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Fourth District Rejects CEQA Challenge To San Diego's Use of Existing Facilities Categorical Exemption For Mission Beach Amusement Park Lease Amendment and Extension.

In an opinion filed December 27, 2018, and later ordered published on January 15, 2019, the Fourth District Court of Appeal (Div. 1) affirmed the trial court's judgment rejecting CEQA and other challenges to the City of San Diego's (City) approval of an amended and restated lease of City-owned land containing an oceanfront amusement park in its Mission Beach neighborhood (Belmont Park), which restated lease potentially extends the prior lease term for a significant period. *San Diegans For Open Government v. City of San Diego (Symphony Asset Pool XVI, LLC, Real Party in Interest)* (2019) __ Cal.App.5th __.

Relevant Factual Background

Belmont Park, developed in 1925, contains original amusement attractions including the Plunge (an indoor swimming pool) and the Giant Dipper roller coaster. Upon its developer's death, it was granted to the City, which thereafter in the early 1970's dedicated it along with adjacent land (collectively named Mission Beach Park) for public park and recreational purposes. In 1987, to renovate and revitalize the aging Belmont Park, the City entered into a 50-year Lease and Development Plan for Belmont Park (excluding the Roller Coaster) providing for the demolition and construction of various facilities, including restaurants, shops, and parking, for recreational and visitor-serving commercial uses. The 1987 Lease gave the lessee/operator (Belmont Park Associates) the right of first refusal to enter into a new lease upon terms within City's sole discretion upon City's finding of a continuation of the property's uses to be in the public's best interest.

A few months after execution of the 1987 Lease, City's electorate passed Proposition G limiting commercial development of Mission Beach Park to preserve its recreational and visitor-serving parkland uses and its amusement park's historical remnants. Proposition G provided exemptions for certain development and redevelopment projects or proposals which had obtained vested rights under its standards as determined by the City Council after an application and noticed public hearing. The City subsequently determined the Roller Coaster and Belmont Park Associates Project had vested rights to continue operation and complete development. In 1989, the Mission Bay Precise Plan was amended to recognize Mission Beach Park development would be guided by the Council-approved Lease and Development Plan until the lease expired on March 31, 2037, but recommended that future development thereafter be limited to public and recreational uses with commercial uses restricted to the Plunge building.

City's Resolution Approving The Restated Lease And The Litigation Challenging It

Following a number of lease assignments, in late 2012 Symphony became the lessee under the 1987 Lease and also acquired the entity that was lessee/operator of the Roller Coaster lease. In 2015, the City approved and entered into an amended and restated lease with Symphony encompassing both Belmont Park and the Roller Coaster. That Restated Lease recognized Symphony had already invested \$18 million in capital improvements and upgrades to the property (and planned to

additionally invest \$5.9 in Plunge pool refurbishment); required Symphony to maintain and operate the Plunge and Roller Coaster and pay City annual rent; and provided it an opportunity for an extended lease term (of from 40 to 50 additional years) if it completed the contemplated improvements, made additional City-approved capital improvements, and paid the City a lump sum of \$500,000. The Restated Lease specified numerous allowed uses of the premises and provided City could approve additional uses in its sole discretion, subject to all applicable laws.

City determined its approval of the Restated Lease was categorically exempt from CEQA under Guidelines § 15301's exemption for existing facilities. Petitioner SDOG challenged City's resolution approving the Restated Lease, alleging it violated Proposition G, CEQA, and a City Charter provision requiring actions authorizing "contract[s], agreement[s], or obligation[s] extending for a period of more than five years" be taken by ordinance with notice published in City's official newspaper. The trial court rejected all three arguments, and the Court of Appeal affirmed.

The Court Of Appeal's Decision On the Non-CEQA Issues

Reviewing the matter as challenging legislative action and thus subject to ordinary mandamus review (Code Civ. Proc., § 1085), the Court of Appeal held (with respect to the non-CEQA arguments) that: (1) the Restated Lease fell within the vested rights determined by the City Council in 1988, and that the broad language of the 1987 Lease encompassed all the uses specifically set forth in the Restated Lease (e.g., restaurant, full service and fast foods, and recreational); (2) the Restated Lease's extension provision was permissible because the 1987 Lease contemplated possible extensions and did not mandate a fixed inflexible term, and the Mission Beach Precise Plan did not address vested rights (which were not limited in time) and its recommendations regarding future development were not legally binding; and (3) the City Charter provision was ambiguous when considered in context with surrounding provisions, but was properly construed (consistent with City's long-standing interpretation, the legislative history, and established rules of construing charters) only to restrict City's authority to enter into long-term contracts and projects that would require it to expend funds, not agreements (like the Restated Lease) under which it received revenues.

The Court Of Appeal's Holdings On The CEQA "Existing Facilities" Exemption Issues

With respect to the CEQA claim, the Court reviewed it under Public Resources Code § 21168.5, which provides the standard of review in CEQA challenges where no evidentiary hearing is required, and under which a prejudicial abuse of discretion is established where the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence. Guidelines § 15301's existing facilities exemption from environmental review under CEQA applies to the "operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing *at the time of the lead agency's determination.*" (Emph. added.) SDOG's argument that Symphony's willingness to pay over \$25 million in construction costs proved the Restated Lease exceeded the exemption's "negligible or no expansion of [existing] use" provision failed because, as reflected by the Restated Lease, "the \$18 million in improvements... had already been completed and, accordingly, were existing facilities" at the time of City's exemption determination; SDOG did not argue that the contemplated \$5.9 million for future Plunge refurbishment fell outside the exemption. The Court also rejected SDOG's attempt to rely on case law addressing whether *CEQA litigation* becomes moot when a challenged project is completed during that litigation; here, per the Court, "the existing facilities exemption applied from the time that the Restated Lease was approved, and the City made its CEQA determination because all the structures at issue were already completed."

Finally, the Court rejected SDOG's argument that Guidelines § 15300.2(c)'s "unusual circumstances exception" to the exemption applied. It noted that the party challenging the exemption has the burden of producing evidence supporting an exception. Per the Court: "SDOG has not identified any unusual circumstances due to which there may be a significant effect on the environment." While SDOG argued "that the single unusual circumstance present here is that the electorate passed Proposition G to govern the development of Mission Beach Park," and that a "fair argument" existed that the Restated Lease would result in increased environmental impacts (i.e., significant noise and traffic) that Proposition G sought to avoid, this "undeveloped and conclusory argument" failed for two reasons. First, the Court found it "entirely speculative" that the "sole fact cited by SDOG" - over \$100 million in City revenues over the course of the lease - would result in significant visitor increases and increased traffic and noise.

Second, it held that "even if there was evidence to support SDOG's contention that the Restated Lease will result in increased traffic and noise, SDOG has made no attempt to show that the increased traffic and noise would be due to the unusual circumstances it cites, namely the existence of Proposition G." The Court observed: "In order for the unusual circumstances exception to apply, the significant environmental effect must be *due to* the unusual circumstance. [citations.] No such causal connection has been identified." (Emph. Court's, citing Guidelines § 15300.2(c) and *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1105.)

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January 23, 2019

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