

FILED

Clerk of the Superior Court

MAR 22 2010

By: M. BARHAM, Deputy

ORIGINAL

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO—CENTRAL DIVISION

CHOLLAS RESTORATION, ENHANCEMENT
AND CONSERVANCY COMMUNITY
DEVELOPMENT CORPORATION,

Petitioner,

vs.

CITY OF SAN DIEGO and DOES 1 through 100,

Respondents;

DOES 101 through 1,000,

Real Parties in Interest.

CASE NO. 37-2008-00093831-CU-TT-CTL

[Proposed]
**JUDGMENT ON PETITION FOR WRIT
OF MANDATE**

Action Filed: October 14, 2008
Department: 74 (Quinn)

Trial Date: February 5, 2010
Hearing Time: 9:00 a.m.

This proceeding came on regularly for trial on February 5, 2010, at 9:00 a.m. in Department 74 of the San Diego County Superior Court (Hall of Justice), with the Honorable Linda B. Quinn sitting without a jury. Petitioner Chollas Restoration, Enhancement and Conservancy Community Development Corporation appeared by and through attorneys Cory J. Briggs and Mekaela M. Gladden of Briggs Law Corporation. Respondent City of San Diego appeared by and through attorney Heather L. Stroud of the Office of the City Attorney of the City of San Diego.

Following the trial, the Court took the matter under submission. On February 11, 2010, the Court issued a minute order granting the petition for writ of mandate in part and denying it in part.

1 Based on that minute order, which is incorporated into this Judgment on Petition for Writ of
2 Mandate by reference and attached hereto as Exhibit "A," **IT IS ORDERED, ADJUDGED, AND**
3 **DECREED** that:

4 1. A preemptory writ of mandate shall issue to command Respondent City of San Diego
5 as follows:

6 A. That certain denial of the Wightman Street CEQA Appeal, approved by
7 the City Council of the City of San Diego through Resolution no. R-304140 (finally
8 passed on September 16, 2008), is now set aside and declared to be invalid;

9 B. Respondent shall give notice of the draft mitigated negative declaration
10 for Project no. 149112 for Wightman Street Neighborhood Park in compliance with the
11 California Environmental Quality Act ("CEQA"); and

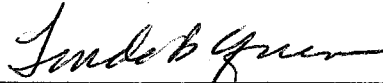
12 C. Respondent shall suspend any and all activities under and take no action
13 in reliance on Resolution no. R-304140, the Mitigated Negative Declaration for Project
14 no. 149112 for Wightman Street Neighborhood Park (certified and adopted by the City
15 Council of the City of San Diego through Resolution no. R-304141 (finally passed on
16 September 16, 2008)), the General Development Plan for the Wightman Street
17 Neighborhood Park (approved by the Park and Recreation Board of the City of San
18 Diego on July 17, 2008), or any combination of those items that could result in an
19 adverse change in the environment until the Court determines that Respondent has
20 complied with CEQA.

21 2. Petitioner Chollas Restoration, Enhancement and Conservancy Community Development
22 Corporation shall recover its attorney fees incurred in connection with this proceeding from Respondent
23 City of San Diego, if and when Petitioner files a successful motion for an award of attorney fees, in the
24 amount of \$ _____.

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27 [This space is intentionally blank.]
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1 3. The Court reserves jurisdiction over the issue of the costs to be awarded until such time
2 as the prevailing party, as determined by the Court, has filed and served its memorandum of costs and
3 any challenge thereto has been adjudicated.

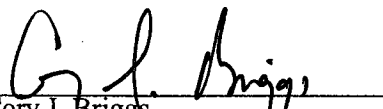
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5 Date: 3-22, 2010.



Judge of the Superior Court
LINDA B. QUINN

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8 APPROVED AS TO FORM:

9 Date: February 24, 2010.



Cory J. Briggs

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11 Attorney for Petitioner Chollas Restoration,
12 Enhancement and Conservancy Community
13 Development Corporation

13 Date: February 24, 2010.



Heather L. Stroud

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15 Attorney for Respondent City of San Diego
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JUDGMENT ON PETITION FOR WRIT OF MANDATE

Exhibit "A"

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

F I L E D

Clerk of the Superior Court

FEB 11 2010

Date: 02/11/2010

Time: 09:00:00 AM

Dept: C-74

Judicial Officer Presiding: Judge Linda B. Quinn
Clerk: Mary Jean Barham

By: M. BARHAM, Deputy

Bailiff/Court Attendant:
ERM:
Reporter: not reported

Case Init. Date: 10/14/2008

Case No: 37-2008-00093831-CU-TT-CTL Case Title: Chollas restoration, Enhancement and
Conservancy Community Development Corporation vs. City

Case Category: Civil - Unlimited

Case Type: Toxic Tort/Environmental

Event Type: Motion Hearing (Civil)

Moving Party: Chollas restoration, Enhancement and Conservancy Community Development
Corporation

Causal Document & Date Filed: Petition for Writ of Mandate, 10/14/2008

Appearances:

The Court, having taken the above-entitled matter under submission on 02/05/2010 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

Petitioner Chollas Restoration, Enhancement and Conservancy Community Development Corporation's Petition for Writ of Mandate is granted in part and denied in part.

The court declines to address Petitioners' argument the proper notice time period is 30-days because the allegation is not pled in the petition.

The writ is granted because the record shows the notice was defective. Even based upon a 20-day notice period, Respondent failed to give adequate notice. The parties agree that prior to adoption of an Mitigated Negative Declaration, public notice must be provided in one of three ways: (1) publication; (2) posting in the area where the project is to be located; or (3) direct mailing to the owners and occupants of contiguous property. (Pub. Res. Code §21092(b)(3).) In addition, notice must be posted in the office of the county clerk for 20 days. (Pub. Res. Code §21092.3.) In this case, the notice was published on May 9, 2008. (AR 106:2524) The notice was posted at the county clerk's office on May 14, 2008. (AR 5:81-82) The public comments period closed on May 28, 2008. (AR 323:5587) Neither of the notices provided the requisite 20-days notice.

Respondent argues that because the notice was published on May 9, 2008, providing 19-days notice, Respondent made a good faith effort and the claim of defective notice should be rejected. In support of this argument, Respondent relies on *Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 Cal.App.4th 911. In *Gilroy Citizens*, respondent published a notice of the draft EIR 42-days prior to the close of the public comment period instead of the statutorily required 45-days. In addition, respondent posted the notice in the county clerk's office for 30-days and did a direct mailing to contiguous property owners. (Id. at 921, 923.) The court found the 42-day notice period was not fatal

Date: 02/11/2010

MINUTE ORDER

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because respondent used other methods of giving notice. (Id. at 922.)

In this case, neither method of providing notice, publication and posting, gave the public requisite notice. The publication was one day short and the posting at the county clerk's office was six days less than required. Since none of the methods used by the City complied with CEQA, the petition for writ of mandate is granted.

With regard to the substantive arguments raised in the petition as to whether an EIR is required, the court finds ...

CEQA requires an EIR "whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental impact." (No Oil, Inc. v. City of Los Angeles (1974) 13 Cal.3d 68, 75) If there is substantial evidence of a significant environmental impact, evidence to the contrary does not dispense with the need for an EIR when it can still be fairly argued that the project may have a significant impact. (City of Antioch v. City Council (1986) 187 Cal.App.3d 1325, 1331, quoting Friends of "B" Street v. City of Hayward (1980) 106 Cal.App.3d 988)

A negative declaration, adopted after a project has been revised to avoid or mitigate environmental impacts, is referred to as a "mitigated negative declaration." ("MND") (Pub. Res. Code §21064.5; 14 CCR §153695.) An MND describes mitigation measures to eliminate significant impacts to be adopted after the project has been proposed. (14 CCR §15064(f)(2).) When a project applicant has tailored the project to avoid potential impacts and is willing to accept mitigating conditions, there is no need for an EIR to evaluate the project as originally proposed. (Running Fence Corp. v. Superior Court (1975) 51 Cal.App.3d 400.) An MND may be adopted only if all potentially significant effects of the project will be avoided or reduced to insignificance. (Pub. Res. Code §21080(c)(2); 14 CCR §15070(b).) If there is substantial evidence in the record the project may have one or more significant impacts on the environment despite modifications, a negative declaration is improper and an EIR is mandatory. The burden is on petitioner to demonstrate there is substantial evidence in the record supporting a fair argument the proposed project may have a significant effect even after mitigation measures are considered. (Architectural Heritage Ass'n v. County of Monterey (2004) 122 Cal.App.4th 1095.)

With regard to Petitioner's substantive arguments regarding preparation of an EIR, the writ is denied.

A negative declaration, adopted after a project has been revised to avoid or mitigate environmental impacts, is referred to as a "mitigated negative declaration." ("MND") (Pub. Res. Code §21064.5; 14 CCR §153695.) An MND describes mitigation measures to eliminate significant impacts to be adopted after the project has been proposed. (14 CCR §15064(f)(2).) When a project applicant has tailored the project to avoid potential impacts and is willing to accept mitigating conditions, there is no need for an EIR to evaluate the project as originally proposed. (Running Fence Corp. v. Superior Court (1975) 51 Cal.App.3d 400.) An MND may be adopted only if all potentially significant effects of the project will be avoided or reduced to insignificance. (Pub. Res. Code §21080(c)(2); 14 CCR §15070(b).) If there is substantial evidence in the record the project may have one or more significant impacts on the environment despite modifications, a negative declaration is improper and an EIR is mandatory. The burden is on petitioner to demonstrate there is substantial evidence in the record supporting a fair argument the proposed project may have a significant effect even after mitigation measures are considered. (Architectural Heritage Ass'n v. County of Monterey (2004) 122 Cal.App.4th 1095.)

Risk of Flooding

Petitioner argues there is a fair argument the Project may have a potentially significant impact by exposing people and structures to risks from flooding. Petitioner does not allege any impact from flooding in the First Amended Petition. (FAP ¶¶ 19.) However, since it was raised in the briefs, the court will address the issue. There is no dispute between the parties the area floods. The issue is whether there is a fair argument the Project may have a potentially significant impact by exposing the area risk from flooding. Under Pub. Res. Code §14125(a), physical conditions existing at the time is the baseline condition used to determine whether an impact is significant. Here, Petitioner did not meet its burden there is a fair argument of significant impact due to flooding. The Project's tendency to flood is a baseline condition which will not be adversely impacted by the Project.

In reply, Petitioner argues one of the purposes of CEQA is to reduce impacts of certain risks to people and structures. In support, Petitioner cites to statutes relating to schools, airports and subdivision

developments. However, in this case, the Project is a park. There is no evidence in the record support a finding potential flooding will damage the structures on the project or that people will be present, in the rain, while the Project floods and do nothing while the flood reaches them. In fact, the evidence supports Respondent's claim the Project is a better use of the site and will help to reduce flooding and issues related thereto. (AR 3:44, 41:1636; 43:1779; 65:5470-5471, 5501, 5505.)

Soil Contamination/Runoff

Petitioner argues there is a fair argument the project will have a significant environmental impact due to contamination caused by runoff and sewage. Petitioner has failed to meet this burden and show there substantial evidence in support of this assertion. First, Petitioner contends indicators within the creek have been rated medium and cadmium, copper, diazinon, lead and zinc are rated high. However, the document Petitioner cites, AR 73:2346, does not support this contention. (Petitioner's Opening Brief, 10:3-4; Page 2345-46 are a Public Notice and Agenda.) The evidence Petitioner cites in support of the contention there is a contamination problem upstream is also lacking. The evidence cited only seems to discuss the flooding issue, not any contamination issue. (AR 65:5533-5523, 5543-5544 – Ms. Quiroz' testimony regarding her interpretation of litigation documents and flooding.)

Petitioner also points to the fact there have been two sewage spills in the area. The first sewage spill was along the park's western boundary in August 2002 and consisted of 910 gallons of sewage and the second was on the eastern side of Wightman Street between manholes 122 and 586 in January 2008 and consisted of 680 gallons of sewage. (AR 65:5468.) There have been no sewage spills on the project site. (Id.) The fact there have been sewage spills in the area is not substantial evidence there is a significant impact from sewage contamination and Petitioner failed to meet its burden.

Biological Resources

Petitioner asserts there is a fair argument the Project will have a potentially significant impact on biological resources. Petitioner has failed to meet its burden substantial evidence supports a fair argument. The MND states the impact on biological resources is less than significant with mitigation. (AR 3:56-57) The Biological Survey conducted showed there would be no biological impact. (AR 3:34) Thus, no mitigation is required. (Id.) In support of their argument, Petitioner cites to a letter from the Department of Fish and Game. (AR 131:2685-2691) A review of the complete letter does not reveal any there will be significant impacts which cannot be mitigated to insignificance.

Petitioner's requests for judicial notice are granted.



Linda B. Quinn

PROOF OF SERVICE

1. My name is Cory J. Briggs. I am over the age of eighteen. I am employed in the State of California, County of San Bernardino.

2. My business _____ residence address is Briggs Law Corporation, 99 East "C" Street, Suite 111, Upland, CA 91786

3. On February 24, 2010, I served _____ an original copy a true and correct copy of the following documents: [Proposed] JUDGMENT ON PETITION FOR WRIT OF MANDATE

4. I served the documents on the person(s) identified on the attached mailing/service list as follows:
 by personal service. I personally delivered the documents to the person(s) at the address(es) indicated on the list.

by U.S. mail. I sealed the documents in an envelope or package addressed to the person(s) at the address(es) indicated on the list, with first-class postage fully prepaid, and then I

deposited the envelope/package with the U.S. Postal Service

placed the envelope/package in a box for outgoing mail in accordance with my office's ordinary practices for collecting and processing outgoing mail, with which I am readily familiar. On the same day that mail is placed in the box for outgoing mail, it is deposited in the ordinary course of business with the U.S. Postal Service.

I am a resident of or employed in the county where the mailing occurred. The mailing occurred in the city of Upland, California.

by overnight delivery. I sealed the documents in an envelope/package provided by an overnight-delivery service and addressed to the person(s) at the address(es) indicated on the list, and then I placed the envelope/package for collection and overnight delivery in the service's box regularly utilized for receiving items for overnight delivery or at the service's office where such items are accepted for overnight delivery.

by facsimile transmission. Based on an agreement of the parties or a court order, I sent the documents to the person(s) at the fax number(s) shown on the list. Afterward, the fax machine from which the documents were sent reported that they were sent successfully.

by e-mail delivery. Based on an agreement of the parties or a court order, I sent the documents to the person(s) at the e-mail address(es) shown on the list. I did not receive, within a reasonable period of time afterward, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws _____ of the United States of the State of California that the foregoing is true and correct.

Date: February 24, 2010

Signature: C. J. Briggs

SERVICE LIST

Chollas Restoration, Enhancement and Conservancy Community Development Corporation

v.

City of San Diego *et al.*

San Diego County Superior Court case no. 37-2008-00093831-CU-TT-CTL

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