

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CIVIL COMPLEX CENTER**

MINUTE ORDER

Date: 09/29/2009

Time: 01:57:38 PM

Dept: CX101

Judicial Officer Presiding: Judge David C. Velasquez
Clerk: Christine D Carr

Bailiff/Court Attendant: None

Reporter: None

Case Init. Date: 03/04/2008

Case No: 30-2008-00051261-CU-PT-CXC Case Title: Parks Legal Defense Fund vs. The City of Huntington Beach

Case Category: Civil - Unlimited

Case Type: Petitions - Other

Event Type: Chambers Work

Causal Document & Date Filed:

Appearances:

There are no appearances by any party.

Tentative ruling in Phase Two of the trial on petition and complaint (California Rules of Court, rule 3.1590)

This action came on regularly for trial on August 6, 2009, in Department CX-101, of the Orange County Superior Court, the Honorable David C. Velasquez, judge presiding, tried to the court without a jury on the first, third and fourth causes of action, respectively as follows: violation of the California Environmental Quality Act ("CEQA"), violation of the respondent's and defendant's general plan, and for declaratory relief; the court having bifurcated the trial of these causes of action from the trial of the second cause of action, to wit, violation of CEQA and section 612 of the Huntington Beach City Charter; and

The parties and counsel were present as follows: the petitioners and plaintiffs represented by Emily Zung Manninger, Esq., and Susan Graham Lovelace, Esq. of the law offices of Laquer Urban Clifford & Hodge, LLP; and the respondents and defendants represented by John M. Fujii, Esq., Sr. Deputy City Attorney of the Office of the City Attorney for the City of Huntington Beach; and

THE COURT, having read and seen the documentary and other evidence received into evidence; having received and read the trial briefs and other papers filed in the action; and having heard the arguments of counsel; and the parties' requests for judicial notice having been granted; and

Having considered all of the foregoing; and

On August 31, 2009, the matter having been submitted to the court for ruling on the above stated bifurcated causes of action:

HEREBY FINDS, ORDERS, ADJUDGES AND DECREES:

The petition as to the first, third, and fourth causes of action is granted. Judgment is entered in favor of the petitioners and plaintiffs and against the respondents and defendants, all jointly and severally; and

The writ is hereby issued ordering:

The certification of the EIR and the issuance of the conditional use permit ("CUP") are hereby vacated and set aside; and further

On the fourth cause of action to court declares the rights of the parties as follows:

The assessment of in lieu fees pursuant to the Quimby Act (Government Code §66477) in connection with the Pacific City Project cannot be used for the subject project within the open space area of Central

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Park to build banquet facilities, meeting rooms, or office space.

IT IS FURTHER ORDERED:

The respondents and defendants, and all those working in concert with them, or under their management and supervision, are enjoined and restrained from taking any and all activity under the instant EIR and CUP.

FURTHER:

The matter is remanded to the Huntington Beach City Council for further review, consideration, analysis and findings, and upon which occurring, the respondents and defendants are hereby ordered to prepare, circulate and consider a Supplemental Environmental Impact Report ("SEIR") addressing the suitability of alternative off-site locations which may reasonably become available to the City as a site for the proposed project, including the public school property identified by the City of Huntington Beach ("the City") in the proceedings below; and

Costs of suit are hereby awarded to the petitioners and plaintiffs and against the respondents and defendants, jointly and severally, in the sum of \$_____.

[Proposed] Partial Statement of decision; Phase Two of the trial (CCP §632)

The court finds the respondents and defendants prejudicially abused their discretion by failing to proceed in the manner required by law, and by a lack of substantial evidence supporting their findings noted below as follows:

The EIR violates CEQA

Among other things, a draft EIR must contain an analysis of reasonable alternatives to the proposed project, including reasonably possible alternative locations for the project. (CEQA Guidelines, §§15126 and -15126.6; Pub. Res. §21100; and Laurel Heights Improvements Assoc. v. Regents of the University of California (1988) 47 Cal.3d 376, 404.) CEQA Guideline, §15126.6 states in pertinent part:

"(a) Alternatives to the Proposed Project. An EIR shall describe a range of reasonable alternatives . . . to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. An EIR need not consider every conceivable alternative to a project. Rather it must consider a reasonable range of potentially feasible alternatives that will foster informed decision making and public participation. An EIR is not required to consider alternatives which are infeasible. The lead agency is responsible for selecting a range of project alternatives for examination and must publicly disclose its reasoning for selecting those alternatives." (Emphasis added.)

The record reflects that the City knew of several vacant school sites which may be feasible alternative locations for the proposed senior center. These school sites could reasonably have become available if the City had created a plan to purchase the sites - which in turn may have prompted the school district to offer to sell these sites to the City. The public agency needs to address in the EIR the feasibility of property it might reasonably acquire as an alternative site. (See Laurel Heights Improvements Assoc. v. Regents of the University of California, supra, at 404 [An EIR is inadequate if it fails to address the "possibility of purchasing or leasing" other property as an alternative to a project]. Emphasis added.) Although the City identified alternative locations, such as vacant schools in the city, as an aspect of mitigating the environmental impact of the project, there is no discussion of those alternative sites. In the instant case, the EIR does not include any discussion of the feasibility of the alternative school sites.

"An EIR shall contain a brief summary of the proposed actions and its consequences." (CEQA Guidelines §15123(a).) The instant EIR fails to discuss the consequences to the entire city of the loss of open space park land, and of the loss of funds to replace it due to the diversion of Quimby Act funds from open space replenishment and, instead, towards non-park uses.

The EIR does not accurately describe the project. "The description of the project shall contain . . . [¶] (c) A general description of the project's . . . economic and environmental characteristics . . ." (CEQA 15124; Pub. Res. §21100.) The City presumes incorrectly that the subject open space alternatively has no value, is underused land, is surplus land, or is vacant land. However, the City's General Plan and its Park Plan demonstrate the importance to the City of park land and open space land within the city. (See also AR at page 3888.) The very existence of the statutes indicates that protection of parkland was to be given paramount importance. (Cf. Citizens to Preserve Overton Park, Inc. v. Volpe (1971) 401 U.S. 402, 412-413.) But the loss of open space is not without economic cost to the City if it plans to replenish the amount of open space which will be used in connection with the proposed project. The City intends to fund the construction of the project with Quimby Act funds instead of using such funds to acquire replacement open space. (CEQA 1683.) Directing \$20-25 million of the Quimby Act funds towards construction of the proposed senior center means less open space not only in the park, but also within the entire City. The EIR fails to discuss the environmental impact to the park and the City of the

re-direction of those funds. (AR at pages 1611, 1668, 1777, 1833, 1834, 1842, 2068, 2224, 2280, 2281, 2331-2335, 2340-2341.)

The City's approval of the conditional use permit violated its General Plan

The City exceeded its authority in authorizing the placement of the proposed senior center in designated open space park land without first amending the City's General Plan and Park Plan. The City's General Plan provides that "structures located in the City's parks and open spaces be designed to maintain the environmental character in which they are located." (General Plan II-LU-44; and LU 14.1.4.) The City is to "[p]rovide for the acquisition and development of the City's parks in accordance with the Parks and Recreation Element of the General Plan." (General Plan II-LU-44; and LU 14.1.5.) The Park Plan designates the subject open space area as "Low Intensity Recreation Area" which restricts use of the area to limited development for barbeque and picnic amenities, restrooms, tot-lot, open turf, and parking. It is undisputed in the record that the use and activity associated with the proposed senior center does not comply with the limitations stated in the Park Plan's low intensity park and recreation designation. The City in its report acknowledges "the project would require an amendment to the existing land use designation for the project site as designated by the Park Plan. . . [T]his area is currently designated Low Intensity Recreational Area . . . to high intensity recreation on the 5-acre project site." (EIR §3.3.4; AR 614.) Despite that acknowledgment, the City did not amend its General Plan or the Park Plan to permit high intensity park use in an area designated as low intensity open space. Therefore, the Planning Commission exceeded the scope of its authority in granting the CUP.

The petition was timely filed and served

Pursuant to the provisions of Government Code §66499.37, the action must be filed within 90 days of the decision to adopt a development agreement. The 90 days begins to run upon the granting of the CUP. (McPerson v. City of Manhattan Beach (2000) 78 Cal.App.4th 1252.) Pursuant to the provisions of Government Code §65009(c)(1)(F), the action must be filed within 90 days of a decision of the public agency listed in that section. The 90 days begins to run under that statute when the challenged decision becomes final, i.e., when the CUP is authorized. (Wagner v. City of Pasadena 78 Cal.App.4th 943.) In the instant case, the EIR was certified and the CUP was granted on February 4, 2008. The petition was filed and served in March, 2008 - clearly within the 90 day period.

Quimby Act funds

Using the in lieu fees assessed against the Pacific City project violates the Quimby Act (Government Code §66477(a)) for two reasons. Firstly, the funds are not intended by the City to be used to provide for park and open space land, and secondly, using the entire \$20 million to \$25 million in lieu fees to pay for 100% of the cost to build the senior center bears no reasonable relationship to degree to which the proposed senior center will be used by the future inhabitants of the Pacific City project, the "subdivision" under the Quimby Act. The Act provides in part:

"The 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 to the approval of a tentative map or parcel map, if all of the following requirements are met:

(3) The land, fees, or combination thereof are to be used only for the purpose of developing new or rehabilitating existing neighborhood or community park or recreational facilities to serve the subdivision.

(5) The amount . . . of the fees to be paid shall bear a reasonable relationship to the use of the park and recreational facilities by the future inhabitants of the subdivision."

In similar language, §254.08 the City's Parkland Dedication Ordinances provides in part:

"This Section is adopted to implement the provisions of the Quimby Act to require the dedication of land for park and recreational facilities or payment of in-lieu fees incident to and as a condition of the approval of a tentative tract map . . . for a residential subdivision. The park and recreational facilities for which dedication of land and/or payment of an in-lieu fee . . . are in accordance with the policies, principles and standards for park, open space and recreational facilities contained in the General Plan."

Section 254.08 continues:

"The general purposes and objectives of this Section are:

2. To provide a procedure for the acquisition, development and rehabilitation of local park and recreational facilities;

3. To secure . . . the provision of orderly park, recreation and open space facilities;

4. To establish conditions which will allow park and recreational facilities to be provided and to exist in harmony with the surrounding and neighborhood land uses;
5. To ensure that adequate park and recreational facilities will be provided"

In the present case, the proposed senior center building and its intended usage does not satisfy the customary notion of a park. Therefore, the use of the in lieu fees to build the proposed senior center does not mitigate the loss of park and open space to the City. Diverting those fees to a use other than to replenish park and recreational facilities violates the Quimby Act and the City's parkland dedication ordinance.

Furthermore, requiring the developer of the Pacific City project to bear 100% of the development and construction costs of the proposed senior center does not bear any reasonable relationship to the "use of the park and recreational facilities by the future inhabitants of the subdivision." (Government Code §66477.) There is no evidence that the proposed senior center will be used exclusively (100%) by the residents of the Pacific City project.

Petitioners, as citizens, have standing to assert against the City an action based upon the violation of the Quimby Act and the City's park dedication ordinance where, as in the instant case, the issue is one of public right, and the object of the suit is to procure the enforcement of a public duty, and further, where these plaintiffs are interested as citizens in having the laws governing the duty of the City properly executed and enforced. (Bozung v. Local Agency Formation Comm. (1975) 13 Cal.3d 263, 272; Waste Management v. County of Alameda (2000) 79 Cal.App.4th 1223, 1232-1234, 1236-1238.)

In all other respects to the issues raised by the petitioners and plaintiffs above addressed by the court, the respondents and defendants did not abuse their discretion, and all of the findings supporting their decisions are based upon substantial evidence in light of the record as a whole. Within 10 days of receipt of this minute order, the Petitioner is ordered to prepare the proposed judgment. The clerk of the court is hereby ordered to serve this minute order upon all parties.