

**SUPERIOR COURT OF CALIFORNIA,**

COUNTY OF SAN DIEGO

HALL OF JUSTICE

TENTATIVE RULINGS - October 19, 2023

EVENT DATE: 10/20/2023

EVENT TIME: 09:00:00 AM

DEPT.: C-75

JUDICIAL OFFICER: James A Mangione

CASE NO.: 37-2023-00038256-CU-WM-CTL

CASE TITLE: PLAYER VS CITY OF CORONADO [IMAGED]

CASE CATEGORY: Civil - Unlimited

CASE TYPE: Writ of Mandate

EVENT TYPE: Motion Hearing (Civil)

CAUSAL DOCUMENT/DATE FILED:

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Petitioners' Motion for Preliminary Injunction is granted, conditioned on posting a bond in the amount of \$1,000.

The court must balance two interrelated factors when ruling on a request for a preliminary injunction: "(1) the likelihood that the plaintiff will prevail on the merits at trial and (2) the interim harm that the plaintiff would be likely to sustain if the injunction were denied as compared to the harm the defendant would be likely to suffer if the preliminary injunction were issued." (*Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 749.) Where the interim harm is great, plaintiff need only show some possibility that she will ultimately prevail. (*Butt v. State of California* (1992) 4 Cal.4th 668, 678.)

Of note, "[a] trial court's decision on a motion for a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the right claimed by him [or her]. The general purpose of such an injunction is the preservation of the status quo until a final determination of the merits of the action." (*Take Me Home Rescue v. Luri* (2012) 208 Cal.App.4th 1342, 1352 (quotation marks and citations omitted).)

Likelihood of Success

In reviewing an agency determination that a project is categorically exempt from CEQA, "the court considers whether the agency proceeded in the manner required by law and whether its determination is supported by substantial evidence." (*CREED-21 v. City of San Diego* (2015) 234 Cal.App.4th 488, 501.) In implementing CEQA, agencies use "a multistep decision tree, which has been characterized as having three tiers." (*Arcadians for Environmental Preservation v. City of Arcadia* (2023) 88 Cal.App.5th 418, 429, review denied (May 17, 2023).) "First, the agency determines whether the proposed activity is subject to CEQA at all. In practice, this requires the agency to determine whether the proposed activity constitutes a "project" as defined in the statutory scheme and CEQA's Guidelines. [Citation.] If not, the lead agency may proceed without further regard to CEQA." (*Id.* (quotation marks omitted).) "Second, assuming the activity is a project, the agency must decide whether the activity qualifies for a statutory exemption (see § 21080, subd. (b)(1)) or one of the 33 categorical exemptions articulated in CEQA's implementing guidelines. [Citations.] If an exemption applies, the project is excused from environmental review." (*Id.*) Finally, "[i]f the lead agency determines the proposed activity is a project subject to CEQA and not categorically exempt from CEQA's requirements, CEQA requires the agency to undertake an initial study to determine whether the project "may have a significant effect on the environment." (*Id.* at 430 (quotation marks omitted).) The results of that study determine whether the level of review required

by CEQA. (*Id.*)

Here, Respondent contends that the project is categorically exempt from CEQA as a Class One Exemption, Class Two Exemption and Class Four Exemption. "Where the issue turns only on an interpretation of the language of the Guidelines or the scope of a particular CEQA exemption, this presents a question of law, subject to de novo review by this court. [Citations.] Our task is to determine whether, as a matter of law, the project met the definition of a categorically exempt project." (*Save Our Carmel River v. Monterey Peninsula Water Management Dist.* (2006) 141 Cal.App.4th 677, 693 (quotation marks and alterations omitted).) "Where the record contains evidence bearing on the question whether the project qualifies for the exemption, such as reports or other information submitted in connection with the project, and the agency makes factual determinations as to whether the project fits within an exemption category, we determine whether the record contains substantial evidence to support the agency's decision. [Citations.] There must be substantial evidence that the activity is within the exempt category of projects." (*Id.* at 694 (quotation marks and alterations omitted).) "[A]n agency may not apply a categorical exemption without considering evidence in its files of potentially significant effects, regardless of whether that evidence comes from its own investigation, the proponent's submissions, a project opponent, or some other source." (*Arcadians for Environmental Preservation*, 88 Cal. App. 5th at 438 (quotation marks omitted).) Finally, "[a]n agency should decide whether a project is eligible for a categorical exemption as part of its preliminary review of the project without reference to or reliance upon any proposed mitigation measures." (*Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1106 (quotation marks omitted).)

As Respondent approved the project on the basis that it was exempt from CEQA, Petitioners can establish a violation of CEQA by showing that the project does not fall into one of the categorical exemptions asserted or that the project is an exception to the exemptions. Here, Petitioners rely solely on the argument that the project is not exempt. Therefore, to satisfy their burden on the instant motion, Petitioners must show they are likely to succeed on the argument that the project is not exempt as a matter of law and/or that the agency's determination that the project qualifies for an exemption is not supported by substantial evidence.

With these standards in mind, the Court turns to each of the exemptions asserted.

### ***Class One Exemption***

A Class 1 Categorical Exemption "consists of 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 existing or former use. . . . The key consideration is whether the project involves negligible or no expansion of use." (CEQA Guidelines, § 15301.) The statute lists a variety of examples, the most relevant of which are "[e]xisting highways and streets, sidewalks, gutters, bicycle and pedestrian trails and similar facilities (this includes . . . other alterations such as the addition of . . . street trees . . .)" and "[m]aintenance of existing landscaping, native growth, and water supply reservoirs . . . ." (*Id.*, § 15301(c) & (h).)

Petitioners assert that this exemption does not apply because the plain language of the statute does not encompass maintenance of trees. They also argue that, to the extent trees can qualify as a "topographical feature," removal of healthy trees cannot be considered maintenance. Assuming arguendo that the subject trees qualify as topographical features, this exemption would apply to maintenance or minor alteration of the trees. Because removal of the trees is inarguably not a minor alteration, this exemption can only apply if the project qualifies as "maintenance" of the existing landscape. Respondent relies on its municipal code, which defines maintenance as "pruning of branches or fronds, root pruning, tree removal, spraying, mulching, fertilizing, cultivating, supporting, treating for disease or injury or any other similar act which promotes life, growth, health or beauty of public trees and palms." (ROA 33, Ex. 10 at pgs. 81-82.) Based on its own definition, tree removal is only part of tree maintenance if it promotes life or growth of public trees. There is evidence in the record that the Torrey Pine tree was unhealthy and/or detrimental to the health of the surrounding trees. (*Id.*, Ex. 4 at pg. 35.) However, Respondent has not identified any evidence supporting its determination that removal of the

Canary Island trees qualifies as tree maintenance promoting life or growth of public trees. Therefore, Petitioners have shown a likelihood of success in proving that the project does not fall under a Class One Exemption.

Notably, Respondent's argument that the four Canary Island pines will be replaced is not properly included in the Court's analysis of this exemption. An argument that the replacement of the trees reduces the environmental impact of the project is an improper use of a mitigation measure to support an exemption. (*Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1108 ("An agency should not be permitted to evade standards governing the preparation of a mitigated negative declaration 'by evaluating proposed mitigation measures in connection with the significant effect exception to a categorical exemption.'").) To the extent the project encompasses the replacement of the trees, such replacement would potentially qualify as a class two exemption, not a class one exemption.

### **Class Two Exemption**

A Class 2 Categorical Exemption "consists of replacement or reconstruction of existing structures and facilities where the new structure will be located on the same site as the structure replaced and will have substantially the same purpose and capacity as the structure replaced . . . ." (CEQA Guidelines, § 15302.) Examples specified in the statute include replacement of commercial structures, schools, hospitals and utility systems and/or facilities of a certain size or capacity, as well as conversion of overhead electrical utility distribution system facilities into underground facilities so long as the surface is restored to the prior existing condition. (*Id.* § 15302(a)-(d).)

Petitioner asserts that none of the statutory language is applicable to the removal of street trees. Additionally, Petitioner claims that there is no substantial evidence supporting this exemption because the record does not show that the trees will be replaced as part of the project or compare the proposed replacement trees with the existing trees. Assuming arguendo that a tree qualifies as a structure, there must be substantial evidence in the record that the replacement trees will be located on the same site and have substantially the same purpose and capacity.

The minutes from the August 15, 2023 City Counsel meeting note that the councilmembers heard comments on the trees removal from the public, including plant pathologist Pat Nolan. Additionally, the councilmembers discussed "the viability of the trees surviving the installation of the root barrier," the "backlog of trees not being replaced," the budget for tree replacement and the issue of nests located in the tree. (ROA 32, Ex. 8 at pgs. 9-10.) The minutes state that "a new tree cannot be immediately planted in the same spot that another tree was removed from, often occurring a year after removal of the old tree." (*Id.* at pg. 10.) Ultimately, a motion was passed to "remove the four Canary Island Pine trees, prioritize their replacement, and explore the possibility of planting larger, more mature trees in collaboration with the Street Tree Committee to decide on the types and locations of the trees." (*Id.*) A "City's 'understanding' that there will a replacement structure of similar size and purpose on the same site does not amount to substantial evidence within the meaning of CEQA." (*Save Our Carmel River*, 141 Cal.App.4th at 698.) "At the very least a Class 2 exemption determination must be based on evidence from which the agency can compare the replacement structure and the existing structure." (*Save Our Carmel River*, 141 Cal.App.4th at 698.) Because the project defers the selection of replacement trees and the locations in which they will be planted, Petitioners have shown a likelihood of success in proving that the project does not fall under a Class Two Exemption.

### **Class Four Exemption**

A Class 4 Categorical Exemption "consists of minor public or private alterations in the condition of land, water, and/or vegetation which do not involve removal of healthy, mature, scenic trees except for forestry and agricultural purposes." (CEQA Guidelines, § 15304.) The statute lists a variety of examples, the most relevant of which is "[n]ew gardening or landscaping, including the replacement of existing conventional landscaping with water efficient or fire resistant landscaping." (*Id.*, § 15304(b).)

Petitioners assert that there is no substantial evidence supporting this exemption because the trees

slated for removal are healthy, mature and scenic. Specifically, Petitioners claim there is no evidence in the record supporting Respondent's finding that the trees are not "scenic" and that its own report states that the recommendation to remove the Torrey Pine was not due to the health of the tree. Contrarily, Respondent argues that the phrase "healthy, mature, scenic trees" should be read in the disjunctive rather than the conjunctive.

As to the interpretation of the statute, the Court interprets "healthy, mature, scenic trees" in the conjunctive. CEQA exemptions must be narrowly construed to ensure that, "in all but the clearest cases of categorical exemptions, a project will be subject to some level of environmental review." (*Save Our Carmel River*, 141 Cal.App.4th at 697.) Taken to its extreme, interpretation of this statute in the disjunctive would allow for the removal of healthy, mature trees because they are not considered "scenic"-a description that is not defined within the CEQA Guidelines-without any level of environmental analysis. As Respondent notes, interpreting the statute in the disjunctive exempts only the removal of immature, unhealthy and non-scenic trees from any type of environmental review. This narrower interpretation aligns with the statutory purpose of CEQA.

As to the evidentiary showing, Respondent asserts that all five trees "feed the fungus causing the mounding damage" to the Green but concedes that only the Torrey Pine tree is "objectively unhealthy." (ROA 30, pg. 13.) "CEQA Guidelines define a project to mean the whole of an action." (*California Farm Bureau Federation v. California Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, 191 (quotation marks omitted).) Therefore, the project is only exempt if all five trees must meet the exemption criteria. Because Respondent does not contend that the four Canary Island pines are unhealthy, Petitioners have shown a likelihood of success in proving that the project does not fall under a Class Four Exemption.

#### Interrim Harm

Failure to comply with CEQA is itself an injury. (*See Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 515 (noting that a violation of CEQA is necessarily prejudicial if it results in the omission of "material necessary to informed decisionmaking and informed public participation).) Additionally, if the trees are removed, Petitioners' petition is arguably moot, and there can be no further review of the potential impacts such removal will have. While Respondent asserts that delaying the repair of the Green will result in increased costs in the project overall (ROA 31, ¶¶ 9-10), there is no evidence in the record quantifying the purported harm. Therefore, the Court finds that the balance of harms weighs in favor of Petitioners.

Finally, Respondent argues that, if the Court grants the injunction, it should limit the injunction to removal of the trees and allow the first phase of the project to continue. However, Petitioner Shannon Player, a certified retired arborist, has submitted a declaration stating that the installation of the root barrier "could cause harm or death to the trees." (ROA 25, ¶ 31.) Respondent has not provided any evidence contradicting this claim or supporting a claim that the root barrier will not affect the health of the subject trees. Therefore, the Court grants Petitioners' request to enjoin any "action that may harm any trees in the vicinity of the Project."

#### Bond

On granting an injunction, the Court generally "must require an undertaking on the part of the applicant to the effect that the applicant will pay to the party enjoined any damages, not exceeding an amount to be specified, the party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction." (CCP § 529(a).) Neither party has requested a specific amount for the bond; however, Petitioners request that the bond be for a nominal amount and Respondent has not objected. Therefore, the Court sets the bond amount at \$1,000.

All requests for judicial notice are granted.

The Court is prepared to fill in the bond amount and sign the proposed order upon confirmation of the tentative.

