novo, with a preference for resolving doubts in favor of environmental review."

Petitioner takes issue with the City's determination with respect to land use, aesthetics, traffic, and human health/public safety/hazardous materials.

Land Use. Petitioner contends that many individuals (i.e., Angeles Leira ("Leira"), principal planner responsible for the preparation of the PDO, and Joe La Cava ("La Cava"), president of the La Jolla Community Planning Group) provided evidence the Project conflicts with the PDO. (Pet AR 02428, Tab 15, 02697-8, Tab 16.) In addition, the La Jolla Community Planning Assn. rejected the Project because it did not comply with the current PDO, including but not limited to incorporation of a third story in the

design. It also expressed concern with establishing a precedent for allowing third-story through use of a deviation. (Pet AR 00350, Tab 7.) As noted above, it appealed the Planning Commission's approval of the Project to the City Council and testified before the Planning Commission and the City Council that the Project was not consistent with the PDO. (Pet AR 05827, Tab 9, 02695-7, Tab 16, 02400-3, Tab 15.) The City and RPI contend that there would be no land use impact because the Project received a deviation from the limitations of the PDO. However, as noted above, the test is whether substantial evidence to support a fair argument that the Project may have a significant impact. As noted above, Petitioner has presented such evidence.

Aesthetics. In Pocket Protectors, the court stated that "the opinions of area residents, if based on direct observation, may be relevant as to aesthetic impact and may constitute substantial evidence in support of a fair argument; no special expertise is required on this topic." (Id. at p. 937.) Here, as noted above, Leira, La Cava, members of the LJCPA, and long time residents presented the following evidence: (1) Approval of a deviation for three stories will set a precedent to allow three stories throughout all the commercial areas of La Jolla. (Pet AR 02663:3-9, 02664:3-6), (2) Three stories and 30 feet means the retail space will not be much taller than the residential space. This will create nonviable commercial spaces when there is already excess spaces in the Bird Rock neighborhood (Pet AR 02664:7-12, 02668:9-14), (3) Allowing three stories will create an abrupt transition in scale between Bird Rock Station and adjacent residential development. (Pet AR 02670:1-7, 02672:3-8), (4) The third story units will violate the neighbors privacy because they would start at 20 feet high rather than the typical 15 feet high found in two stories. (Pet AR 02707:8-12), and (5) The three story building looks more compressed than other development permitted under the PDO and allows more intense development. (Pet AR 02410:16-20.) Furthermore, the Petitioner notes that the project in *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 593-594, unlike this case, was subject to extensive design review. Based on the foregoing, Petitioner has presented sufficient evidence to support a fair argument that the Project may have a significant impact.

Traffic. The impacts addressed by Petitioner's expert, Douglas Kim ("Kim"), are impacts to the street segment and are specific impacts that would occur only if the roundabouts were constructed. (Pet AR 06793, 06797, Tab 19, and 00421, Tab 21.) Thus, the adopted mitigation measures will not mitigate the impacts addressed by Kim because the signal will not be required if the roundabouts are constructed and the impacts are only anticipated if the roundabouts are constructed. Because the roundabouts have been constructed, Petitioner has presented sufficient evidence to support a fair argument that the Project will result in significant impacts based on the City's adopted criteria. The City utilized two methods for determining what the impact would be. Although the City pointed out that an actual traffic count it conducted after the 2006 traffic study showed a much lower impact, it does not discount the fact that Kim correctly pointed out that the City's own study based on its traffic impact analysis manual determined that a significant impact would occur. A conflict in expert opinion over the significance of an environmental impact normally requires preparation of an EIR. (CEQA Guidelines §15064(g); *Sierra Club v. CDF* (2007) 150 Cal.App.4th 370.)

Human Health/Public Safety/Hazardous Materials. As a result of the Initial Study and the complete plan for removal of soil conducted pursuant to the Interim Remedial Action Plan, the City determined no potential for additional significant environmental impacts not previously known, studied, and planned for remediation by DEH existed to warrant an EIR, or even further mention in the MND. (City's RJN, Exhs. E and F, City's AR 00168-9, Tab 47, 03229, Tab 50, 01747, Tab 51, 01803, Tab 52, 03226-7, Tab 53, 03593, Tab 54, 01810, Tab 59.) Petitioner's expert, Peter Geissler, does not state that the remedial plan would be ineffective.

The third issue is whether the City's approval of the MND, PDP, Site Development Permit ("SDP"), Coastal Development Permit ("CDP"), and Tentative Map should be set aside due to the City's failure to make the required findings.

Resolution No. R-304265 specifically set forth the findings of the City as to the MND, PDP, SDP, CDP, and Tentative Map. The Court finds that the City properly made the required findings in said Resolution. (City's AR 00027-37.)

The fourth issue is whether the Project should be set aside due to the disorganized nature of the record certified by the City.

Petitioner contends that the Project should be set aside due to the disorganized nature of the AR certified by the City. However, the City informed the Court that Petitioner, who had elected to prepare the AR pursuant to Public Resources Code section 21167.6, failed to do so in a timely and accurate manner. Furthermore, the Court notes that all the parties were able to submit briefs based on AR as formatted and that the City made clear findings with respect to its approval of the Project. (AR 00027-37.) Thus, this case is distinguishable from *Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362.

Therefore, the Court declines to set aside the Project due to the manner in which the City organized the AR.

Based on the foregoing, the Court grants Petitioner's writ. Petitioner is directed to prepare the Judgment.

IT IS SO ORDERED.

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