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Turn Down the Lights

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MONTEREY

TURN DOWN THE LIGHTS,

Petitioner,

v.

CITY OF MONTEREY,

Respondents.

_____/

Case No. M116731
Petition filed March 22, 2012

MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY ON MOTION FOR AN ORDER AUGMENTING THE RECORD

Date: August 16, 2013
Time: 9:00 a.m. (Law & Motion)
Dept.: 14
Judge: Hon Kay T. Kingsley

None of the cases cited by the City involves facts similar to what the City did here: approve a project without a public hearing, without public participation, and without public comment. This is not a typical CEQA case. The Public Resources Code and Code of Civil Procedure section 1085 permit the Court to augment the record as requested.

ARGUMENT

A. Monterey Did Not Hold a Public Hearing. The Public Did Not Participate or Comment on the Streetlight Project Because the Public Did Not Know About It.

The City's Brief inaccurately describes the facts. Contrary to the City's claims,

1. The City did not give notice of a public hearing about the City Council's consideration of LED streetlights contract or of a CEQA exemption.
2. The City Council did not approve a CEQA exemption.
3. The City Council did not base its contract approval on a CEQA exemption.

Consistent with the lack of notice by the City, nobody from the public spoke or commented in writing about the LED streetlights. The public cares about environmental issues in Monterey, as demonstrated by the large audience at the November 1 evening City Council meeting for a proposed plastic bag ban, which was the first item on the evening agenda.[1] (AR16, AR21, AR45, AR37 [video at 26:20].) In addition to written comments on the plastic bag agenda item, nine people commented orally. (AR8.)

All but one[2] of the cases cited in the City's Brief fall into one of two categories:

1. Code of Civil Procedure section 1094.5 cases in which a public hearing was required and held, and/or
2. Matters in which the public agency gave public notice and the public participated and commented.

Most CEQA cases involve public notice and public participation including public comment. In the present case, there was no public notice, no public participation, and no public comment. This is not a typical CEQA case.

The City makes an assertion that the November 1, 2011 "Council meeting was a public hearing for purposes of CEQA." (City Brief, p. 7 lines 3-4; see p. 7, line 29; p. 10, line 5; p.11, line 24.) The City cites no support for its claim. The agenda item did not mention CEQA. The item was not a public hearing under the City's rules and did not

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[1] The LED streetlights item was on the afternoon consent agenda (AR44), but was bumped to the evening agenda (AR7).

[2] The one exception is *Robinson v. City and County of San Francisco* (2012) 208 Cal.App.4th 950, a case that did not address the appropriate contents of the record. In *Robinson*, a telecommunications company proposed to place sets of wireless telecommunications equipment on some existing utility poles at "scattered" (*id.* at 956) locations "widely dispersed" (*id.* at 959) throughout the city. The public agency issued a discretionary permit. (*Id.* at 954.) The issuance of a permit was a commitment to the project, and it happened prior to the agency's CEQA determination. Later, agency planning staff determined a CEQA exemption applied. (*Id.* at 954, 959.) Then the installation began. (*Id.* at 954, 960.) The trial court admitted a declaration by a petitioner, but the admissibility issue was not addressed because it was of no consequence to the outcome (*id.* at p. 958, fn. 5). In the Court of Appeal opinion, there was no holding as to the contents or the cutoff date of the record.

require public notice.[3] (AR44 ["PUBLIC APPEARANCE items are reports on non-routine issues that . . . do not require formal noticing as public hearings"].)

This case is unlike the *Tomlinson* case cited by the City (City Brief, p. 7, line 24; p. 8, line 3). In *Tomlinson*, the public agency held multiple public hearings and there was extensive public notice and extensive public participation at the hearings. (*Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 288.) The Supreme Court distinguished the numerous public hearings in *Tomlinson* from the lack of public hearing in another leading case, *Azusa Land Reclamation Company, Inc. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165. (*Tomlinson*, *supra*, at p. 290.)

In *Azusa*, the issue was a longstanding controversy involving a landfill, groundwater contamination, and a State Water Resources Control Board order (52 Cal.App.4th 1165, 1175-1176, 1179-1186). Prior to the Regional Board meeting at issue in that case, at least five public agencies, their experts, "several elected officials, and numerous members of the public" commented in opposition to the project. (*Id.*, at 1176.) The Regional Board staff met with two sets of experts, wrote a report on staff's "findings," and "notified other interested parties" that the report was "available" (*id.*, at 1187). The Regional Board then held a "regularly scheduled public meeting," took public comments from public agencies, experts, and others, then approved the project and "simultaneously found the project to be exempt from CEQA" (*id.*, at 1188).

The Court of Appeal in *Azusa* held that "because the Regional Board declared that the project was exempt from CEQA, there was no "public comment period provided by [CEQA]" and there was no "public hearing . . . before the issuance of the notice of determination" (*id.*, at 1210). "[W]here an agency approves a project and simultaneously decides that the project is exempt from CEQA, there is no "public hearing . . . before the issuance of the notice of determination." (*Id.*, at 1210) "[T]here was no public hearing on October 30, 1995, there was simply a regularly scheduled

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[3] This is the same issue upon which the City based its demurrer in this case. The Court overruled the demurrer.

public meeting of the Regional Board." (*Id.*, at 1211) The Court of Appeal cited the *City of Pasadena* case on this point. (*Ibid.*) The fact that a public agency meets and discusses some aspect of a project is not sufficient to establish a public hearing under CEQA.

The rule urged by the City is that it is acceptable for public agencies to approve projects without public hearings on the projects or on the CEQA implications, and then file after-the-fact exemptions. The rule would encourage more secrecy, and less transparency and accountability. The rule would allow the City staff to tell the City Council one thing (that the LED streetlights would not affect the historic district [AR20]) and then do the opposite (install LED streetlights in the National Landmark Historic District [AR676, AR701, in Exhibit B; AR886, AR888, AR892, in Exhibit C]), and the public would have no remedy or opportunity to address the environmental impacts – either before approval or after.

Contrary to the City's claim, the City did not "provide an opportunity for the public to comment on the Project and to submit evidence into the record." (City Brief, p. 6, lines 21-22; see p. 7, lines 30-32.) There was no meaningful "opportunity" to comment because the City did not notify the public about the project or its environmental impacts. Because there was no meaningful opportunity for public comment, the City's action was an informal action, and admission of extra-record evidence is appropriate under *Western States Petroleum Association v. Superior Court of Los Angeles County* (1995) 9 Cal.4th 559, 575-576.

The City suggests that Petitioner "could have easily" provided the documents to the City for inclusion in the record before project approval (City Brief, p. 8, lines 1-3, see p. 12, lines 8-10), but fails to describe how Petitioner and its members could have known about the project approval. Exhibit A includes a request from James Bryant to the City, asking to be notified of actions by the City with regard to lighting in Monterey's historic districts (AR592, in Exhibit A). Mr. Bryant and others participated actively in the City's review of lighting in the historic district in 2009 (AR587-AR591, AR604-AR608, in

Exhibit A). The City did not notify Mr. Bryant about the proposed approval of city-wide LED streetlights. When the public became aware of the streetlights being installed, the public – including Mr. Bryant – started commenting. (AR716, AR695, in Exhibit B.)

B. The City Did Not Give Prior Notice to the Public of a CEQA Determination, or Prior Notice of the LED Streetlights Project.

The City is not accurate in its repeated claim that "the City provided regular notice to the public . . . that the City had determined that the Project was exempt from CEQA" (City Brief, p. 1, lines 23-25; see p. 8, lines 16-18; p. 10, line 5; p. 13, line 23). The City Council agenda item did not mention CEQA or a proposed CEQA exemption. (AR44.) To "give notice to the public" of the CEQA exemption, the agenda should have included that information. As the California Supreme Court has held, the public agency has a duty to comply with CEQA's requirements.

> To make faithful execution of this duty contingent upon the vigilance and diligence of particular environmental plaintiffs would encourage attempts by agencies to evade their important responsibilities. It is up to the agency, not the public, to ensure compliance with [CEQA] in the first instance.

(*Concerned Citizens of Costa Mesa v. 32nd District Agricultural Association* (1986) 42 Cal.3d 929, 939, internal punctuation omitted [after approvals, amphitheatre project was built facing the opposite direction without public notice; demurrer overruled].)

The recent case of *San Joaquin Raptor Rescue Center v. County of Merced* (2013) 216 Cal.App.4th 1167 addressed adequate notice of CEQA actions by a public body under the Brown Act. While that case addressed a mitigated negative declaration, the holdings of Justice Kane in the Fifth District are applicable here:

> The Brown Act clearly and unambiguously states that an agenda shall describe "*each item of business* to be transacted or discussed" at the meeting. (§ 54954.2, subd. (a)(1), italics added.) . . . The adoption of the MND was plainly a distinct item of business, and not a mere component of project approval, since it (1) involved a

> separate action or determination by the Commission and (2) concerned discrete, significant issues of CEQA compliance and the project's environmental impact. As an individual item of business, it had to be expressly disclosed on the agenda; it was not sufficient for the agenda to merely reference the project in general.

(*San Joaquin Raptor*, *supra*, 216 Cal.App.4th 1167, 1176-1177.) Although a CEQA exemption does not have to be adopted at a public meeting, if a CEQA exemption is to be adopted at a public meeting it must be on the agenda. (*Ibid.*)

> [A] public agency's decision whether to adopt or certify a CEQA document (such as a negative declaration, MND or an EIR) is always a matter of at least *potential* public interest since it would concern the local environmental effects of a proposed project. Such issues often motivate members of the public to participate in the process and have their voices heard. Of course, that is exactly what the Brown Act seeks to facilitate. Its purposes include ensuring that the public is adequately notified of what will be addressed at a meeting in order to facilitate public participation and avoid secret legislation or decisionmaking. (§ 54950 . . . .) Those purposes would be impaired if a public agency could refuse to disclose in its meeting agenda that it will be considering approval of a CEQA document. Such an approach would allow a potentially controversial issue to be quietly proposed and decided without having to open the discussion to meaningful public input.

(*San Joaquin Raptor*, *supra*, 216 Cal.App.4th at 1177-1178, internal citation omitted.)

Contrary to the City's claims (City Brief, p. 2, line 1-4), the written staff report, which the City calls an "agenda report" (AR38), does not provide notice to the public of a CEQA exemption, and the City provides no authority otherwise.

Petitioner and its members wanted to know about the proposed project in advance, so they could participate in the process. As referenced above, Mr. Bryant, a member of Petitioner and the owner of an historic adobe, asked for notice of lighting

projects in the historic districts (AR592, in Exhibit A). The City failed to provide him with prior notice of the LED streetlights which ended up being installed throughout the City, including the National Historic Landmark District (AR676, AR701, in Exhibit B; AR886, AR888, AR892, in Exhibit C).

C. The City Council Did Not Make or Rely on a CEQA Determination.

Contrary to the City's claim (City Brief, p. 2, lines 20-21; p. 7, lines 29-30; p. 12, line 31; p. 13, lines 10-11), the City Council did not make an exemption determination. The City Council did not mention CEQA or environmental concerns (AR12-AR25), other than one Councilmember's question about whether the lights would be placed in the historic district, to which staff responded in the negative (AR20). The City Council resolution made no findings and did not mention any reliance on a CEQA exemption. (AR2.)

At the City Council meeting, no City planning staff spoke on the agenda item on the LED streetlights. The staff presentation was from the City public works staff (AR7) who did not mention CEQA (AR12-AR25).

D. Extra-Record Evidence is Admissible in Mandamus Actions Regarding Informal Agency Decisions.

If there is no public notice or opportunity for public comment, the decisions may be considered informal agency actions that may require extra-record evidence for judicial review. Informal decisions are reviewed by way of traditional mandamus under Code of Civil Procedure section 1085. (*Western States*, *supra*, 9 Cal.4th 559 at 575.) Extra-record evidence is admissible in traditional mandamus actions that pertain to informal agency decisions. (*Ibid.*) The California Supreme Court has held that this extra-record evidence is often necessary in traditional mandamus actions regarding informal agency decisions "because there is often little or no administrative record in such cases" and should be admitted if the facts are in dispute. (*Ibid.*)

Contrary to the City's unsupported allegations (City Brief, p. 9, lines 20-24), the *City of Pasadena* case is good law. It has not been overturned. The commentators in

Kostka & Zischke's treatise, Practice Under the California Environmental Quality Act (Cont.Ed.Bar 2d ed. [2013] §§ 23.55-23.56, pp. 1194-1196), use *City of Pasadena* as an example of a situation where an agency action should be considered an informal agency decision. The opinion of the commentators in Kostka & Zischke with respect to the issue of the admissibility of evidence should be given significant weight because the California Supreme Court relied heavily on the Kostka & Zischke analysis in establishing the limitations on extra-record evidence set out in Western States. (*Western States*, *supra*, 9 Cal.4th at 575, citing the 1993 edition of Kostka & Zischke.)

The fact that the *City of Pasadena* case has not been recently cited on this point (City Brief, p. 10, lines 2-3) is further evidence that the vast majority of CEQA cases involve a public hearing or at least ample opportunity for public participation and active public participation. It further demonstrates that this LED streetlights/CEQA exemption case is not typical.

The Exhibit A documents which Petitioner seeks to add to the record contain relevant and material records that the City had in its possession prior to approving the contract for the streetlights. Courts have frequently allowed augmentation of the record in CEQA actions to include documents designated by Public Resources Code section 21167.6 as part of the administrative record but that were excluded from the record that was submitted for judicial review. (*County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1, 8; *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 335.) The Exhibit A documents should not be considered extra-record evidence because they were in fact part of the administrative record in the City's possession.

E. The Size of the City-Certified Record Is Not Material to the Motion.

Contrary to the City's argument (City Brief, p. 9, lines 8-19), the City-certified record is not adequate for judicial review. Nowhere in the City-certified record is there any investigation or evaluation of possible environmental impacts of the new LED lights, or any initial study pursuant to CEQA, or consideration of the new LED lights under the policies of the General Plan and Area Plans. Nowhere in the City-certified record is

there any consideration of the environmental impacts of the existing lights vs. induction lighting vs. LED lighting, other than electricity savings.

This case fits squarely within the Supreme Court holding that extra-record evidence is often necessary in traditional mandamus actions regarding informal agency decisions "because there is often little or no administrative record in such cases" (*Western States*, *supra*, 9 Cal.4th 559, 575).

The size of the City-certified record is not evidence of adequacy. Nearly half of the pages – approximately 284 pages of 583 – were added to the record at the City's insistence. The majority of the 284 pages are internal emails between City staff on funding and on technical specifications, documentation regarding funding (AR236-AR247; AR263-276), a City Code section (AR328-AR331), and technical reports (AR352-AR398). The City refused to certify the record without them.

Like the City's other cited cases, *Friends of the Old Trees v. Cal. Dept. of Forestry and Fire Protection* (1997) 52 Cal.App.4th 1383 is distinguishable. In that case, there was public notice and "numerous opportunities for public and agency input, and the [respondent public agency] is under an obligation to respond in writing to environmental concerns" due to statutory mandates (*id.* at p. 1392 and fn. 6), and the public made comments in "numerous letters" and participated in the process (*id.* at p. 1398). None of those facts is present here.

F. Public Resources Code and Code of Civil Procedure Section 1085 Permit Augmenting the Record as Requested.

As the California Supreme Court has directed, it is the California Legislature's intent that CEQA "be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Concerned Citizens of Costa Mesa, supra*, 42 Cal.3d 929, 939.) Nothing in Public Resources Code section 21167.6 or in Code of Civil Procedure section 1085 excludes Exhibits A, B or C from the record here. Augmenting the record is permitted.

Exhibits A, B and C contain information that is relevant and material to the City's exemption dated February 21, 2012. It is up to the Court to determine the weight of the evidence.

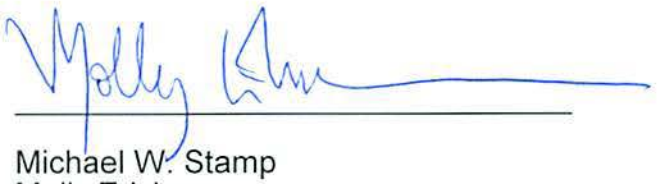
CONCLUSION

For each of the reasons stated, and in the interests of justice, this Court should grant the motion to augment the record.

Respectfully submitted,

Dated: August 8, 2013

LAW OFFICES OF MICHAEL W. STAMP



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STATE OF CALIFORNIA, COUNTY OF MONTEREY

I am employed in the County of Monterey, State of California. I am over the age of 18 and not a party to the within action. My business address is 479 Pacific Street, Suite One, Monterey, California 93940. My email address is mache@stamplaw.us.

On August 8, 2013, I served the document(s) described as follows:

MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY ON MOTION FOR AN ORDER AUGMENTING THE RECORD

(X) pursuant to stipulation by all parties, via electronic mail at approximately ____ PM. No error message was received by me.

Addressed as follows:

For Respondents City of Monterey:

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Executed and emailed on August 8, 2013.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Rachael Mache