

**SUPERIOR COURT OF CALIFORNIA,**

COUNTY OF SAN DIEGO

HALL OF JUSTICE

TENTATIVE RULINGS - February 28, 2018

EVENT DATE: 03/01/2018

EVENT TIME: 09:00:00 AM

DEPT.: C-73

JUDICIAL OFFICER: Joel R. Wohlfeil

CASE NO.: 37-2017-00018630-CU-TT-CTL

CASE TITLE: SAVE OUR HERITAGE ORGANISATION SOHO 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: Brief - Other, 12/11/2017

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The Petition (ROA # 1, 23) of Petitioner Save Our Heritage Organisation ("Petitioner" or "SOHO") for a peremptory writ of mandamus ordering Defendant CITY OF SAN DIEGO, CITY COUNCIL OF THE CITY OF SAN DIEGO ("Defendant" or "City") to set aside its approval of the 1122 4th Street project and demolition of the historic California Theatre, and all project entitlements, and to refrain from considering approvals pending its certification of an adequate subsequent EIR and full compliance with the California Environmental Quality Act ("CEQA"), is GRANTED.

As discussed below, the applicable EIR is deficient because it did not consider the feasibility of an adaptive reuse alternative as a means to lessen or avoid project impacts.

**A. Introduction**

This Petition involves a challenge to the April 2017 decision by the City of San Diego certifying the EIR and adopting CEQA findings for the proposed "1122 4<sup>th</sup> Avenue Project." This Project includes demolition of the historic California Theatre building followed by construction of a 40 story, 420-foot-tall mixed use development of 282 residential units with a street level retail lobby, associated residential amenities, two and a half levels of underground parking and four levels of above grade parking (AR 7957). The Petition asserts several arguments challenging approval and certification of the Project. These arguments generally coalesce around a central theme: the City failed to adequately address the ability to adapt and reuse the existing historical structure such that its loss could be avoided, mitigated or minimized.

**B. Applicable Standard of Review**

"Any action or proceeding to attack, review, set aside, void or annul a determination ... of a public agency, made as a result of a proceeding in which by law a hearing is required to be given ..., on the grounds of noncompliance with the provisions of this division shall be in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure." Pub. Resources Code 21168. In reviewing an agency's compliance with CEQA in the course of its legislative or quasi-legislative actions, the Court's inquiry "shall extend only to whether there was a prejudicial abuse of discretion." Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal. 4th 412, 426 (quoting Pub. Resources Code 21168.5). Such an abuse is established if the agency has not proceeded in a manner required by law, or if the determination or decision is not supported by substantial evidence. Id. Abuse of discretion is established if the County did not proceed as required by law, if its determination was not supported by its findings, or its findings were not supported by substantial evidence. Citizens To

Preserve the Ojai v. County of Ventura (1985) 176 Cal. App. 3d 421, 428.

The EIR is the "heart of CEQA," and its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal. 3d 553, 564. The EIR protects not only the environment, but also informed self-government. Id. An EIR should be prepared with a sufficient degree of analysis to provide decisionmakers with information enabling them to make a decision which intelligently takes account of environmental consequences. 14 C.C.R. 15151 (CEQA "Guidelines"). An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible. Id. The Court looks not for perfection, but for adequacy, completeness, and a good faith effort at full disclosure. Id.

The Court does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document. Citizens To Preserve the Ojai v. County of Ventura, supra. Certification of an EIR which is legally deficient because it fails to adequately address an issue constitutes a prejudicial abuse of discretion regardless of whether compliance would have resulted in a different outcome. Id. An omission in an EIR's significant impacts analysis is deemed prejudicial if it deprived the public and decision makers of substantial relevant information about the Project's likely adverse impacts. Neighbors for Smart Rail v. Exposition Metro Line Const. Authority (2013) 57 Cal. 4th 439, 463. Although an agency's failure to disclose information called for by CEQA may be prejudicial regardless of whether a different outcome would have resulted if the public agency had complied with the law, under CEQA there is no presumption that error is prejudicial. Id. Insubstantial or merely technical omissions are not grounds for relief. Id. A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decision making and informed public participation, thereby thwarting the statutory goals of the EIR process. Id.

Where an EIR is challenged as being legally inadequate, the Court presumes a public agency's decision to certify the EIR is correct, thereby imposing on a party challenging it the burden of establishing otherwise. Sierra Club v. City of Orange (2008) 163 Cal. App. 4th 523, 530. Petitioner is the moving party, and therefore frames the issues to be litigated when the CEQA writ is filed. enter for Biological Diversity v. County of San Bernardino (2010) 185 Cal. App. 4th 866, 897.

### **C. Consideration of Adaptive Reuse Alternative**

Paragraph 17 of the Petition alleges that the EIR "fails to consider a required range of alternatives according to the rule of reason, including but not limited to alternatives avoiding demolition of the California Theatre and its Signs, and alternatives that are fully consistent with the city's adopted plans and policies."

It is the declared policy of this state to "[t]ake all action necessary to provide the people of this state with ... historic environmental qualities." Pub. Resources Code 21001(b). It is also declared policy to "preserve for future generations ... examples of the major periods of California history." Pub. Resources Code 21001(c). In the context of CEQA, the pertinent legal question is whether demolition "may cause a substantial adverse change" to a building's significance as an historical resource. Architectural Heritage Ass'n v. County of Monterey (2004) 122 Cal. App. 4th 1095, 1118 (quoting Pub. Resources Code 21084.1). A project that may cause a substantial adverse change in the significance of an historical resource is a project that may have a significant effect on the environment. Id. (quoting Pub. Resources Code 21084.1 and Guidelines 15064.5(b)). "Substantial adverse change in the significance of an historical resource" means physical demolition or other adverse effects, such that the significance of the historic resource would be materially impaired. Id. (quoting Guidelines 15064.5(b)(1)). Material impairment occurs when a project alters or destroys "those physical characteristics of an historical resource that convey its historical significance and that justify its inclusion" in a state or local historic registry. Id. (quoting Guidelines 15064.5(b)(2)).

Public agencies should not approve projects as proposed if there are feasible alternatives or feasible

mitigation measures available which would substantially lessen the significant environmental effects of such projects. Pub. Resources Code 21002. The procedures required by CEQA "are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects." Id. A public agency must consider measures that might mitigate a project's adverse environmental impact, and adopt them if feasible. Mountain Lion Foundation v. Fish & Game Com. (1997) 16 Cal. 4th 105, 123.

The EIR must describe a "range of reasonable alternatives to 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. Guidelines 15126.6(a). The EIR must "evaluate the comparative merits of the alternatives." Id. Importantly, the EIR need not consider every conceivable alternative to a project, but instead must only consider a "reasonable range of potentially feasible alternatives that will foster informed decisionmaking and public participation." Id. The EIR must include "sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project." Id. at (d). There is no ironclad rule governing the nature or scope of the alternatives to be discussed in an EIR, other than the rule of reason. Citizens of Goleta Valley v. Board of Supervisors, supra at 576. Whether to approve a development project is a delicate task which requires a balancing of interests, and is necessarily left to the sound discretion of local officials. Id. The "rule of reason" requires the EIR to set forth only those alternatives necessary to permit a reasoned choice. Guidelines 15126.6(f). The alternatives are limited to ones that would avoid or substantially lessen any of the significant effects of the project. Id. Of these, the EIR need examine in detail only the ones that the lead agency determines could feasibly attain most of the basic objectives of the project. Id. An EIR should not exclude an alternative from detailed consideration merely because it would impede to some degree the attainment of the project objectives. In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings (2008) 43 Cal. 4th 1143, 1165. But an EIR need not study in detail an alternative that is "infeasible," or that the lead agency has reasonably determined cannot achieve the project's underlying fundamental purpose. Id. The range of alternatives included in an EIR should focus on those that could feasibly attain the basic objectives of the project. Save San Francisco Bay Assn. v. San Francisco Bay Conservation etc. Com. (1992) 10 Cal. App. 4th 908, 922. "CEQA does not require the examination of alternatives that are so speculative, contrary to law, or economically catastrophic as to exceed the realm of feasibility." Id.

"'Feasible' means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." Pub. Resources Code 21061.1. In the event specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures, individual projects may be approved in spite of such significant effects. Pub. Resources Code 21002 and Habitat and Watershed Caretakers v. City of Santa Cruz (2013) 213 Cal. App. 4th 1277, 1302. "If economic, social, or other conditions make it infeasible to mitigate one or more significant effects on the environment of a project, the project may nonetheless be carried out or approved at the discretion of a public agency if the project is otherwise permissible under applicable laws and regulations." Pub. Resources Code 21002.1(c). It is the agency's responsibility to provide an adequate discussion of alternatives, and an EIR should not exclude an alternative from detailed consideration merely because it would impede to some degree the attainment of the project objectives. Habitat and Watershed Caretakers v. City of Santa Cruz, supra at 1303. An environmentally superior alternative cannot be deemed infeasible absent evidence that the additional costs or lost profits are so severe the project would become impractical. Kings County Farm Bureau v. City of Hanford (1990) 221 Cal. App. 3d 692, 736.

The Supplemental EIR ("SEIR") lists three primary objectives for the Project: (1) Provide new multifamily housing opportunities within walking distance of existing employment opportunities along a trolley line and in proximity to downtown civic and recreational opportunities; (2) Create economic growth through revitalization of commercial areas along C Street through the creation of new retail space as part of the project and also by bringing residents to patronize existing businesses in the area; and (3) Pay homage to the historical nature of the California Theatre using features resembling those of the California

Theatre (AR 8030). The record contains evidence that the Project garnered much support from residents interested in revitalizing this area of downtown San Diego.

It is undisputed that the California Theatre building is considered to be "historically significant." Obviously, this historical character would not be retained or preserved if the building was demolished. See AR 8010 ("... a direct and cumulative significant and unavoidable historical resources impact was found to result from implementation of the proposed project due to the full demolition of the California Theatre which is a historical structure"). Further, the EIR for the Downtown Community Plan did not contemplate the demolition of qualified downtown historic resources. As a result, the SEIR concludes that demolition is a significant and unavoidable impact (AR 6639). The SEIR considered and rejected the alternative location alternative and the "full rehabilitation" alternative (AR 8058-8061). The SEIR also evaluated a no project alternative, and four other alternatives, all of which involved varying degrees of demolition (3 of these alternatives retained and rehabilitated the 9 story office building) (AR 8061-8063).

The failure to include at least one preservation alternative in the SEIR, to avoid significant impacts to historic resources, rendered the SEIR inadequate, and violates CEQA as a matter of law. In other words, the SEIR fails to evaluate at least one alternative that would serve to avoid the significant impact of demolition. It is unknown whether adaptive re-use of the existing structure is feasible and / or whether additional new housing units could be incorporated into the existing structure. It is unknown whether an alternative exists (and its feasibility) that both preserves the California Theatre and expands housing and retail uses. See AR 8980 (the Historic Resources Board "does not concur that the SDP findings have been substantiated due to an alternatives analysis that should contain further alternatives including an adaptive re-use option"). Respondent and RIP refer to such an alternative as a "mythical unicorn" and a "fanciful effort." See Opposition Brief at page 23, lines 4-5 and page 24, line 9. Of course, the feasibility and practicality of such an alternative was never exposed to the light of public discourse because the SEIR was deficient. The decisionmakers and public were never given the opportunity to weigh mythical versus reality, the very purpose of CEQA.

As set forth within the administrative record, a full rehabilitation alternative to restore the theater building does not require reuse as a theater. Adaptive reuse is a flexible concept. In light of the Project's inconsistency with the Downtown Community Plan, at least one full rehabilitation alternative must be evaluated in a revised Project EIR before the City may consider the feasibility of alternatives, or any overriding considerations. Without the addition of a full rehabilitation alternative, the EIR fails in its stated purpose to inform the public and its responsible officials. The lead public agency must be given the opportunity to systematically identify any feasible alternative, which will avoid or substantially lessen significant impacts. Currently, the EIR does not describe and evaluate a range of reasonable alternatives. It is the lead agency's responsibility to provide an adequate discussion of alternatives, and an EIR should not exclude an alternative from detailed consideration merely because it would impede to some degree the attainment of project objectives.

#### **D. Conclusion**

Petitioner's Petition is granted. As set forth above, the CEQA process was inadequate such that the lead agency and the public were not reasonably able to analyze the costs and benefits of the Project. Every project must comply with the procedures set forth within CEQA as a means to foster good governance and public participation in the process of environmental review. See Guidelines 1503 (and cases cited therein). A peremptory writ will issue ordering the City's approval of demolition of the California Theatre to be set aside, and that approval be reconsidered only after preparation, circulation, and certification of a revised EIR that complies with the mandates of CEQA.