

ERRATA TO

**VOLUME I FINAL MITIGATED NEGATIVE DECLARATION
PORTSIDE PIER RESTAURANT REDEVELOPMENT PROJECT
SAN DIEGO, CA (UPD #MND-2016-91; SCH #2016081007)**

The attached replaces Appendix I, Sunroad Project Superior Court Decision, of Appendices to Attachment D: Comments Received and District Responses. A different Superior Court Decision was previously inadvertently attached.

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

MINUTE ORDER

DATE: 05/12/2014

TIME: 10:50:00 AM

DEPT: C-71

JUDICIAL OFFICER PRESIDING: Ronald S. Prager

CLERK: Lee Ryan

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT:

CASE NO: 37-2013-00057492-CU-TT-CTL CASE INIT.DATE: 07/15/2013

CASE TITLE: **San Diegans for Open Government vs CALIFORNIA COASTAL COMMISSION**

[E-File]

CASE CATEGORY: Civil - Unlimited

CASE TYPE: Toxic Tort/Environmental

EVENT TYPE: Motion Hearing (Civil)

APPEARANCES

The Court, having taken the above-entitled matter under submission on 05/08/14 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

The Court rules on plaintiffs/petitioners San Diegans for Open Government (SDOG) and San Diego Navy Broadway Complex Coalition's (SDNBCC) (sometimes collectively Petitioners) petition for writ of mandate as follows:

The Court's tentative ruling will serve as the Court's Statement of Decision pursuant to California Rules of Court, rule 3.1590.

Petitioners are represented by Cory J. Briggs and Mekaela M. Gladden of the Briggs Law Corporation.

Respondent California Coastal Commission (Commission) is represented by Baine P. Kerr of the Office of the Attorney General. Respondent San Diego Unified Port District (Port District) is represented by Michael M. Hogan of Hogan Law APC. The Real Parties in Interest Sunroad Enterprises and Sunroad Harbor Island, Inc. (sometimes collectively RPIs) are represented by Steven H. Kaufman of Richards, Watson & Gershon, APC.

The Court has reviewed the record in light of the parties' briefs and the applicable law and concludes the petition for writ of mandate should be denied for the reasons stated below.

Standard of Review. Public Resources Code section 30801 provides for judicial review of Commission decisions by way of a petition for writ of administrative mandamus under Code of Civil Procedure section

DATE: 05/12/2014

MINUTE ORDER

DEPT: C-71

Page 1
Calendar No.

1094.5. In reviewing a Commission decision, the trial court determines whether (1) the agency proceeded without, or in excess of, jurisdiction; (2) there was a fair hearing; and (3) the agency abused its discretion. (*Ross v. Cal. Coastal Com.* (2011) 199 Cal.App.4th 900, 921 (hereafter *Ross*.) Abuse of discretion is established if the Commission has not proceeded in the manner required by law, the decision is not supported by the findings or the findings are not supported by the evidence. (*Ibid.*) The Commission's findings and actions are presumed to be supported by substantial evidence. (*Ibid.*) A person challenging the Commission's decision bears the burden of showing that substantial evidence does not support the Commission's findings. (*Ibid.*)

When reviewing the Commission's decision, the court examines the whole record and considers all relevant evidence, including that which detracts from the decision. (*Ross, supra*, 199 Cal.App.4th at p. 921.) Although this task involves some weighing to fairly estimate the worth of the evidence, this limited weighing does not constitute independent review where the court substitutes its findings and inferences for those of the Commission. (*Id.* at p. 922.) Rather, the Commission weighs the preponderance of conflicting evidence, and the court may reverse its decision only if, based on the evidence before it, a reasonable person could not have reached the same conclusion the Commission reached. (*Ibid.*; accord *Ocean Harbor House v. Cal. Coastal Com.* (2008) 163 Cal.App.4th 215, 227 (hereafter *Ocean Harbor House*.) Substantial evidence upon which the Commission may base its decision includes opinion evidence of experts, oral presentations at the public hearing, photographic evidence, and written materials of staff. (*Whaler's Village Club v. Cal. Coastal Com.* (1985) 173 Cal.App.3d 240, 261 (hereafter *Whaler's Village Club*); *Coastal Southwest Dev. Corp. v. Cal. Coastal Zone Conservation Com.* (1976) 55 Cal.App.3d 525, 532, 536 (hereafter *Coastal Southwest Dev. Corp.*.)

The ultimate task of statutory interpretation is for the judiciary, but the Commission's interpretation of the statutes and regulations under which it operates is entitled to "great weight," given the Commission's special familiarity with the regulatory and legal issues. (*Ross, supra*, 199 Cal.App.4th at p. 938; *Reddell v. Cal. Coastal Com.* (2009) 180 Cal.App.4th 956, 965-966; but see *Burke v. Cal. Coastal Com.* (2008) 168 Cal.App.4th 1098, 1106.)

As a preliminary matter, the Court notes that there is no dispute as to Petitioners' standing. Thus, it was not necessary for Petitioners' to provide extra record evidence i.e., declarations, to establish that they had standing to pursue the claims asserted here.

Also, Petitioners did not address the Port District's exhaustion argument in its opposition brief. Thus, the Court assumes that they do not contest this issue.

The first issue is whether the Commission violated the Coastal Act.

One, Public Resources Code section 30625 (section 30625) provides, in pertinent part: "any appealable action on a coastal development permit or claim of exemption for any development by a local government or port governing body may be appealed...The commission may approve, modify, or deny such proposed development..." Thus, the Commission has the authority to hear an appeal of development the Port District authorized pursuant to a claim of exemption, and may modify and approve such development on appeal.

Petitioners' contend that by issuing the permit, the Commission instituted a "de facto" amendment of the Plan. In this case, the Commission did not purport to amend the Plan or change any land use designation within it. It modified and approved the project, as section 30625 authorized. Port master plans are required to "include" proposed projects, and ports must certify that approved projects

"conform" to port master plans, but no provision of the Coastal Act states that the Commission may only approve development included in a project list when exercising its appellate jurisdiction over a claim of exemption. (See Pub. Res. Code, §§30711, 30715, 30715.5, 30112.)

Petitioners' interpretation of the Coastal Act would negate the requirement in section 30621 that the Commission hold a "de novo" hearing once appellate review is exercised, because there cannot be a "de novo" hearing if only one course of action is possible. (See *Coronado Yacht Club v. Cal. Coastal Com.* (1993) 13 Cal.App.4th 860, 871-872 (hereafter *Coronado Yacht Club*).)

Petitioners' argument that the Commission lacks authority to approve development not listed in a port master plan conflicts with Public Resources Code section 30715, which provides that the Commission's permitting authority is delegated to the Port "over any new development contained in the certified plan...." Read together with section 30625, this provision demonstrates that the Commission has authority to approve development not listed in a port master plan when exercising appellate jurisdiction over a port's claim of exemption, and it was not required by law to deny the permit application.

In sum, the fundamental flaw in Petitioners' argument is that it ignores the very Coastal Act provision which expressly authorized the Commission to "approve" or "modify" the Project.

Two, the Project was not an "appealable development", but even assuming it was, the Commission had express authority in section 30625 to "approve" and "modify" the Project.

Three, the Commission had the jurisdiction to conditionally approve the Project based on retained Commission jurisdiction.

Petitioners read the words in the second sentence of Public Resources Code section 30715 subd. (a), "contained in the certified plan," to mean that every development proposed in a port must be listed in the Port Master Plan. At the same time, they ignored the first sentence, which states that until a port master plan is certified, permit jurisdiction remains with the Commission. Consequently, assuming Petitioners' interpretation was correct, development not listed in the plan would remain subject to the Commission's original permit jurisdiction. It would not be delegated to the Port District at all. As applied here, the Port District's exercise of jurisdiction in the first instance would be irrelevant. The Commission would retain jurisdiction to conditionally approve the Project. Importantly, however, Petitioners not only ignore the first sentence of section 30715 subd. (a), but wrongly interpret the second sentence. The quoted words, in context, mean simply that after certification, jurisdiction over developments in the port master plan or portion thereof that is certified is delegated to the ports, with appeal jurisdiction reserved to the Commission. (See *Coronado Yacht Club, supra*, 13 Cal.App.4th at p. 872.) Furthermore, nothing in the Coastal Act mandates that every proposed development in a port be the subject of a port master plan amendment. (See Pub. Res. Code, §30711.) In Public Resources Code section 30711, the Legislature could have stated that a port master plan must include all developments, including exempt, emergency, and nonappealable development, but instead expressly stated only that "[p]roposed projects listed as appealable in Section 30715" be included.

Four, substantial evidence supports the Commission's determination that the Project, as modified, complied with the Coastal Act.

The Commission found that the new landside restaurant development, as the Port approved, would block waterfront access that was currently available through the existing parking lot. (11 AR 2778.) The Commission required Sunroad to re-design the project to provide a continuous public path along the

shoreline between the restaurant and the water. (11 AR 2654-2655.) The Commission further required Sunroad to allow public access to the floating barge, and to provide appropriate signage directing the public to the barge. (11 AR 2799.) Commission staff testified that the project, as revised, would maintain and improve public access along the shoreline. (11 AR 2654-2655.) The Commission concurred. (11 AR 2797.)

The Commission also found that the modified development would not have any adverse impact on the visual quality of the area because the proposed barge would be a maximum 18 feet in height, compared to the previous barge, the 4-story Reuben E. Lee. Moreover, the public access improvements on the shoreline side of the restaurant would provide pedestrian access to views beyond the building. (11 AR 2801.) Visual depictions that the Commission considered show that the project would provide shoreline public access and enhanced views of the water. (11 AR 2562-2571; 2816-2818; 1 AR 11-12.) The Commission also found the proposed project includes expansive landscaping and "hardscape" that would make the area more inviting to the public. (11 AR 2801.)

Petitioners claim that additional public input would have resulted in further measures to enhance public access and protect scenic views, but failed to identify any further measures or cite any evidence in the record supporting their position. (*Ibid.*)

The Commission concluded the project as modified and conditioned was consistent with the Coastal Act based on ample evidence that public access and views would be protected and enhanced. The evidence showed the project's public path and deck area would be preferable to the currently-available public access to the end of the peninsula via a parking lot, and the new floating barge would be significantly lower in height and bulk than the Reuben E. Lee. The Commission was entitled to consider this evidence and infer from it that the project would enhance, not diminish, public access and scenic views. (*Whaler's Village Club, supra*, 173 Cal.App.3d at p. 261; *Coastal Southwest Development Corp., supra*.) Petitioners do not offer any evidence contrary to the Commission's findings, and cannot carry their burden to defeat the presumption that substantial evidence supported the Commission's decision. (*Ocean Harbor House Homeowners Assn., supra*, 163 Cal.App.4th at p. 227.)

The second issue is whether the Commission violated CEQA

Under CEQA, a state agency's regulatory program may be exempted from the requirements of preparing initial studies, negative declarations and environmental impact reports if the Secretary of the Resources Agency certifies the program. (Pub. Res. Code, §21080.5.) A certified regulatory program remains subject to other CEQA policies, including the obligations to identify a project's adverse environmental effects, to mitigate those effects through the adoption of feasible alternatives or mitigation measures, and to justify its actions based on specific economic, social or other conditions. (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1230.)

The secretary certified the Commission's coastal development permit program under section 21080.5. (Cal. Code Regs, tit. 14, §15251(c).) A Commission staff report "complies with the relevant substantive and procedural requirements applicable to a certified regulatory program" for CEQA purposes. (*Ross, supra*, 199 Cal.App.4th at p. 933; see Cal. Code Regs., tit. 14, §§13057 [requirements for staff report]; 13096 [requiring written conclusions by Commission as to consistency of permit applications with CEQA].) The report must include "a description of the proposed activity with alternatives to the activity..." (Pub. Res. Code, §21080.5(d)(3)(A).) The consideration of alternatives need not be exhaustive, but "it must reasonably reflect that due consideration was given" to project alternatives. (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 136.)

Here, the Commission staff report described two projects: the project the Port District approved, and the project that the Commission ultimately approved. The report found that the Port District approved project would total 27,505 square feet, and would provide two public viewpoints on either side of the proposed restaurant. (11 AR 2760.) The report stated that the Project would eliminate public access to the shoreline and water views, and that the proposed overlook points would not preserve or enhance the level or quality of public access that existed on the site. (11 AR 2778-2779.) It also found that, as a result of the elimination of public access to the shore, the project would block existing views of the downtown skyline and bay, (11 AR 2780.) In addition, the report noted that the Port District's proposal did not include conditions requiring measures to prevent the spread of the invasive algae *Caulperia taxifolia*. (*Ibid.*) In contrast, as described above, the modified development proposed to the Commission would be approximately 22,850 square feet—a significant reduction—and would include measures to ensure public access to the coast and protect scenic views, coastal biology and water quality. (11 AR 2790.)

In addition, the Commission considered and rejected alternatives requiring that the project be moved further away from the shoreline or shrunk in size. (11 AR 2798.) The restaurant could not be shifted inland because of setback requirements related to a seismic fault, and shrinking the project further would have required eliminating basic components of the project. (*Ibid.*; 11 AR 2781 [describing 10-foot setback zone].) And, such changes would be unnecessary because the project had been re-designed to avoid all significant environmental impacts. (11 AR 2797-2803.) The record thus contains substantial evidence that the Commission considered a reasonable range of feasible alternatives, imposed feasible mitigation measures to reduce the project's environmental impact, and adopted the least environmentally-damaging alternative.

Contrary to petitioners' assertion, the staff report's findings that "feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects on the environment," and "there are no further feasible mitigation measures that would substantially lessen any significant adverse effects on the environment" (11 AR 2808-2809), were supported by substantial evidence and complied with CEQA. (See *Sierra Club v. Cal. Coastal Com.* (1993) 19 Cal.App.4th 547, 556; see also *Mira Development Corp. v. City of San Diego* (1988) 205 Cal.App.3d 1201, 1222-1223.)

Finally, the "Put it Back" alternative would not have required a CDP at all. Under the "Replacement or Reconstruction" exemption in both Section 8.b subd. (1) of the Port District's certified CDP regulations (5 AR 953-954) and the CEQA Guidelines (Cal. Code Regs., tit., 14, §15302(b)), RPIs could have put back a "Reuben E. Lee" or another restaurant on a barge without a permit, new public access, or new sweeping public views. An alternative must "substantially lessen a significant adverse impact that the activity may have on the environment." (Pub. Res. Code, §21080.5(d)(2)(A).) Petitioners' alternative would not achieve this goal. Any viable restaurant sitting on a barge would block views of downtown San Diego, the Bay, the Bridge, and Coronado. (11 AR 2576, 2581, 2587.) Moreover, counsel's generalized objection, without further explanation, made at the close of the public hearing, was barred in any event barred by the exhaustion doctrine. (Pub. Res. Code, §21177; *CREED v. City of San Diego* (2011) 196 Cal.App.4th 515, 527; *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1197-1198.)

Based on the foregoing, the Court denies the writ. The Commission is directed to prepare the Judgment.

IT IS SO ORDERED.

Ronald S. Prager

Judge Ronald S. Prager

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO


Central
330 West Broadway
San Diego, CA 92101

SHORT TITLE: San Diegans for Open Government vs CALIFORNIA COASTAL COMMISSION [E-File]

CLERK'S CERTIFICATE OF SERVICE BY MAIL

CASE NUMBER:
37-2013-00057492-CU-TT-CTL

I certify that I am not a party to this cause. I certify that a true copy of the attached minute order was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at San Diego, California, on 05/12/2014.

Clerk of the Court, by: , Deputy

MEKAELA M GLADDEN
BRIGGS LAW CORPORATION
814 MORENA BOULEVARD # 107
SAN DIEGO, CA 92110

STEVEN H KAUFMANN
RICHARDS/ WATSON/ GERSHON
355 S. GRAND. AVE, 40TH FLOOR
LOS ANGELES, CA 90071

BAINÉ P KERR
OFFICE OF THE ATTORNEY GENERAL
300 SOUTH SPRING STREET # 1702
LOS ANGELES, CA 90013

HAYLEY E PETERSON
110 WEST A ST #1100
SAN DIEGO, CA 92101

CORY J BRIGGS
BRIGGS LAW CORPORATION
99 EAST C STREET # 111
UPLAND, CA 91786

MICHAEL M HOGAN
HOGAN LAW APC
225 BROADWAY STE 1900
SAN DIEGO, CA 92101

Additional names and address attached.

CLERK'S CERTIFICATE OF SERVICE BY MAIL

Page 1