

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

HALL OF JUSTICE

TENTATIVE RULINGS - November 27, 2018

EVENT DATE: 11/28/2018

EVENT TIME: 01:30:00 PM

DEPT.: C-73

JUDICIAL OFFICER: Joel R. Wohlfeil

CASE NO.: 37-2017-00048213-CU-TT-CTL

CASE TITLE: CITIZENS FOR SOUTH BAY COASTAL ACCESS VS CITY OF SAN DIEGO [E-FILE]

CASE CATEGORY: Civil - Unlimited

CASE TYPE: Toxic Tort/Environmental

EVENT TYPE: Motion Hearing (Civil)

CAUSAL DOCUMENT/DATE FILED:

The Petition (ROA # 1, 26) of Petitioner CITIZENS FOR SOUTH BAY COASTAL ACCESS ("Petitioner") for writ of mandamus against Respondent CITY OF SAN DIEGO ("Respondent" or "CITY"), is GRANTED IN PART and DENIED IN PART. The Petition is GRANTED and the issuance of a Coastal Development Permit is required; otherwise, the Petition is DENIED.

Respondent's evidentiary objections (ROA # 31) are OVERRULED IN PART and SUSTAINED IN PART. The "objections to the entirety of the declaration" are OVERRULED. The balance of the objections are SUSTAINED.

Respondent's Request (ROA # 32) for judicial notice is GRANTED.

Petitioner's Request (ROA # 36) for judicial notice is GRANTED.

Whether City Failed to Obtain a Coastal Development Permit ("CDP")?

Petitioner argues that the City failed to obtain a required CDP. As discussed below, this argument has merit.

The Coastal Commission delegates authority for issuance of a CDP to local governments after certification of a local coastal program ("LCP"). See Pub. Res. Code § 30600(d). The Coastal Commission must certify that a proposed LCP conforms with the Coastal Act before the local government can adopt it. Pub. Res. Code §§ 30512 and 30513. After a local coastal program has been certified, the Coastal Commission can no longer exercise development review authority over proposed development within the LCP. Pub. Res. Code § 30519(b). Chapter 12 of the San Diego Municipal Code is titled "Land Development Reviews," and was established in 1997 as the City's LCP. The LCP became effective in 2000, after the Coastal Commission certified it. Section 126.0702(a) of the City's LCP provides: "A Coastal Development Permit issued by the City is required for all coastal development of a premises within the Coastal Overlay Zone ... unless exempted by Section 126.0704." Section 126.0704(a) provides that improvements to "existing structures" are generally exempt. One exception to this exemption is found at subsection (a)(3): "Improvements that result in an intensification of use. For purposes of Section 126.0704, intensification of use means a change in the use of a lot or premises which, based upon the provisions of the applicable zone, requires more off-street parking than the most recent legal use on the property."

The Court notes that substantial evidence supports the City's determination that the project did not

require a CDP because of the section 126.0704(a) exemption. An agency's view of the meaning and scope of its own ordinance is entitled to great weight unless it is clearly erroneous or unauthorized. Friends of Davis v. City of Davis (2000) 83 Cal. App. 4th 1004, 1015. Acquisition of the Super 8 hotel and the associated improvements for use as transitional housing is exempted from the requirement of obtaining a CDP as an improvement to an existing structure. There is substantial evidence that the improvements did not result in an intensification of use, including a decrease in required parking. Although the Coastal Act seeks to maximize feasible public access to coastal resources, there is no mandatory requirement within the certified LCP that the property site continue to be used as a hotel. Thus, a facial application of the exemption supports the City's position.

On the other hand, the section 126.0704 exemption, as applied, is pre-empted by state law. "An ordinance contradicts state law if it is inimical to state law; i.e., it penalizes conduct that state law expressly authorizes or permits conduct which state law forbids." Suter v. City of Lafayette (1997) 57 Cal. App. 4th 1109, 1124. Public Resources Code, section 30610(b) provides: "Notwithstanding any other provision of this division, no coastal development permit shall be required pursuant to this chapter for the following types of development ...: ... ¶ ... (b) Improvements to any structure other than a single-family residence or a public works facility; provided, however, that the commission shall specify, by regulation, those types of improvements which (1) involve a risk of adverse environmental effect, (2) adversely affect public access, or (3) involve a change in use contrary to any policy of this division. Any improvement so specified by the commission shall require a coastal development permit." The companion regulation is found at Title 14, section 13253(b), and provides in relevant part:

"(b) Pursuant to Public Resources Code Section 30610(b), the following classes of development require a coastal development permit because they involve a risk of adverse environmental effect, adversely affect public access, or involve a change in use contrary to the policy of Division 20 of the Public Resources Code:

-
- "(7) Any improvement to a structure which changes the intensity of use of the structure;
 - "(8) Any improvement made pursuant to a conversion of an existing structure from a multiple unit rental use or visitor-serving commercial use to a use involving a fee ownership or long-term leasehold including but not limited to a condominium conversion, stock cooperative conversion or motel / hotel timesharing conversion."

The administrative record indicates that the Municipal Code section 126.0704 exemption was applied in such a way that a CDP was not required because the project resulted in a lowered intensification of use (as evidenced by less required parking). However, this is forbidden by state law. Instead, any "change" in intensity, not just a higher intensity, requires a CDP. In addition, the administrative record indicates that the subject hotel conversion project seeks to convert the hotel from multiple unit commercial use to a use involving a fee ownership. This is also forbidden by state law in the absence of a CDP. As a result, the section 126.0704 exemption, as applied, is pre-empted by state law. The exemption is not valid and a CDP is required.

Whether the Subject Project is Consistent with the City's LCP?

Petitioner argues that the subject project is not consistent with the LCP because of the failure to adhere to the applicable community plan. As discussed below, this argument lacks merit.

"Local coastal program" is defined to include "a local government's (a) land use plans, (b) zoning ordinances, (c) zoning district maps, and (d) within sensitive coastal resources areas, other implementing actions, which, when taken together, meet the requirements of, and implement the provisions and policies of, this division at the local level." Pub. Resources Code, § 30108.6.

According to the Coastal Commission correspondence (AR 62:908): "The site is designated for community Commercial in the certified Otay Mesa-Nestor Community Plan / Land Use Plan and zoned Commercial-Community (CC-4-2) in the City's zoning code." This correspondence notes that the "Otay

Mesa-Nestor Community Plan includes specific language protecting existing motels, recommending 'retention and rehabilitation of the existing hotels, retail, and visitor-oriented commercial areas along the southern edge of the San Diego Bay in order maintain visitor-oriented uses and public access to coastal resources.' Conversion of an existing motel to a residential use would not be consistent with this policy. Thus, before the City could issue a coastal development permit for the conversion, an amendment to the City's Community / Land Use Plan would be required." This constitutes evidence within the administrative record demonstrating that the subject project fails to follow a recommendation in the applicable community plan.

On the other hand, elsewhere within the administrative record (Resolution Number R-311456, AR 6:20-22), the City discusses the hotel retention recommendation, as well as other community plan goals (affordable housing, exterior improvements, landscaping, parking, etc.). The City notes that the subject hotel was underutilized, and that other similar hotel properties exist within close proximity. The City concludes that, on balance, the subject project complies with the applicable community plan. This is substantial evidence of compliance with the community plan and the LCP.

CEQA Analysis

Petitioner argues that approval of the project violates CEQA because an environmental review was required. Specifically, the categorical exemption cited by the City does not apply because of the "unusual circumstances" exception. As discussed below, this argument lacks merit.

At the administrative level, the agency determines whether the project qualifies for a statutory or categorical exemption from CEQA. San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist. (2006) 139 Cal. App. 4th 1356, 1386 and 14 C.C.R. ("Guidelines") § 15061(a). There must be substantial evidence that the activity is within the exempt category of projects. San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist., *supra*. That evidence may be found in the information submitted in connection with the project, including at any hearings that the agency chooses to hold. *Id.* The Court's task is to determine whether, as a matter of law, the activity meets the definition of a categorically exempt project. *Id.* In undertaking this independent analysis, there is a "highly deferential" review standard that applies to the agency's factual determinations. *Id.* at 1387. The factual bases of quasi-legislative administrative decisions are entitled to the same deference as the factual determinations of the Court. *Id.*

The City concluded that the subject transitional housing project was exempt from CEQA pursuant to the categorical exemption set forth within Title 14, section 15301 of the "CEQA Guidelines." AR 2:3. The "Class 1" categorical exemption found within the Guidelines at section 15301 "consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures ..., involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination." Examples include interior or exterior alterations involving such things as interior partitions, plumbing and electrical conveyances; or additions to existing structures under specified circumstances. *Id.* However, "[a] categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." Guidelines at § 15300.2(c). "Significant effect on the environment" means a substantial, or potentially substantial, adverse change in the environment." Pub. Resources Code, § 21068.

"As to projects that meet the requirements of a categorical exemption, a party challenging the exemption has the burden of producing evidence supporting an exception As explained above, to establish the unusual circumstances exception, it is not enough for a challenger merely to provide substantial evidence that the project may have a significant effect on the environment, because that is the inquiry CEQA requires absent an exemption. (§ 21151.) Such a showing is inadequate to overcome the Secretary's determination that the typical effects of a project within an exempt class are not significant for CEQA purposes. On the other hand, evidence that the project will have a significant effect does tend

to prove that some circumstance of the project is unusual. An agency presented with such evidence must determine, based on the entire record before it - including contrary evidence regarding significant environmental effects - whether there is an unusual circumstance that justifies removing the project from the exempt class." Berkeley Hillside Preservation v. City of Berkeley (2015) 60 Cal. 4th 1086, 1105. A party invoking this exception to the exemption may establish an unusual circumstance without evidence of an environmental effect, by showing that the project has some feature that distinguishes it from others in the exempt class, such as its size or location. Id. In such a case, to render the exception applicable, the party need only show a reasonable possibility of a significant effect due to that unusual circumstance. Id. Alternatively, a party may establish an unusual circumstance with evidence that the project will have a significant environmental effect. Id.

Application of "unusual circumstances" exception involves two distinct inquiries. Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego (2006) 139 Cal. App. 4th 249, 278. First, whether the project presents unusual circumstances. Id. Second, whether there is a reasonable possibility of a significant effect on the environment due to the unusual circumstances. Id. A negative answer to either question means the exception does not apply. Id. Whether a particular project presents circumstances that are unusual for projects in an exempt class is an essentially factual inquiry, which the Court reviews under the traditional substantial evidence standard. Don't Cell Our Parks v. City of San Diego (2018) 21 Cal. App. 5th 338, 360, 361.

In this action, there is substantial evidence within the record supporting the conclusion that removing an underperforming hotel from the market and replacing it with a transitional living facility does not present unusual circumstances justifying application of the exception to the categorical exemption. The use of the property as transitional housing is permitted within the subject zoning area. Renovation and rehab of the existing structure presents no significant environmental impacts. The City is empowered to weigh competing policies set forth in a community plan. A finding that the need for affordable housing outweighs the need for low cost visitor accommodations is not unusual, especially when there are other nearby affordable visitor accommodations with access to the coast. Even if unusual circumstances exist, substantial evidence within the record supports the conclusion that renovation and rehab of the existing building will not have a significant effect on the environment. See, e.g. AR 19-42 and 56-288.