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FILED
Clerk of the Superior Court
DEC 02 2010
By: A. GERBA Taylor

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO--CENTRAL DIVISION

SAN DIEGANS FOR OPEN GOVERNMENT Petitioner, vs. CITY OF SAN DIEGO and DOES 1 through 100, Respondents; DOES 101 through 1,000, Real Parties in Interest.	CASE NO. 37-2009-00098375-CU-TT-CTL [~~Proposed~~] **JUDGMENT ON PETITION FOR PEREMPTORY WRIT OF MANDATE** Action Filed: September 17, 2009 Department: 72 (Taylor)

This proceeding came on regularly for hearing on July 15, 2010, and November 12, 2010, in Department 72 of the San Diego County Superior Court (Hall of Justice), with the Honorable Timothy B. Taylor sitting without a jury. At each hearing, Petitioner San Diegans for Open Government appeared by and through attorneys Cory J. Briggs and Mekaela M. Gladden of Briggs Law Corporation and Respondent City of San Diego appeared by and through attorneys Christine M. Leone and Alexis L. Jodlowski of the Office of the City Attorney for the City of San Diego.

At the hearings, the Court heard the arguments made on behalf of the parties by their respective attorneys and upon the conclusion of each hearing deemed the matter submitted. On July 19, 2010, the Court issued a Minute Order ruling on the matter submitted at the hearing on July 15, 2010. On

November 16, 2010, the Court issued a Minute Order ruling on the matter submitted at the hearing on November 12, 2010. True and correct copies of the July 15, 2010 Minute Order and the November 16, 2010 Minute Order are attached hereto as Exhibits "A" and "B," respectively; their attachment is solely for ease of reference and is not intended to make them, separately or collectively, a "statement of decision" under Code of Civil Procedure Section 632.

Based on the Minute Orders, **IT IS ORDERED, ADJUDGED, AND DECREED** that:

1. Judgment shall be entered in favor of Petitioner San Diegans for Open Government and against Respondent City of San Diego, with Petitioner's first amended petition for writ of mandate being granted as to Petitioner's third cause of action and denied as to Petitioner's first and second causes of action. Consequently:

   A. Respondent shall complete and submit an application for a standard coastal development permit in accordance with San Diego Municipal Code Section 126.0718(b) no later than January 30, 2011, to cover all work authorized and performed under Emergency Coastal Development Permit no. 688571 issued by Respondent on October 2, 2009.

   B. At Respondent's election, the application described in the preceding paragraph may be submitted either as a stand-alone application covering all work authorized and performed under Emergency Coastal Development Permit no. 688571; or as part of Respondent's application for a coastal development permit covering its Master Storm Water System Maintenance Program, including all work authorized and performed under Emergency Coastal Development Permit no. 688571.

2. A peremptory writ of mandate shall issue to command Respondent as follows:

   A. Complete and submit an application for a standard coastal development permit in accordance with San Diego Municipal Code Section 126.0718(b) no later than January 30, 2011, to cover all work authorized and performed under Emergency Coastal Development Permit no. 688571 issued by Respondent on October 2, 2009.

B. At Respondent's election, submit the application described in the preceding paragraph either as a stand-alone application covering all work authorized and performed under Emergency Coastal Development Permit no. 688571; or as part of Respondent's application for a coastal development permit covering its Master Storm Water System Maintenance Program, including all work authorized and performed under Emergency Coastal Development Permit no. 688571.

3. This judgment may be amended to allow Petitioner San Diegans for Open Government to recover its attorney fees incurred in connection with this proceeding from Respondent City of San Diego if and when Petitioner brings a successful motion for attorney fees.

4. This judgment may be amended to allow Petitioner San Diegans for Open Government to recover its costs incurred in connection with this proceeding from Respondent City of San Diego if and when Petitioner files a timely memorandum of costs and after the Court considers any motion to challenge the memorandum; and to allow Respondent to recover its costs incurred in connection with this proceeding from Petitioner if and when Respondent files a timely memorandum of costs and after the Court considers any motion to challenge the memorandum.

Date: DEC 02 2010, 2010.

Timothy B. Taylor
Judge of the Superior Court

JUDGMENT ON PETITION FOR PEREMPTORY WRIT OF MANDATE

Exhibit "A"

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 07/19/2010 TIME: 09:43:00 AM DEPT: C-72

JUDICIAL OFFICER PRESIDING: Timothy Taylor
CLERK: Herlinda Chavarin
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2009-00098375-CU-TT-CTL** CASE INIT.DATE: 09/17/2009
CASE TITLE: **San Diegans For Open Government vs. City of San Diego**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Toxic Tort/Environmental

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EVENT TYPE: Motion Hearing (Civil)

APPEARANCES

The Court, having taken the above-entitled matter under submission on 7/15/10 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

TENTATIVE RULING:

This matter came on for hearing on July 15, 2010 in Dept. 72. Cory Briggs, Esq. argued on behalf of petitioners, and Christine Leone argued on behalf of respondent City. Following argument, the court took the case under submission. The court now determines the submitted issues.

I. **Overview**.

In this CEQA case, petitioner attacks a decision by the San Diego City Council on September 15, 2009 to invoke the "emergency" exemption to CEQA in order to proceed on an expedited basis to conduct channel clearing activities in the Tijuana River Valley in the hopes of avoiding life-threatening flooding similar to that which occurred during late 2008. This action was filed shortly after the City Council authorized the clearing of tons of sediment, trash and debris; on October 15, 2009, while bulldozers were working in the channel near the US-Mexico border, petitioner sought to enjoin the work. Following the receipt of briefing and an *ex parte* hearing, the court denied the request for a TRO. The channel clearing work was thereafter completed.

Now, petitioner states that it wants to make "one thing absolutely clear...petitioner agrees that the TRV needed to be dredged in 2009." [Op. Br. 2:8-10] Petitioner refocuses its ire not at the decision to proceed in 2009, but rather at what it refers to as the years of inaction which preceded the decision (which, according to petitioner, rendered the decision something other than an emergency).

Because the court finds, under the law as interpreted in 2002 by the 4th District Court of Appeal, Division 1, that the City had substantial evidence before it justifying the invocation of the "emergency" exemption to CEQA, the court denies, in the main, the application for a writ of mandate. Before turning to that analysis, however, the court must address several preliminary matters.

II. **Judicial Notice**.

The court takes judicial notice as requested by Respondent City of San Diego, as supplemented by its Notice of Errata and submission of a signed Ex. 1, of an Emergency Coastal Development Permit – Tijuana River Valley Emergency Channel Maintenance, issued on 10/2/2009 by the Development Services Department of the City of San Diego, Permit # 688571 (also attached as Ex. 3 to the City's Opposition to Petitioner's Ex Parte Request for TRO, filed 10/15/09). Judicial Notice of the permit is taken pursuant to Evid. Code sections 452(b) and (d), and 453.

Further, the Court also takes judicial notice of the Notice of Errata filed by the City which confirms a valid Emergency Coastal Development Permit was obtained. (See Respondent's Notice of Errata to City's Request for Judicial Notice filed in support of its Opposition to Petitioner's Opening Brief.) The City originally inadvertently attached to its papers an unsigned copy of the Emergency Coastal Development Permit. The City did not realize this error until receipt of Petitioner's Reply Brief on 6/29/10, at which time the City promptly prepared this Notice of Errata, and its attached Ex. 1, the fully executed copy of the Emergency Coastal Development Permit, issued pursuant to SDMC section 126.0718. This permit authorized the City to "perform necessary work to restore the flood control to original flow lines to reduce the chance of flooding and alleviate the serve [sic -- presumably "severe" was intended] imminent threat to life and property facilities in the Tijuana River Valley." Contrary to petitioners' brief filed July 8, the court determines that the City has provided adequate, reliable information allowing judicial notice.

The court declines to take judicial notice of Ex. A and B to Petitioner's Request for Judicial Notice, the trial court decisions in *The California Chapparal Institute v. County of San Diego*, Case No. 37-2009-00091583-CU-TT-CT, and *Butte Environmental Council, et al v. California Department of Water Resources*, Alameda County Superior Court Case No. RG09446708. Trial court decisions in cases involving different parties and facts are not binding authority and are thus irrelevant. Judicial Notice is taken of petitioners' Exs. C-G, pursuant to Evid. Code sections 452(b) and 453. The court denies petitioner's Second Request for Judicial Notice as untimely.

III. **Ruling on Respondent City's Evidentiary Objections:** (1) to the Union Tribune article attached to Item # 13 of Petitioner's "Supplemental Administrative Record [Pet. Supp. Record]" and cited in Petitioner's Opening Brief at 5:14-18 and 11:9-11; and (2) evidentiary objections to portions of the declarations of Ian Trowbridge and Dell Cunamay.

Use of the newspaper article as an alleged source of facts is improper, as the court may not take judicial notice of the truth of the facts contained in a newspaper article. *Mangini v. R.J. Reynolds Tobacco Co.*, 7 Cal.4th 1057, 1063 (1994) [truth of the contents of a newspaper article is not judicially noticeable]. The article is also irrelevant, as it was not before the City Council at the time it decided to apply the emergency exemption to the Project. *El Morro Community Association v. California Dept. of Parks and Recreation*, 122 Cal.App.4th 1341, 1358-1359 (2004). It is also hearsay. The objections are sustained.

The objections to portions of the declarations of Mr. Trowbridge, at paragraph #5, and Mr. Cunamay at paragraph #3, containing the declarants' opinions that if the City had done its job maintaining the channels the [potential flooding] situation would not have occurred, are sustained on grounds these statements are improper expert opinions. Their opinions require special knowledge, skill, experience, training and education (Evid. Code section 801), yet the declarations contain no evidence of the declarants' qualifications to so opine. Their opinions are based solely on their purported recreational use of the TRV. These activities do not make them experts on the technical matters in this lawsuit. Thus, the objections are sustained.

IV. **Ruling on Petitioner San Diegans for Open Government's Motion to Augment**.

Petitioner San Diegans for Open Government's motion to augment administrative record or replace administrative record is denied. Petitioner bears the burden to establish the proposed documents should be added to the record, and has failed to do so.

The Court's review is limited to the record before the decision-making body. See *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School District* (2006) 139 Cal.App.4th 1356, 1381. Documents that were not in front of the agency or that involve post decision matters are extrinsic to the record and are not admissible to "augment" the record. *El Morro Community Association v. California Dept. of Parks and Recreation* (2004) 122 Cal.App.4th 1341, 1358-1359. Further, only those documents relevant to the decision being challenged may be included in the record. *Blue v. City of Los Angeles* (2006) 127 Cal.App.4th 1133, 1142, n.9. Petitioner failed to show the requested records were before the City Council when it made its resolution R-305356, or are otherwise within PRC section 21167.6(b). The record that was certified by the City did not contain the records the Petitioner now wishes the court to allow through augmentation.

Petitioner fails to show that Items # 1-17 should be added to the record. While the Petitioner asserts Items # 1-17 fall within two (2) of the categories set forth in PRC 21167.6(e) ["all internal agency communications, including staff notes and memoranda related to the project" under PRC 21167.6(e)(10), and written evidence or correspondence submitted to, or transferred from the public agency with respect to the project under Section 21167.6(e)(7)], it fails to limit the record to matters concerning the Project. Only documents which are part of the Project should be included in the administrative record. Petitioner seeks to augment the record to include incomplete and selective e-mail exchanges from entirely different plans, projects and miscellaneous groups to cobble together an argument to challenge the City's decision to declare an emergency on 9/15/09.

The proposed documents, with the possible exception of Item 17, do not fall within the categories set forth in the PRC because they do not relate to the Project. PRC 21167.6(e) provides a list of eleven (11) types of documents that should be included in an administrative record. Petitioner argues the documents sought to augment the record are either correspondence to or from the agency relating to the Project [PRC section 21167.6(e)(7)] or other written material relating to the project. [PRC 21167.6(e)(11)]. PRC 21167.6 clearly shows that each document must relate to the Project. Petitioner cannot and has not made this showing. While the Project is limited to flood control work performed by the City in the TRV during the latter part of 2009 to address the approaching rainy season and the effects of the federal government's construction of the Border Fence in light of the 2008 flood experience, Petitioner improperly seeks to broaden the scope of the Project to all channel clearing proposed or considered in

the TRV at any time.

Items # 1-11 long predate the construction of the border fence by federal authorities in 2008. AR 0041 (Tab 7); AR 0129 (Tab 10). The documents are cherry-picked, out-of-context emails among City employees regarding overall maintenance of its storm water channels in the TRV. Proposed exhibits 1-11 are all from 2006 and 2007. Although Petitioners would like to claim the grading done in connection with the border fence is unimportant to the Court's consideration of this matter, there is substantial evidence in the record to the contrary, indicating a profound change to the topography, hydrology and drainage in the TRV. AR 0144, 218-220. Moreover, the proposed exhibits tend to negate, not support, petitioners' assertions that the City was dithering or ignoring its environmental obligations.

Proposed exhibits 12-16 are at least temporally closer to the Project. But the newspaper article portion of 13 is inadmissible as determined in part III above, and there is nothing in those documents to suggest that they were part of the City's deliberative process in determining the applicability of the emergency exemption, and nothing to suggest they are anything other than what they purport to be – internal emails between various City employees, and one responding to a reporter's inquiry.

Item # 17 arguably relates to the Project. However, it was not presented to or considered by the Council and has no bearing on the narrow issues in this case. It is a report prepared by City consultant Dudek, in conjunction with the City's application for an Army Corps permit for the Project and contains Dudek's analysis of jurisdictional delineation of the Project, i.e. whether the Project falls within the jurisdiction of the Army Corps of Engineers. There is no evidence Dudek was hired to perform an analysis as to what effect the Border Fence had on the TRV, and none of Dudek's findings were provided to the Council. The City was not required to consider draft or incomplete documents relating to not yet approved plans or projects. *Chapparal Greens v. City of Chula Vista*, 50 Cal.App.4th 1134, 1148 n.12 (1996).

The Petitioner improperly asks the court to look beyond the record provided to the Council to determine whether its decision on 9/15/09 was supported by substantial evidence. Such a practice was expressly rejected by the California Supreme Court *in Western Municipal Water District v. Superior Court*, 187 Cal.App.3d 1104, 1113 (1986). Extra-judicial evidence may not be used to challenge the substantiality of the evidence supporting a public agency's CEQA determination. *Porterville Citizens for Responsible Hillside Development v. City of Porterville*, 157 Cal.App.4th 885, 894 (2007). It is not proper to augment the record with documents that were not in front of the agency, or that involve post decision matters. *Western States*, 9 Cal.4th at 573-574; *Eureka*, 147 Cal.App.4th at 366. In other words, the issue is not whether there is some snippet from the City's files which might have supported a contrary decision; rather, the question is whether there was substantial evidence to support the decision.

Finally, even if petitioner's request had been granted, the record still contains substantial evidence of an emergency to exempt further required action under CEQA. The Petitioner-requested augmentation of the administrative record to include the internal communications among City employees does not change this conclusion. The City Council approved Resolution 305256 finding, with the wisdom gained by the 2008 flooding experience, that the Border Fence "modified the hydrology of the TRV in the Smuggler's Gulch area creating sedimentation and occlusion problems in dredging channels..." (AR 1:0002;2:0006). Flooding was imminent in light of the approaching rainy season unless emergency work was performed to clear the channels. (AR 1:0002; 2:0006). There is substantial evidence in the record to support this conclusion. AR 1:0002; 4:0009; 5:00016; 6:0023-24; 7:0029-31; 7:0057-58, 59; 12:144. Contrary to the petitioner's brief filed July 8, 2010, the activity being approved was one channel clearing operation in advance of a predicted wet season. An ongoing program of channel clearing was not before the City Council on 9/15/09. This serves to distinguish this case from *Mejia v. City of Los Angeles*, 130

Cal.App.4th 322, 334 (2005), and *County of Orange v. Superior Court*, 113 Cal.App.4th 1, 9-10 (2008).

V. **Ruling on Petitioner San Diegans for Open Government's Petition for Writ of Mandamus**.

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." 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. Overview of the CEQA Process.

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].)

1. *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.) As part of the preliminary review, the public agency must 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).

2. *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).

3. *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. The Environmental Impact Report.

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.' (§§ 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. (§ 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).

D. Application to Facts of This Case.

1. *Standard of Review.*

As noted at the outset, "[j]udicial review under CEQA is generally limited to whether the agency has

abused its discretion by not proceeding as required by law or by making a determination not supported by substantial evidence. [Citations.]" *CREED, supra*, 134 Cal. App. 4th at 605. The precise standard of review to be used in determining whether an agency has abused its discretion under CEQA varies depending on the type of claim under review. *Id.* Here, the essence of petitioner's claim is that the City (the "agency" in this setting) skipped steps 2 and 3 as outlined in parts V B2, B3 and C above by erroneously determining that the project was exempt under the "emergency" exemption, Pub. Res. Code section 21080(b)(4). Thus, under *Banker's Hill, supra*, and other case law (including a 4th DCA case that will figure prominently in the court's discussion below [*CalBeach Advocates v. City of Solana Beach,* 103 Cal.App.4th 529, 536 (2002)]), the "authorities are in agreement that "the substantial evidence test governs our review of the city's factual determination that a project falls within a categorical exemption." *Banker's Hill, supra*, 139 Cal App. 4th at 267-68, citing *Fairbank*, 75 Cal.App.4th at p. 1251; see also *Davidson Homes v. City of San Jose*, 54 Cal.App.4th 106, 115 (1997)["On review, an agency's categorical exemption determination will be affirmed if supported by substantial evidence that the project fell within the exempt category of projects"]; *Magan v. County of Kings,* 105 Cal.App.4th 468, 475 (2002)(an agency "only has the burden to demonstrate substantial evidence that the ordinance fell within the exempt category of projects"); *McQueen v. Board of Directors,* 202 Cal. App. 3d 1136, 1148 (1988)("Our concern is whether there is substantial evidence supporting the [agency's] assertion of exemption"). Although "'there is no statutory requirement of a preliminary study attending an agency decision to use [an] exemption[,] ... [¶] ... the administrati[ve] record must disclose substantial evidence of every element of the contended exemption.'" *CalBeach Advocates v. City of Solana Beach, supra,* 103 Cal.App.4th at 536 (*CalBeach Advocates*) [addressing statutory exemptions].

2. *There is Substantial Evidence in the Record Justifying the City's Exemption Decision.*

Here, the City properly concluded, based on substantial evidence, that the channel clearing project was subject to the emergency exemption contained in PRC 21080(b)(3). This took the project outside the further requirements of CEQA, as set forth in City Council Resolution 305256 (see AR, Tab 1 0001, pages 1-5; and Tab 7, AR 0027-0086). Thus, no further analysis was due under CEQA. See *CalBeach Advocates v. City of Solana Beach*, 103 Cal.App.4th 529 (2002). Petitioner's petition for a writ of mandamus is therefore properly denied. The City Council concluded, on the basis of substantial evidence, that it faced an emergency, as defined at PRC 21060(3): "Emergency" means a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services. "Emergency" includes such occurrences as fire, flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident or sabotage." This had the effect of exempting the project from environmental review under CEQA (Public Resources Code section 21000 et seq). The potential of imminent flooding of the TRV met the statutory definition of "emergency". As in the potential collapse of the sandstone bluff in *CalBeach Advocates v. City of Solana Beach*, 103 Cal.App.4th 529 (2002), the situation in the TRV was an "occurrence" rather than a "condition". Just as the notch in the bluff in *CalBeach* required immediate action, the development of the Border Fence intensified the potential for flooding and required immediate action. Just as the anticipated collapse of the bluff in *CalBeach* did not prevent it from presenting an emergency, so too the increased potential for flooding raised by the Border Fence (see AR 0029-31,58-59,218-222) did not prevent it from constituting an emergency. PRC 21080(b)(4) exempts not only projects that mitigate the effects of an emergency, but also projects that prevent emergencies. In order to design a project to prevent an emergency, the designer must anticipate the emergency. If all emergencies must be unexpected, then projects can never be designed to prevent emergencies. *CalBeach*, 103 Cal.App.4th at 537.

An interpretation of a statute that renders related provisions nugatory must be avoided ... *Lakin v.*

Watkins Associated Industries (1993) 6 Cal.4th 644, 659. PRC 21060.3 does not require that emergencies be unexpected when a projects' purpose is to prevent the emergency. *CalBeach*, 103 Cal.App.4th at 537.

The record before the City Council on 9/15/09 contained substantial evidence of an emergency as defined by the *CalBeach* court. The imminent flooding would be caused by the changes wrought by the construction of the Border Fence (AR 218-222),combined with the onset of an expected heavy rainy season, not the City's earlier inaction. (AR 1:0002;4:0009;5:0016;6:0023-24;7:0027-0066). The imminent flooding constituted an "unexpected occurrence" even if it was anticipated. *CalBeach Advocates v. City of Solana Beach*, 103 Cal.App.4th 529 (2002).

There was substantial evidence that the Project was necessary to prevent imminent loss to life and property (AR TAB 7 0027-0066). There was testimony (AR Tab 7) supported by a PowerPoint presentation (AR Tab 33) from a knowledgeable official in the City's Storm Water Department (Director Heinricks) evidencing the absence of adequate runoff controls on the newly constructed slope beneath the border fence, which in turn gave rise to justified concerns and sedimentation adding to the debris already clogging the channel in light of the predicted wet 2009-2010 season. AR 0030,31; AR 218, 219. Petitioner does not cite to admissible evidence to support its argument the situation in the TRV was created by City's inaction rather than the changes to the topography, hydrology and drainage brought about by the Border Fence construction.

Petitioner's counsel conceded during his argument that city councils typically rely on presentations of City staff like Mr. Heinricks, and the court believes they are entitled to do so. The court does not read *CalBeach* or any other case to require outside independent experts to testify regarding the presence of an impending emergency. There is no magic talisman; rather, the question is whether the information relied upon is of the sort that city councils typically rely upon. Clearly that standard was met here.

Petitioner sought to distinguish *CalBeach*, arguing that the homeowner there had filed a regular permit application, but because of the vagaries of mother nature, simply ran out of time. The record in this case, however, shows (AR 0032,0156) the City was in much the same predicament. Even one of petitioner's proposed supplemental exhibits (Tab 16, Supp. AR 032) supports this conclusion.

Petitioner laid some stress on the 1987 decision in *Barrie v. Coastal Commission*, which also arose in San Diego County. That case would be instructive if the City had received a temporary permit to build a levee to protect property and persons from flood damage, and later sought to avoid having to remove the levee. See 196 Cal.App.3d at 11. Contrary to the statement in petitioner's Reply brief at 4:24, the situation here is <u>not</u> the same as in *Barrie*.

Section 21080(b)(4) of the Public Resources Code provides that CEQA does not apply to "specific actions necessary to prevent or mitigate an emergency." The court finds there was substantial evidence of such emergency here. Thus, the City was not required to take further steps under CEQA.

3. *Subsidiary Claims.*

Although the main thrust of this case arises under CEQA, petitioners also assert two subsidiary claims. One has no merit; the court cannot yet determine whether the second has merit.

The first subsidiary claim (the second cause of action) is that the "no-bid" contract violated the Municipal

Code. Because the court finds that the language of the Municipal Code expressly includes "floods" and "storms" as within the emergencies justifying departure from the competitive bid requirements of the Municipal Code, and because the court finds there is substantial evidence that the City Council had the threat of both storms and floods specifically in mind when it authorized departure from the competitive bid requirements, the court cannot find that the City violated its own contracting rules.

Petitioner's second subsidiary claim (the third cause of action) is that no valid Coastal Development Permit was granted. The City's Errata Exhibit 1, a signed copy of the permit with proof of publication, exposes the canard first advanced by petitioner (that there was no permit). The court finds the permit was valid at its inception, as the City had substantial evidence before it justifying the "emergency" analysis. This evidence is the same as is discussed at length above.

Petitioner went on to argue, however, that the City has failed to comply with SDMC section 126.0718(b) and paragraph 4 of the Permit itself by failing to apply for a regular Coastal Development Permit. There is no evidence before the court that he City has done so (more than 8 months after the TRO hearing and at least 6 months after the channel clearing project was concluded). The court further finds, construing paragraph 34 and paragraph B2 of the prayer of the amended petition liberally, as the court is required to do [CCP section 452; *Kotlar v. Hartford Ins. Co.*, 83 Cal.App. 1116, 1120 (2000)], that the petition properly raised this issue.

The court further determines it cannot decide this issue today. First, there is no evidence that the City has (or has not) processed the regular CDP. Second, there has been insufficient briefing on the available remedies and the extent of the court's authority in this setting. Accordingly, the court orders further submissions as set forth below.

VI. **Conclusion**.

In light of the foregoing, the petition is denied as to the first and second causes of action, and they are dismissed.

As to the third cause of action, the court orders both sides to submit further briefing on the issues identified above, and continues the hearing to October 15, 2010 at 1:30 p.m. The City's supplemental briefing is due by September 17, and the petitioner's response is due by October 1.

IT IS SO ORDERED.

[redacted]

Judge Timothy Taylor

JUDGMENT ON PETITION FOR PEREMPTORY WRIT OF MANDATE

Exhibit "B"

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 11/16/2010 TIME: 09:03:00 AM DEPT: C-72

JUDICIAL OFFICER PRESIDING: Timothy Taylor
CLERK: Andrea Taylor
REPORTER/ERM: Not reported
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2009-00098375-CU-TT-CTL** CASE INIT.DATE: 09/17/2009
CASE TITLE: **San Diegans For Open Government vs. City of San Diego**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Toxic Tort/Environmental

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APPEARANCES

The Court, having taken the above-entitled matter under submission on 11/12/10 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

1. **Judicial Notice**.

The court takes judicial notice as requested by the Respondent City of Ex. A-F (Application for MSWSMP dated 5/27/04; Introductory Report to Program Environmental Impact Report for MSWSMP dated 3/17/10; Excerpts from MSWSMP; Application appealing Planning Commission approval of MSWSMP, PEIR, SDP, and CDP, dated 5/27/10; SDMC 126.0718; and SDMC section 127.0705-0712) pursuant to Evid. Code section 452(d) and 453.
The court takes judicial notice of A-F as requested by Petitioner pursuant to Evid. Code sections 452(b),(d),(h) and/or 453; Ex. G-L pursuant to Evid. Code sections 452(h) and 453; and Ex. M pursuant to Evid. Code section 452(h) and 453.

2. **Evidentiary Rulings**.

The City's objection to the Supplemental Request for Judicial Notice and Authenticating Declaration of Attorney Mekaela M. Gladden, is overruled.

3. **Ruling on Petition for Writ of Mandamus regarding the 3rd cause of action for alleged violation of SDMC 126.0718(b)**

Petitioner's Petition for Writ of Mandamus is granted as it relates to the 3rd c/a for alleged violation of SDMC 126.0718(b). The 10/2/09 Emergency Coastal Development Permit-Tijuana River Valley Emergency Channel Maintenance ["ECDP"] (Ex. 1 to the City's Notice of Errata dated 6/29/10 and file-stamped 6/30/10) specifically states on page 3, at C.4 that "The Owner/Permittee shall apply for a regular Coastal Development Permit to have the emergency work be considered permanent"(emphasis added). It does not say "the 2004 MSWSMP is deemed to be compliance with Municipal Code section 126.0718(b).

SDMC section 126.0718(b), which sets forth the procedures for obtaining Emergency Coastal Development Permits, states at subsection (b) in regards to the Application as follows: "When a coastal emergency exists, an *applicant* may use the procedures of this section instead of the standard application and decision procedures for a Coastal Development Permit. However, all emergency Coastal Development Permits shall authorize only the minimum necessary to stabilize the emergency. In addition, emergency development requires the subsequent processing of a standard Coastal Development Permit application for any work authorized on an emergency basis by these procedures" (emphasis added).

The Declaration of Tony Heinrichs, Director of the Storm Water Department of the Public Works Group of the City of San Diego, signed on 9/15/10 and file-stamped 9/17/10, avers that the City is in the process of obtaining permits for a long-term storm channel maintenance program entitled the Master Storm Water Systems Maintenance Program [MSWSMP]. Heinrich's decl. at 2:7-13. The MSWSMP was (and is) being developed in large part as a result of a movement by the Army Corps of Engineers who in or around 2004 directed the City to develop an implement a master program to consolidate and streamline the permitting process for future channel clearing projects. The development of the MSWSMP began with an application for a Master Site Development permit [SDP] and a Coastal Development Permit (CDP). A true and accurate copy of this application, dated 5/27/04, is attached to the RFJN as Ex. A. "As a result of the large number of flood control channels in the City, as well as the City's diverse and sensitive ecology, the development of the program has been a complicated and lengthy process." (Heinrich's decl. at 2:14-23). He further avers he appeared on 9/15/09 in front of the City Council in support of a decision to declare a state of emergency in the Tijuana River Valley (TRV) and authorize emergency flood control work. He avers the emergency project was substantially completed by January 2010. At that time, processing and approval of the applications for the SDP and CDP for the MSWSMP was still in progress. He avers that the Storm Water Department and the Project Manager assigned to the project, Patricia Grabski, at that time assessed the most efficient way to process a standard CDP for the ECDP. "[I]t was determined that the CDP requirement of SDMC 126.01718(b) would be met by processing the CDP required for the ECDP with the MSWMSP." (Heinrich's decl. at 2:8-15). But Ms. Grabski, in signing the Emergency Permit No. PTS 194684, did not say that in Paragraph C 4. While the court is cognizant of the deference it should extend to other branches of government [see *City of Walnut Creek v. Contra Costa County*, 101 CA3d 1012, 1021 (1980); *Sara M. v. Superior Court* 36 C.4TH 998, 1012 (2009); and *Stolman v. City of Los Angeles*, 114 Cal.App.4th 916, 928 (2003)], this is not so unlimited as to allow the City to determine it may never get around to complying with the clear requirement of SDMC 126.0718(b). The City cannot be the sole arbiter as to when it is going to comply with SDMC 126.0718(b) and obtain a standard CDP for the emergency work it did from approximately 10/09 up to 1/10. Moreover, the ECDP did not expressly or impliedly relieve the City of the requirement to submit a "regular" or "standard" CDP (as contemplated by section 126.0718(b)). Accepting the City's argument would render the temporary and exigent nature of emergency permits a nullity. Accordingly, the court directs the City to complete and submit its standard CDP application for the emergency work it did with regard to the Pilot Channel and Smuggler's Gulch by January 30, 2011, in compliance with SDMC 126.0718(b). This can be done separately or in conjunction with the MSWSMP, but in either case, must be completed by 1/30/11.

Plaintiff is to provide an appropriate order for the court's signature reflecting this ruling and the ruling of 7/19/10.

[redacted]

Judge Timothy Taylor

PROOF OF SERVICE

1. My name is **Cory J. Briggs**. I am over the age of eighteen. I am employed in the State of California, County of **San Bernardino**.

2. My ✓ business ___ residence address is **Briggs Law Corporation, 99 East "C" Street, Suite 111, Upland, CA 91786**.

3. On **December 1, 2010**, I served ___ an original copy ✓ a true and correct copy of the following documents: **[Proposed] JUDGMENT ON PETITION FOR PEREMPTORY WRIT OF MANDATE**

4. I served the documents on the person(s) identified on the attached mailing/service list as follows:

___ ***by personal service.*** I personally delivered the documents to the person(s) at the address(es) indicated on the list.

___ ***by U.S. mail.*** I sealed the documents in an envelope or package addressed to the person(s) at the address(es) indicated on the list, with first-class postage fully prepaid, and then I

___ deposited the envelope/package with the U.S. Postal Service

___ placed the envelope/package in a box for outgoing mail in accordance with my office's ordinary practices for collecting and processing outgoing mail, with which I am readily familiar. On the same day that mail is placed in the box for outgoing mail, it is deposited in the ordinary course of business with the U.S. Postal Service.

I am a resident of or employed in the county where the mailing occurred. The mailing occurred in the city of **San Diego**, California.

___ ***by overnight delivery.*** I sealed the documents in an envelope/package provided by an overnight-delivery service and addressed to the person(s) at the address(es) indicated on the list, and then I placed the envelope/package for collection and overnight delivery in the service's box regularly utilized for receiving items for overnight delivery or at the service's office where such items are accepted for overnight delivery.

___ ***by facsimile transmission.*** Based on an agreement of the parties or a court order, I sent the documents to the person(s) at the fax number(s) shown on the list. Afterward, the fax machine from which the documents were sent reported that they were sent successfully.

✓ ***by e-mail delivery.*** Based on an agreement of the parties or a court order, I sent the documents to the person(s) at the e-mail address(es) shown on the list. I did not receive, within a reasonable period of time afterward, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws ___ of the United States ✓ of the State of California that the foregoing is true and correct.

Date: **December 1, 2010** Signature: Original Signed

SERVICE LIST

San Diegans for Open Government v. City of San Diego *et al.*
San Diego County Superior Court case no. 37-2009-00098375-CU-TT-CTL

Jan Goldsmith, Christine M. Leone, and Alexis Jodlowski
Office of the City Attorney
1200 Third Avenue, Suite 1100
San Diego, CA 92101-4100

Attorneys for Respondent City of San Diego