

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

MINUTE ORDER

DATE: 01/19/2012

TIME: 10:16:00 AM

DEPT: C-68

JUDICIAL OFFICER PRESIDING: Judith F. Hayes

CLERK: Patricia Legler

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT:

CASE NO: **37-2011-00095579-CU-WM-CTL** CASE INIT.DATE: 08/02/2011

CASE TITLE: **SAVE OUR HERITAGE ORGANISATION [SOHO] vs. CITY OF SAN DIEGO**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

APPEARANCES

The Court, having taken the above-entitled matter under submission on 12/16/11 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

The Writ of Mandamus of Petitioner Save Our Heritage Organisation SOHO is GRANTED.

The Court finds the subject MOU constitutes an approval of the proposed project without prior environmental review as required by CEQA. The MOU constitutes action that effectively forecloses due consideration of project alternatives or mitigation measures that are essential parts of CEQA review. In looking at the terms of the agreement and the surrounding circumstances the City has committed itself to the proposed project in such a way that any promise of meaningful future CEQA review would constitute a post-hoc rationalization to support the action already taken. (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 138-39, and referencing *Citizens for Responsible Government v. City of Albany* (1997) 56 Cal.App.4th 1199, 1221-22)

The MOU unequivocally states the City and Committee fully understand and acknowledge that the City will conduct full environmental review and consider alternatives and mitigating measures as required under CEQA. (MOU, Recitals at para. G) The MOU also states the City is not committed to approve the project. (*Id.*) This does not eliminate the issue presented by petitioner's writ. "A CEQA-compliance condition can be a legitimate ingredient in a preliminary public-private agreement, viewed in light of all the surrounding circumstances, commits the public agency as a practical matter to the project, the simple insertion of a CEQA compliance condition will not save the agreement from being considered an approval requiring prior environmental review." (*Save Tara, supra* at 132, emphasis added)

The MOU contains a very detailed description of the "proposed project." (MOU, Article 2, Proposed Project) The proposed project is the project supported by Real Party the Plaza de Panama Committee. Significantly, the MOU also states the MOU shall terminate upon the City's denial of the proposed project, and/or the City approval of the proposed project in a form unacceptable to the Committee (decided in the sole discretion of the Committee) and/or the bonds to be issued by the City will not yield funds adequate to support construction of the parking structure. (MOU, Article 6, Miscellaneous)

Although the MOU expressly states that the agreement is not a binding contract and is not enforceable against either party (*Id.*, at 6.4 and 6.5) the fact that the Committee has the ability to unilaterally terminate the project if the proposed project does not go forward as it prefers, the agreement effectively constitutes an approval of the project as proposed by Real Party. This is demonstrated by the surrounding circumstances, and past conduct of the Committee.

The pertinent circumstances include the following. When the Committee first presented the MOU for Council approval, the City Council's Committee on Rule, Open Government and interdepartmental Relations declined to recommend approval of the MOU to the City Council due to concerns about the project. (AR 1:100-210 at 209-210) Shortly thereafter, the Committee pulled its support of the project "in light of the lack of support today by the Rules Committee." (AR 2:795-796) This conduct together with the express language of the MOU, demonstrates the Committee will not support any project other than the one proposed.

Sometime later, the Committee approached the full City Council to consider the MOU at a public hearing on July 19th. Prior to the hearing, Mayor Jerry Sanders emailed citizens urging them to contact their City Council members to urge them to vote in favor of approving the MOU. (AR 730-736) The Mayor addressed the Council and urged it to approve the MOU. At this meeting, the City Council approved the MOU. This evidence shows that the City publicly defended the project in the face of opposition and committed resources to its approval. The commitment of resources is also evidenced in the terms of the MOU where the City is required to provide staff assistance and direction at no cost to the Committee (MOU, Article 4, City Contributions, 4.1.5, 4.1.6) In addition, the City is to secure tax-exempt bonds to construct the parking structure. (MOU, Article 5, Funding, 5.2)

The terms of the MOU and the surrounding circumstances create the kind of situation CEQA is meant to guard against. The California Supreme Court explained the CEQA process "protects not only the environment but also informed self-government." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564) Self-government is protected by requirements that "ensure[] that members of the [governmental decision-making body] will fully consider the information necessary to render the decisions that intelligently take into account the environmental consequences. It also promotes the policy of citizen input underlying CEQA." (*Mountain Lion Foundation v. Fish & Game Commission* (1997) 16 Cal.4th 105, 133; Public Resources Code section 21080,5(d)(2)(D), 21091(d)(2), CEQA Guidelines section 15088) Here, Respondents' actions preclude meaningful analysis and consideration of project alternatives and mitigation measures, as well as, deny the public meaningful input and trust in the process.



Judge Judith F. Hayes