Ruling on Petition for Writ of Mandamus

SOHO v. City of San Diego (Plaza de Panama Ctee.), Case No. 2012-00102270

Hearing: February 1, 2013, 1:30 p.m., Dept. 72

1. Overview and Procedural Posture.

The Plaza de Panama Committee (hereinafter "RPI") proposed, and the City approved, a plan to change vehicle access and parking in San Diego's Balboa Park. The changes would remove vehicles from many of the areas of Balboa Park where they are now allowed, restore pedestrian and park uses to those areas, and add paid parking structures (and a 405 foot bridge from the east end of the existing Cabrillo Bridge to provide traffic circulation and access to the structures). AR 5407, 5411-5412, 5427-5428. The idea is to finish all the work in time for the centennial celebration of the 1915 Panama-California Exposition (which is when Balboa Park as we know it came into being).

SOHO, focusing largely on the proposed "Centennial Bridge," contends that the City's approval violated CEQA, the 1870 state statute whereby the "City Park" was set aside for perpetual free public use, and the City's own Municipal Code. It seeks an order from this court directing the City to set aside the certification of the EIR and all project approvals. It is undisputed that Balboa Park, and the project area in particular, is a National Historic Landmark.

After much preliminary work, RPI submitted its application for a Site Development Permit (SDP) and other project approvals on March 15, 2011. There were numerous intermediate public hearings. *E.g.* AR 9587, 22109. A draft EIR was prepared and circulated; SOHO commented on it (AR 6404), as did many others (*e.g.* AR 18247). The City's resolution certifying the FEIR passed following a lengthy public hearing on July 9, 2012. AR 011, 9750. The SDP was issued the same day (AR 0139), and must be utilized by July 9, 2015 (AR 0141). The Notice of Determination was filed July 13, 2012. AR 004.

SOHO filed its petition in this court on August 13, 2012. The case was assigned to Judge Hayes, but RPI challenged her. ROA 5. The case was reassigned to Judge Dato, but he was challenged by the City. ROA 6, 8. The case was reassigned to Judge Prager, but he was challenged by SOHO. ROA 9-10. Thus did the case come to Dept. 72.

The parties appeared *ex parte* on October 4, 2012 to set a briefing schedule. ROA 14-17. Understandably, RPI and the City wanted the soonest possible hearing date, because extensive demolition and construction such as that contemplated by the project takes time, and the 2015 centennial is only 2 years away. SOHO wanted adequate time for briefing and preparation/submission of the Administrative Record (herein "AR"), and the court was constrained by previously set hearing dates in other CEQA cases and many other matters. [The San Diego Superior Court was forced by severe budget cuts in the

second half of 2012 to close numerous courtrooms; the cases theretofore assigned to those courtrooms were then reassigned to the "surviving" departments, resulting in an exponential increase in caseload.] In any event, the hearing date of 2/1/13 was arrived at, and the parties stipulated to a briefing schedule. ROA 21, 26.

SOHO filed its opening brief and lodged its AR Excerpts on 11/19/12. ROA 25. The City lodged the AR on 10/18/12 (two CDs, totaling about 23,000 pages of imaged documents). The City filed its brief on 12/21/12, and lodged its AR Excerpts on 1/3/13. ROA 20, 27, 30. RPI filed its brief on 12/21/12 (using the wrong case number), filed its *errata* and a corrected brief on January 7, 2013, and lodged its AR Excerpts on 12/28/12. ROA 29, 31-33). SOHO filed its closing brief (ROA 36) late on January 24, 2013, more than a week after the due date agreed to by the parties and ordered by the court (ROA 26). [The court understands this was due to an illness suffered by petitioner's counsel.] The court has carefully reviewed the briefing and the AR (including the Powerpoint, animation and video portions of the AR which were mentioned in RPI's 12/21 brief at 6:5 and page 12, footnote 5, but not lodged by the City until January 11, 2013 after the clerk called at the court's direction to inquire about same).

The court elected to publish its detailed Tentative Ruling a week early, in light of the intense public interest this dispute has generated (and RPI's request filed January 24). The court believed that doing so would allow the parties to make ready a focused oral presentation on February 1, and also plan for the prompt seeking of appellate review if desired. As the court has recently recognized in a similar setting, it is but a way station in the life of most CEQA cases; the court is also acutely aware of the rapidly closing window of opportunity for the centennial celebration.

The early posting of the Tentative Ruling was explicitly <u>not</u> an invitation for further briefing (ROA 35 at p. 2). Nevertheless, without first seeking leave to do so, the City attempted to file, on the eve of the hearing, a supplemental brief which was not contemplated by the parties' agreed briefing schedule. ROA 37. The court rejected the untimely brief, which sought to raise arguments not made in the extensive regular briefing. *See San Diego Watercrafts, Inc. v. Wells Fargo Bank*, 102 Cal. App. 4th308, 316 (2002)(due process requires a party be fully advised of the issues to be addressed and be given adequate notice of what facts it must rebut in order to prevail); *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir.2007) ("the district court need not consider arguments raised for the first time in a reply brief."); *American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453 ("[p]oints raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument"); *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8 (" '[T]he rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.' ").

The court heard excellent and focused oral argument on February 1, from Ms. Brant-Hawley on behalf of SOHO, from Mr. Goldsmith and Ms. Contreras on behalf of the City, and from Mr. Williams on behalf of RPI. Supporters of SOHO and supporters of

RPI filled the gallery. The hearing lasted over 2 hours. Counsel for RPI used a Powerpoint presentation, a printout of which the court ordered marked as Exhibit 1 to the hearing for record purposes. The court took the matter under submission, and now decides the submitted matters.

2. Overview of the CEQA Process.

Count one of the petition (commencing with paragraph 24) alleges CEQA violations by the City in certifying the EIR and approving the project. Thus, the court sets forth a brief summary of the CEQA process and its role therein.

A. The Court's Role in CEQA Cases.

In *Mira Mar Mobile Community v. City of Oceanside*, 119 Cal.App.4th 477, 486 (2004) (*Mira Mar Mobile Community*), the court explained that "[i]n a mandate proceeding to review an agency's decision for compliance with CEQA, [courts] review the administrative record *de novo* [citation], focusing on the adequacy and completeness of the EIR and whether it reflects a good faith effort at full disclosure. [Citation.] [The court's] role is to determine whether the challenged EIR is sufficient as an information document, not whether its ultimate conclusions are correct. [Citation.]" An EIR is presumed adequate. Pub. Res. Code § 21167.3, subd. (a).

Courts review an agency's action under CEQA for a prejudicial abuse of discretion. Pub. Res. Code § 21168.5. "Abuse of discretion 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.;* see *Mira Mar Mobile Community*, *supra*, 119 Cal.App.4th at 486; *County of San Diego v. Grossmont-Cuyamaca Community College Dist*. ("*Grossmont*"), 141 Cal. App. 4th 86, 96 (2006)(same).

In defining the term "substantial evidence," the CEQA Guidelines state: " 'Substantial evidence' … means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made … is to be determined by examining the whole record before the lead agency. Argument, speculation, unsubstantiated opinion[,] narrative [or] evidence which is clearly erroneous or inaccurate … does not constitute substantial evidence." CEQA Guidelines, § 15384(a). "In applying the substantial evidence standard, [courts] resolve all reasonable doubts in favor of the administrative finding and decision. [Citation.]" *Mira Mar Mobile Community*, *supra*, 119 Cal.App.4th at 486; *Grossmont*, *supra*, 141 Cal. App. 4th at 96.

Although the lead agency's factual determinations are subject to the foregoing deferential rules of review, questions of interpretation or application of the requirements of CEQA are matters of law. While judges may not substitute their judgment for that of the decision makers, they must ensure strict compliance with the procedures and mandates of the statute. *Grossmont*, *supra*, 141 Cal. App. 4th at 96.

B. <u>The Three Steps of CEQA</u>.

CEQA establishes "a three-tiered process to ensure that public agencies inform their decisions with environmental considerations." *Banker's Hill, et al v. City of San Diego,* 139 Cal. App. 4th 249, 257 (2006)("*Banker's Hill*"); see also CEQA Guidelines, § 15002(k)(describing three-step process).

First Step in the CEQA Process.

The first step "is jurisdictional, requiring that an agency conduct a preliminary review in order to determine whether CEQA applies to a proposed activity." *Banker's Hill, supra,* 139 Cal. App. 4th at 257; see also Guidelines, § 15060. The Guidelines give the agency 30 days to conduct this preliminary review. (Guidelines, § 15060.) The agency must first determine if the activity in question amounts to a "project." *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 380. "A CEQA …project falls into one of three categories of activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment (§ 21065.)" *Sunset Sky Ranch Pilots Assn. v. County of Sacramento* (2009) 47 Cal.4th 902, 907.

As part of the preliminary review, the public agency must also determine the application of any statutory exemptions or categorical exemptions that would exempt the proposed project from further review under CEQA. See Guidelines, § 15282 (listing statutory exemptions); Guidelines, §§ 15300–15333 (listing 33 classes of categorical exemptions). The categorical exemptions are contained in the Guidelines and are formulated by the Secretary under authority conferred by CEQA section 21084(a). If, as a result of preliminary review, "the agency finds the project is exempt from CEQA under any of the stated exemptions, no further environmental review is necessary. The agency may prepare and file a notice of exemption, citing the relevant section of the Guidelines and including a brief 'statement of reasons to support the finding.' " *Banker's Hill, supra*, 139 Cal.App.4th at 258, citing Guidelines, §§ 15061(d), 15062(a)(3).

Second Step in the CEQA Process.

If the project does not fall within an exemption, the agency proceeds to the second step of the process and conducts an initial study to determine if the project *may* have a significant effect on the environment. (Guidelines, § 15063.) If, based on the initial study, the public agency determines that "there is substantial evidence, in light of the whole record … that the project may have a significant effect on the environment, an environmental impact report [(EIR)] shall be prepared." [CEQA, § 21080(d).] On the other hand, if the initial study demonstrates that the project "would not have a significant effect on the environment," either because "[t]here is no substantial evidence, in light of whole record" to that effect or the revisions to the project would avoid such an effect, the agency makes a "negative declaration," briefly describing the basis for its conclusion. (CEQA, § 21080(c)(1); see Guidelines, § 15063(b)(2); *Banker's Hill, supra*, 139 Cal.App.4th at 259.)

The Guidelines and case law further define the standard that an agency uses to determine whether to issue a negative declaration. "[I]f a lead agency is presented with a *fair argument* that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect." (Guidelines, § 15064(f)(1), italics added.) This formulation of the standard for determining whether to issue a negative declaration is often referred to as the "fair argument" standard. See *Laurel Heights Improvement Assn. v. Regents of University of California,* 6 Cal.4th 1112, 1134–1135 (1993). Under the fair argument standard, a project "may" have a significant effect whenever there is a "reasonable possibility" that a significant effect will occur. *No Oil v. City of Los Angeles*, 13 Cal.3d 68, 83-84 (1974). Substantial evidence, for purposes of the fair argument standard, includes "fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." § 21080, subd. (e)(1). Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts unrelated to physical impacts on the environment. § 21080, subd. (e)(2).

If the initial study reveals no substantial evidence that the project may have a significant environmental effect, the agency may adopt a negative declaration. Pub. Res. Code § 21080, subd. (c)(2); Guidelines, § 15070, subd. (b); *Grand Terrace, supra,* 160 Cal.App.4th at 1331; *Save the Plastic Bag Coalition v. City of Manhattan Beach*, 52 Cal. 4th 155, 175 (2011)(holding common sense is part of the substantial evidence analysis). "Alternatively, if there is no substantial evidence of any net significant environmental effect in light of revisions in the project that would mitigate any potentially significant effects, the agency may adopt [an MND]. [Citation.] [An MND] is one in which '(1) the proposed conditions "avoid the effects or mitigate the effects to a point where *clearly* no significant effect on the environment would occur, *and* (2) there is *no substantial evidence* in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment." (§ 21064.5 . . . .)' [Citations.]" *Grand Terrace, supra,* at 1331-1332. The MND allows the project to go forward subject to the mitigating measures. Pub. Res. Code §§ 21064.5, 21080, subd. (c); see *Grand Terrace, supra,* 160 Cal. App. 4th at 1331.

Third Step in the CEQA Process.

If no negative declaration is issued, the preparation of an EIR is the third and final step in the CEQA process. *Banker's Hill, supra,* 139 Cal. App. 4th at 259; Guidelines, §§ 15063(b)(1), 15080; CEQA, §§ 21100, 21151.

C. <u>The Environmental Impact Report</u>.

Central to CEQA is the EIR, which has as its purpose informing the public and government officials of the environmental consequences of decisions before they are made. [Citation.] "An EIR must be prepared on any 'project' a local agency intends to approve or carry out which 'may have a significant effect on the environment.' Pub. Res.

Code §§ 21100, 21151; Guidelines, § 15002, subd. (f)(1). The term 'project' is broadly defined and includes any activities which have a potential for resulting in a physical change in the environment, directly or ultimately. Pub Res. Code § 21065; Guidelines, §§ 15002, subd. (d), 15378, subd. (a); [Citation].) The definition encompasses a wide spectrum, ranging from the adoption of a general plan, which is by its nature tentative and subject to change, to activities with a more immediate impact, such as the issuance of a conditional use permit for a site-specific development proposal." *CREED v. City of San Diego*, 134 Cal. App. 4th 598, 604 (2005).

There is no dispute here that there are significant environmental impacts associated with the project. AR 004, 047-51, 5262. And there is no dispute that the EIR in question is a project EIR, which examines the environmental impacts of a specific development project. (Guidelines, § 15161.)

Under CEQA, an EIR is presumed adequate (Pub. Resources Code, § 21167.3), and the plaintiff in a CEQA action has the burden of proving otherwise. (*Preserve Wild Santee v. City of Santee*, 210 Cal. App. 4th 260, 275 (4th DCA Div. 1 2012), internal quotation marks omitted), quoting *Concerned Citizens of South Central L.A. v. Los Angeles Unified School Dist.* (1994) 24 Cal.App.4th 826, 836.) Courts review an agency's determinations and decisions for abuse of discretion. An agency abuses its discretion when it fails to proceed in a manner required by law or there is not substantial evidence to support its determination or decision. [§§ 21168, 21168.5; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426-427 (2007) ("*Vineyard*")]. "Judicial review of these two types of error differs significantly: While [courts] determine de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements' [citation], [courts] accord greater deference to the agency's substantive factual conclusions." (*Vineyard*, *supra*, 40 Cal. 4th at 435.)

Consequently, in reviewing an EIR for CEQA compliance, courts adjust "scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts." (*Vineyard*, *supra*, 40 Cal.4th at 435.) For example, where a petitioner claims an agency failed to include required information in its environmental analysis, the court's task is to determine whether the agency failed to proceed in the manner prescribed by CEQA. Conversely, where a petitioner challenges an agency's conclusion that a project's adverse environmental effects are adequately mitigated, courts review the agency's conclusion for substantial evidence. (*Vineyard*, *supra*, 40 Cal. 4th at 435.)

3. <u>Standards for Non-CEQA Claims</u>.

Counts 2 and 3 of the petition (commencing with paragraph 27) allege violation of the Municipal Code and the Statutes of 1870. As to these non-CEQA claims, the court must consider "whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are

not supported by the evidence." (Code Civ. Proc., § 1094.5, subd. (b).) Where it is claimed that the findings are not supported by the evidence and the case, as here, does not involve a fundamental vested right, "abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (*Id*., § 1094.5, subd. (c); *American National Ins. Co. v. Fair Employment & Housing Com.* (1982) 32 Cal.3d 603, 607.)

"Substantial evidence" is evidence of "ponderable legal significance." (*People v. Bassett* (1968) 69 Cal.2d 122, 138-139.) "It must be reasonable in nature, credible, and of solid value." (*Id.* at p. 139; accord, *Ofsevit v. Trustees of Cal. State University & Colleges* (1978) 21 Cal.3d 763, 773, fn. 9.) In determining whether an administrative decision is supported by substantial evidence, "[w]e may not isolate only the evidence which supports the administrative finding and disregard other relevant evidence in the record. [Citations.] On the other hand, [we may not] disregard or overturn the Commission's finding 'for the reason that it is considered that a contrary finding would have been equally or more reasonable.' [Citations.] The ultimate issue in an administrative mandamus proceeding is whether the agency abused its discretion. An abuse of discretion is ' "discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered." ' [Citations.] Unless the finding, viewed in the light of the entire record, is so lacking in evidentiary support as to render it unreasonable, it may not be set aside." (*Northern Inyo Hosp. v. Fair Employment Practice Com.* (1974) 38 Cal.App.3d 14, 24; accord, *Johnson Controls, Inc. v. Fair Employment & Housing Com*. (1990) 218 Cal.App.3d 517, 531-532.)

4. <u>Request For Judicial Notice</u>.

Judicial notice is a limited doctrine; this is so because the taking of judicial notice is a substitute for formal proof. (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564.) Its consequence is to establish a fact as indisputably true, eliminating the need for further proof. (*Ibid*; *see Post v. Prati* (1979) 90 Cal.App.3d 626, 633; *Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 578 [purpose of judicial notice is to expedite production and introduction of otherwise admissible evidence].) Hence, the general rule dictates that a matter is subject to judicial notice only if it is reasonably beyond dispute. (*Fremont Indem. Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113; *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882 (matter being judicially noticed must "not [be] reasonably subject to dispute"); *Post v. Prati*, *supra,* 90 Cal. App. 3d at p. 633 [" 'The fundamental theory of judicial notice is that the matter that is judicially noticed is one of law or fact that cannot reasonably be disputed' "]; see Jefferson, Cal. Evidence Benchbook (4th ed. 2009) Judicial Notice, § 49.5, p. 1145.) Only these kinds of incontrovertible matters are appropriate for judicial notice. (See *City of Chula Vista v. County of San Diego* (1994) 23 Cal.App.4th 1713, 1719; *Dwan v. Dixon* (1963) 216 Cal.App.2d 260, 265.)

Evidence Code section 451(a) renders mandatory the taking of judicial notice of the "public statutory law" of the state, and Evidence Code section 452 (b) permits judicial notice of "legislative enactments" of "any public entity in the United States."

Subsections (g) and (h) permit judicial notice of "facts and propositions" that are "common knowledge" or "capable of immediate and accurate determination."

Bearing in mind these principles, the court rules as follows on RPI's Request for Judicial Notice:

Requests 1-5: granted; Request 6: denied; Requests 7-10: granted under Evid. Code sections 452(g) and (h); Requests 11 and 12: denied.

As to the documents submitted for judicial notice, the court's rulings are:

NOL Ex. A: granted; NOL Ex. B: denied; NOL Exs. C, D, E, F: granted; NOL Exs. G, H, I: denied.

5. RPI's Supporting Declaration.

RPI submitted, with its brief, the Declaration of architect Paul D. Marshall. There is no showing that the testimony provided in this declaration is part of the administrative record. This runs afoul of the general rule that extra record evidence is not admissible in mandamus proceedings. This rule applies in the CEQA setting. *Practice Under the California Environmental Quality Act* §§23.48 – 23.52 (2d ed. Cal. CEB 2009), citing, among other cases, *Western States Petroleum Ass'n. v. Superior Cour*t, 9 Cal. 4th 559, 565, 570 (1995). It also applies to the non-CEQA counts. 1 *Cal. Civil Writ Practice* §§7.9 – 7.12 (4th ed. Cal. CEB 2009)(also collecting cases).

Even if it were proper to receive the Marshall Declaration, Mr. Marshall fails to lay an adequate foundation for the admission of Exhibit G. He cannot possibly say that the documents in Ex. G are "true and correct copies" of documents ostensibly printed long before he was born.

For these reasons, the court disregards the Marshall Declaration.

6. Rulings.

The court thanks all three parties for the excellent and focused briefing submitted in connection with this matter. The court is particularly grateful for the decision of the City and RPI to largely avoid duplicative briefing.

A. Count 1 Under CEQA.

The court perceives no CEQA violation here, and finds that the EIR was more than sufficient as an informational document. The City Council had a huge amount of information before it regarding the environmental benefits and detriments of the project, and the alternatives to the project were fairly raised and adequately discussed. A fully informed City Council voted to certify the EIR and adopt the Statement of Overriding Considerations (AR 8605), and SOHO's remedy if it disagrees with those decisions was and is at the ballot box when those elected official who supported the project stand for re-election. [Perhaps this has already come to pass; the City's current mayor, then a

candidate, spoke against the project during at least one public hearing. AR 9815-9820.] SOHO has failed to overcome the presumption that the EIR is adequate, and the City and RPI prevail on Count 1.

Contrary to SOHO's contentions, the court finds no fault with the statement of project objectives in the EIR. They are set forth clearly in the EIR at AR 5407. It is not the role of the court to redefine the objectives of the project; rather, the court's role is to ascertain whether the EIR complies with the law and adequately addresses feasible alternatives. CEQA Guidelines section 15126.6(a). The court does not find that the statement of project objectives is "artificially narrow" or is a "minutely-detailed blueprint that only the project itself can meet." *Cf. In re Bay-Delta Programmatic EIR*, 43 Cal. 4th 1143, 1166 (2008). Moreover, the notion that the objectives of the project were tardily constricted after opposition arose (SOHO Op. Br. at 22:15-19) is belied by the 2010 staff report to the Planning Commission (AR 8750). Removal of parking and traffic/pedestrian conflict was a project objective from a very early time.

Nor does the court find that the responses to comments on the draft EIR were anything other than thorough and in good faith. As RPI points out, there was no requirement that the City respond at all to comment letters received after the public comment period (which the City actually extended to March 22, 2012 – AR 6289). See Pub. Res. Code section 21091(d) and *Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal. 3d 553, 567 (1990). This eliminates SOHO's arguments about letters received in May and July, 2012, AR 18245 and 18969).

The court finds that the City's response to the "Lewis letter" (AR 6512-14) was entirely appropriate under CEQA guidelines 15126.6(a). Further, the post-comment period follow up by the City (AR 8857-75) actually went well beyond the minimum requirements of CEQA. The court agrees with RPI that the AR reveals that the Lewis letter received more than its share of public debate and alternative analysis. (AR 9807-09, 18533-37, 19045-46, 22132-33).

Along the same lines are the City's responses to the March 22 letters from OHP and SOHO, and the March 12 letter from NPHS (AR 6310, 18247, 6404 and 6347). The court agrees with the RPI that referring the commenters and the reviewing public to the Historical Resources Technical Report (AR 6312, F-6) was entirely appropriate, and finds that the City responded more than adequately to every other substantive point made in the comments. AR 6304-6315, 6349-6362.

Finally, the court finds the City's consideration of project alternatives to have been above reproach. SOHO's argument in this regard is linked to its main premise (rejected above), that the project objectives were improperly narrowed. But even taking it at face value, SOHO has failed to show that the City violated Pub. Res. Code section 21002 or CEQA Guidelines section 15126(d) [as limited by section 21002.1(c) and cases like *City of Santee v. County of San Diego*, 214 Cal. App. 3d 1438, 1450 (1989)]. The City's consideration of alternatives was extensive, both within the EIR and by City staff during the preparation phase. AR 5954-6225. There is no merit to SOHO's implied conclusion (SOHO Op. Br. at 25:18-22) that the City was somehow required to select the alternative

favored by SOHO (which was a moving target in any event, as the City notes). Substantial evidence supports the City's rejection of the Lewis plan as creating additional impacts, and other alternatives as infeasible. *E.g.* AR 8857-74.

The request for a writ of mandamus is denied as to Count 1.

B. Count 3 Under the 1870 Statute.

The City and RPI prevail on Count 3, as the court finds that the 1870 statute has, for purposes of guiding public decision-making regarding Balboa Park, been a dead letter since 1872, 1889, or at the latest since *Olmstead v. City of San Diego*, 124 Cal. App. 14 (1932). There, even though the dispute being addressed had to do with Torrey Pines Park, the court specifically addressed "a statute confirming an ordinance of the City of San Diego setting apart a portion of its pueblo lands as a park to be known as Balboa Park." 124 Cal. App. at 18. In addressing the appellant's argument regarding what this enactment showed about legislative intent, the court held: "Conceding such effect at the date of the statute, it could not in any way limit the authority given to the city by a later act of the legislature," and concluded that the enactment which forms the basis of Count 3 was "annulled by the charter of 1889." *Id*.

SOHO argued on February 1 that a case decided before *Olmstead* is relevant. In *Mulvey v. Wangenheim*, 23 Cal. App. 268 (1913), the court took up a case in which the complaint alleged a proposed incursion into Balboa Park "which lots have been by certain legislative acts of the city and of the state duly declared to be dedicated, set apart, and held in trust forever by the municipal authorities for use and purposes of a free and public park and for no other or different purpose." *Ibid.* The court is unpersuaded; the reference to "legislative acts" in the quoted passage is not specific to the 1870 statute, and consistent with long-established principles of *stare decisis*, the court must regard the more recent (although still quite old) case, which is quite specific, as setting forth the legal status of the 1870 enactment. *Auto Equity Sales v. Superior Court*, 57 Cal. 2d 450, 455 (1962).

A statute which has been "annulled" by the passage of other subsequent legislation simply cannot form the basis for any violation of the law in 2012; it exists as a historical curiosity only. Thus, SOHO cannot show that the City has not proceeded in the manner required by law, and Count 3 is dismissed.

Given the court's resolution of Count 3, it is not necessary for the court to reach the subsidiary arguments about charging for parking. *Compare Natter v. Palm Desert Rent Review Comm'n.*, 190 Cal. App. 3d 994, 1001 (1987); *Young v. Three for One Oil Royalties*, 1 Cal. 2d 639, 647-648 (1934).

C. Count 2 Under Municipal Code Section 126.0504(i).

The court reaches the reluctant conclusion that the City violated section 126.0504(i)(3) of the Municipal Code, because there is no substantial evidence in the record as a whole

supporting the determination that there is no reasonable beneficial use for the project area absent approval of the project.

Weighing heavily on the court is the very real possibility that this decision will cause RPI to abandon its efforts to raise money for a long-desired project in Balboa Park, and at a minimum render very difficult a centennial celebration along the lines hoped for by so many. The court agrees with the City and RPI that the positives from the project seem to far outweigh the negatives. The loss of the generous funding offered by RPI will be a sad day for San Diego, because no other funding source has been identified, and the City's own perilous (and partly self-inflicted) financial problems have been well documented and likely preclude public funding of any significant alternative project. AR 118-120. A wonderful opportunity may be lost; SOHO's opposition to the project seems short-sighted, as the project appears to offer many net benefits in terms of restoration of historic resources. But the law is the law, and the court is bound to follow it. The City has, in other contexts (*e.g.* Case No. 2009-088422, *aff'd.* 9/23/11 in 4th DCA Case No. D057543), asked the court to rigorously apply the City's own law to others. The court's duty is to do likewise when others demand that the City be held to its own law.

The parties agree upon the applicable standard. In order to alter this historic resource, the City was required to make a finding, supported by substantial evidence, that denial of project approval would result in "economic hardship," which the Municipal Code defines as meaning "there is no reasonable beneficial use of a property." The City Attorney agreed at the hearing that the City was required to apply the Municipal Code in the present setting, which involves City-owned land, the same way as it would if a private developer were seeking to alter a privately held historic building or other resource. This concession is supported by the record; in AR 19801, a former city planner noted that in 2000, when the "Land Development Code" was being considered by the Council, he wrote proposed language which "would have allowed the City Council to make a public benefit determination." No such language made its way into the Municipal Code.

Two initial disputes require resolution. First, the City contends its interpretation of the Municipal Code is entitled to deference under *Yamaha Corp. of America v. State Board of Equalization*, 19 Cal. 4th 1, 12 (1998). The court finds this is another way of asking the court to abdicate its responsibility to carry out the review mandated by Code Civ. Proc., § 1094.5, subd. (b). The term "no reasonable beneficial use of a property" is hardly technical, obscure or complex. While the court defers to the City's policy decision (as section 6A above makes clear), the court does <u>not</u> agree that it must give "great deference" to Winterrowd's effort (City Br. at 2:5-9) to pretend away the very words of the Municipal Code.

Second, RPI attacks SOHO for claiming that there is no basis for finding that no reasonable beneficial use of <u>Balboa Park</u> remains, when all that must be shown is that there is no reasonable beneficial use of the <u>project area</u>. RPI Br. at 7:12-16 and 13, citing SOHO Op. Br. at 7:20. The court adopts RPI/City's narrower and more focused formulation (see AR 5390), but, as discussed further below, is still constrained to find the absence of substantial evidence supporting the finding.

The Municipal Code provisions in question were enacted by an earlier City Council, and thus are subject to the general rules of statutory construction: (1) to ascertain the intent of the Council to effectuate the purpose of the law; (2) to give a provision a reasonable and commonsense interpretation consistent with its apparent purpose, which will result in wise policy rather than mischief or absurdity; (3) to give significance, if possible, to every word or part, and harmonize the parts by considering a particular section in the context of the whole; (4) to take matters such as content, object, evils to be remedied, legislation on the same subject, public policy, and contemporaneous construction into account; and (5) to give great weight to consistent administrative construction. *DeYoung v. City of San Diego*, 147 Cal.App.3d 11, 17-18 (1983).

The proper interpretation of "there is no reasonable beneficial use of a property" occupied a significant part of the briefing and the February 1 argument. The parties cast a wide net in an effort to assist the court in this regard. SOHO, in its reply brief, cited *Kavanau v. Santa Monica Rent Control Board*, 16 Cal. 4th 761 (1997). There, the trial court dismissed, after sustaining without leave to amend the demurrer of a city's rent control board, an inverse condemnation action against the board brought by a landlord who had prevailed in a prior action against the rent control board. In that previous action, it was determined that the board's 12 percent limit on rent increases denied the landlord due process by depriving him of a just and reasonable return on his investment. The landlord brought the inverse condemnation action, alleging that he had suffered a taking and that he was therefore entitled to recover lost rental income while the 12 percent limitation was in effect. The Court of Appeal affirmed the dismissal, rejecting the landlord's inverse condemnation claim because he had not lost all use of his property. The Supreme Court affirmed the judgment of the Court of Appeal. The high court held that, although a property owner need not lose all use of his or her property in order to have a viable inverse condemnation claim, the Santa Monica landlord was not entitled to maintain an inverse condemnation action because he was able to obtain a full and adequate remedy for any interim loss flowing from the due process violation through an adjustment of future rents under the city's rent regulation process.

Obviously, the factual differences between *Kavanau* and this case are chasmal. RPI argued *Kavanau* is inapplicable. But the City, accepting SOHO's invitation, seized on language in *Kavanau* and argued that it requires a result different than that reached by the court because it requires something other than a "rigid" interpretation of the key phrase in the Municipal Code.

The City's argument focused on *dicta* in *Kavanau* in which the High Court set forth, summarizing decisions of the US Supreme Court, the factors to be considered when a regulation challenged as a taking does not result in a physical invasion and does not deprive the property owner of all economic use of the property: (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; (3) "the character of the governmental action;" (4) whether the regulation "interfere[s] with interests that [are] sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes"; (5) whether the regulation affects the existing or traditional use of the property and thus interferes with the property owner's "primary

expectation"; (6) "the nature of the State's interest in the regulation" and, particularly, whether the regulation is "reasonably necessary to the effectuation of a substantial public purpose" (7) whether the property owner's holding is limited to the specific interest the regulation abrogates or is broader; (8) whether the government is acquiring "resources to permit or facilitate uniquely public functions" such as government's "entrepreneurial operations"; (9) whether the regulation "permit[s the property owner] ... to profit [and] ... to obtain a 'reasonable return' on ... investment"; (10) whether the regulation provides the property owner benefits or rights that "mitigate whatever financial burdens the law has imposed; (11) whether the regulation "prevent[s] the best use of [the] land"; (12) whether the regulation "extinguish[es] a fundamental attribute of ownership"; and (13) whether the government is demanding the property as a condition for the granting of a permit. *Kavanau, supra,* 16 Cal. 4th at 775-76 (internal citations omitted).

The Supreme Court noted that this list is not a comprehensive enumeration of all the factors that might be relevant to a takings claim, and did not propose a single analytical method for these claims. Rather, the court simply noted factors the US Supreme Court has found relevant in particular cases. Thus, the *Kavanau* court held that instead of applying these factors mechanically, checking them off as it proceeds, a court should apply them as appropriate to the facts of the case it is considering. *Id*.

It is this latter guidance that seemed to animate the City's argument on February 1; it urged this court, in construing the phrase "there is no reasonable beneficial use of a property," to apply a "flexible" approach focused (presumably) on items 5, 6 and 11 from the list enumerated above. The court remains unpersuaded.

As the listing taken from the *Kavanau* case makes clear, among the key factors considered in takings jurisprudence is the "investment-backed expectations" of the landowner. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Obviously this does not apply to property which has been set aside for a public park for well over a century; indeed, Winterrowd went to some lengths to distinguish this project from one involving a private landowner seeking to alter the historic facility. AR 10027. Consequently, the court cannot accept the proposition that it is permissible to argue by analogy the factors considered by courts considering takings cases. The court holds that, rather than consider these factors, the court must apply the more generally applicable precepts of statutory construction summarized six paragraphs above. This does not mean, however, that the court interprets the key provision of the Municipal Code in a "rigid" or wooden fashion. But the "flexible" approach advocated by the City sounded to the court a lot like a suggestion that the court can find that statute can mean whatever the City wants it to mean if the court agrees (as it does here) with the City's ultimate conclusion. The law would be rendered hollow indeed if this were the rule.

Applying the considerations summarized in *DeYoung*, supra, the court finds that the Municipal Code sought to prevent alteration of a historic asset only if the applicant establishes there is no reasonable beneficial use of [the] property sought to be altered absent the alteration sought. The "evil to be remedied" was obviously the untrammelled march of "progress," wherein historic facilities are lost or altered forever. The City

Council's evident purpose was to prevent alteration of historic structures or other facilities unless this showing is made, and the language used by the drafters strikes the court as setting a rather high bar. Neither side offered evidence of prior construction, either in the private developer setting or in circumstances like this one. RPI argued on February 1 that there can be "unreasonable beneficial uses," which the City is free to reject in preference to one deemed more beneficial. Respectfully, this strikes the court as re-writing the Municipal Code. The City Council did not enact language permitting alteration if it determined that the proposed alteration would result in a **more** reasonable beneficial use; rather, it required that there be **no** reasonable beneficial use absent the alteration.

Having interpreted the statutory language, the court now turns to the record evidence. Despite the skilled argument by RPI's counsel on February 1, the court finds that none of the citations to the AR by either the City or the RPI for evidence supporting the finding refer the court to any evidence of ponderable legal significance.

For example, both RPI and the City argue that the City was entitled to find that the failure to remove vehicles would someday affect the regional economy (City Br. at 3:26) or that someday the pedestrian-vehicle conflicts will render "future conditions" in the project area untenable (RPI Br. at 12, 14:16). Setting aside for the moment the inherently speculative nature of such predictions, these arguments once again seek to add words to the Municipal Code that are not contained therein. The Code does **not** say there "will <u>in the future be</u> no reasonable beneficial use of a property." It says "there <u>is</u> no reasonable beneficial use of a property" -- denoting today, right now, based on present facts, not future facts. Thus, the testimony and studies cited in support of the City/RPI position (AR 160, 10029-30) are largely beside the point.

The fact that for 50 years there has not been funding to accomplish this long-desired project (AR 0161, 09774), or that RPI would not donate the $30 million to help complete the project (AR 10029), while certainly relevant to the question of economic hardship, does not establish the absence of a reasonable beneficial use. A contrary ruling would pretend that "economic hardship" alone was the only criteria set forth in the Municipal Code, and would do violence to the further definition thereof the City chose to enact in section 126.0504(i)(3).

Nor do the facts that there are traffic circulation problems and "pedestrian/car conflict" (AR 160, 731, 5700-33, Ex. 1 pp. 2-10) equate to the absence of a reasonable beneficial use. Too much traffic is a daily fact of life for many San Diegans, but this does not mean the roadways upon which they battle that traffic have no reasonable beneficial use. In the same vein, RPI's repeated reference to the Plaza de Panama being "wasted as a parking lot" (RPI Br. at 10:6, 10: 20, 12:10) is self-defeating. This is a conclusory value judgment simply expressing a preference for use of the area as a pedestrian plaza. So while the City and the RPI have persuaded the court that a showing of "no reasonable beneficial use" does not require an abandoned, boarded-up firetrap or a weed and litter strewn empty vacant lot, it <u>does</u> require a demonstration that the facility to be altered is so glaringly underutilized that no reasonable mind could conclude that the use should continue. The evidence does not support such a finding. Again, RPI's argument that

there can be "unreasonable beneficial uses" (which the City is free to reject if it determines there is a more reasonable beneficial use) is simply not consistent with the statute as drafted. The Municipal Code does not say "any reasonable use the City chooses."

The fact that the Plaza de Panama is now used (and, if SOHO has its way, will continue to be used) as a parking lot perforce establishes that it has a reasonable beneficial use. The court takes judicial notice that parking lots around the City are revenue-generating enterprises, and the fact that the project contemplates the construction of two multi-level parking lots both proves the point and negates the City's argument that the fact this is a park makes it different. Certainly the rare Balboa Park visitor who actually finds a parking spot in the Plaza de Panama finds that spot "beneficial" on that particular day. Parking lots are a lawful and reasonably beneficial use, even if an undesirable one. So while the court agrees with RPI and the City that the evidence establishes that the *status quo* in the Plaza de Panama results in an "undesirable park experience," this is unfortunately not the legal standard enacted by the City for approval of the SDP. The critical finding by the City Council is so lacking in evidentiary support as to render it unreasonable; it must therefore be set aside.

In light of the foregoing, the City abused its discretion in making the finding of "no reasonable beneficial use of a property," and SOHO is entitled to a writ of mandamus directing the City to set aside this determination and set aside its approval of the SDP.

Given the court's resolution of the issues arising under section 126.0504(i)(3), it is not necessary for the court to reach SOHO's subsidiary arguments (Br. at 10-13) under section 126.0504(a). See *Natter, supra*, 190 Cal. App. 3d at 1001; *Young, supra*, 1 Cal. 2d at 647-648.

Counsel for SOHO must forthwith submit to the court a form of writ of mandate and a form of judgment consistent with the foregoing.

IT IS SO ORDERED.