10.384.02

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION ONE

CITY OF RICHMOND, a California Municipality, CITY COUNCIL OF THE CITY OF RICHMOND, Appellants, v. PARCHESTER VILLAGE NEIGHBORHOOD COUNCIL, CITIZENS FOR EAST SHORE PARKS, SUSTAINABILITY, PARKS, RECYCLING AND WILDLIFE DEFENSE FUND, and WHITNEY DOTSON, Respondents.	)	**Case No. A123859**

PETITION FOR REHEARING

Appeal from Contra Costa County Superior Court
Case No. MSC07-01090
Honorable Barbara A. Zuniga, Judge of the Superior Court,
Department 2, (925) 957-5702

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I. INTRODUCTION

Respondents and petitioners Parchester Village Neighborhood Council; Citizens for East Shore Parks; Sustainability, Parks, Recycling and Wildlife Defense Fund and Whitney Dotson ("petitioners") respectfully petition, pursuant to Rule 8.268 of the California Rules of Court, for rehearing of this Court's February 24, 2010 Opinion ("Opinion") in this matter for three reasons.

First, the Opinion erroneously determined that the traffic improvements within the Municipal Service Agreement ("MSA") between the City of Richmond ("City") and the Scotts Valley Band of Pomo Indians ("Band") are outside the jurisdiction of the City of Richmond. The MSA provides for specific traffic improvement measures that *will occur within the City's boundaries*. For this reason, the City's binding commitment to approve and/or perform these specific traffic improvements qualifes as a "project" under the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000 *et seq.*, and therefore should have been studied in a legally adequate environmental review prior to the City's signing of the MSA.

Second, the Opinion's determination that the firehouse improvements are too indefinite to be considered a project is in error. The Opinion fails to look at the totality of the evidence regarding the firehouse provisions before determining that the MSA was too indefinite. The record demonstrates, however, that the firehouse improvement options

contemplated within the MSA have sufficient details to warrant CEQA review.

And third, the Opinion erroneously dismisses the City's official support of the Casino as inconsequential based on its misreading of the relevant provisions of the Indian Gaming Regulatory Act. Thus, City approval and support of the project will have significant influence on the federal decisionmaking related to establishment of a gaming facility on the Band's trust lands and therefore should have undergone CEQA review.

II. THE OPINION MISSTATES THE LOCATION OF THE MSA'S TRAFFIC IMPROVEMENTS

The Opinion determined that the MSA's traffic improvements were not within the City's boundaries. Opinion p. 17. It states: "it does not appear any of the traffic improvements specified in this provision are within the City's boundaries" and therefore the City is not "the governmental entity that has 'agreed' to allow the Tribe to construct these traffic improvements." *Id.* Based on this misapprehension, the Court concludes that no CEQA review was required because the City is not "the appropriate agency to conduct CEQA review." *Id.* at 18.

The record, however, clearly demonstrates that some of the traffic improvements contemplated within sections 2.6(b)(3), 2.6(b)(4) and 2.6(b)(1) of the MSA *would occur on land within the boundaries of the City of Richmond.* For example, a chart entitled "Total Mitigation Fees Required for Scotts Valley Proposal" allocates "$40,000" of the cost of

improvements on Godrick Avenue to *the "City's portion" of the road.* AR 0922 (emphasis added); *see, also,* AR 0226 (same); 0031 (map defining city limits[1]); AR 0246 (City requesting Godrick Avenue re-paving); AR 0629-0630 (MSA). The record thus demonstrates that the City has approval authority over some of the traffic improvement projects approved in the MSA.

Because the Opinion assumed that improvements would *only* occur outside the City limits, it incorrectly determined that the City was not the appropriate agency to conduct CEQA review of these improvements. Opinion pp. 17-18. However, since some of the improvements will take place within the City's limits, the City's agreement to approve those improvements constitutes a legally binding commitment by the City to directly undertake activities that will cause a physical change in the environment. Thus, as in *County of Amador v. City of Plymouth*, "there are distinct off-reservation actions that the MSA contemplates will be taken by the City that require the City's approval and which alone could produce a physical change in the environment subject to CEQA." (2007) 149 Cal.App.4th 1089, 1101. Thus, the City's commitments here should have been analyzed in a proper CEQA review prior to the City's signing of the MSA.

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[1] A clearer version of the map is available at: http://www.ci.richmond.ca.us/DocumentView.aspx?DID=399

III. THE OPINION INCORRECTLY DETERMINES THAT THE FIREHOUSE PROVISIONS IN THE MSA ARE TOO INDEFINITE FOR CEQA REVIEW

The Opinion acknowledges that it must examine both the terms of the agreement and the surrounding circumstances to determine whether the City committed itself to a project under CEQA. Opinion at 15, *citing Save Tara v. City of West Hollywood* (2009) 45 Cal.4th 116, 139. The Opinion, however, does not address the evidence in the record of the City's intention to implement specific fire improvements under the MSA's Fire Protection Improvements section.

The Record reflects the City's determination to perform improvements at Fire Station 68 as a part of its agreement to provide emergency response services to the Band. *See, e.g.*, AR 0223-0224, AR 0919-0920 (City states that "the Station 68 upgrades still needed" whether or not a new station is built), 0623 (MSA mandates that "additional fire protection and emergency response infrastructure . . . (including improvements to Station 68 . . .)" be included in any Fire Protection and Emergency Response Agreement developed between the Band and the City). Thus, the City committed in the MSA to the Station 68 expansion project. As the Opinion does not address the specific improvements to Station 68 that are provided for in the MSA, its conclusion that the firehouse improvements are too indefinite to constitute a CEQA project is in error.

The firehouse improvements contemplated in the MSA are much

more definite that the commitment made in *Concerned McCloud Citizens v. McCloud Community Services District* (2007) 147 Cal.App.4th 181. In *McCloud*, the challenged contract lacked details such as "the springs that would be exploited, the site of the bottling plant, how the water would be transported, and other details essential to environmental analysis of the project." *Save Tara, supra,* 45 Cal 4th at 133, *citing McCloud, supra*, 147 Cal.App.4th at 197. Here, the City has expressed its intention to improve Station 68, whether or not it builds an additional fire station.

In addition, the Opinion's determination that the other firehouse improvement options included within the MSA are too indefinite to provide meaningful information under CEQA review does not examine the full record. The two improvement options beside upgrades to existing stations call for "the construction and operation of a fully equipped fire station" within a one and one-half mile radius of the Band's proposed Casino project or "the consolidation and relocation of existing stations" to a location within the same radius. AR 0623 (MSA). Station 62 is the only City firehouse that falls within this radius. AR 0031 (Map). The firehouse improvement alternative of consolidation and relocation of existing stations would likely impact the environment at this location – a specific project that could easily be studied in an appropriate CEQA review.

Further, the interplay between the boundaries of the City, the City of San Pablo, and the County within the designated 1.5-mile radius limits the potential sites of any new fire station. AR 0031 (Map). The record also

shows that limited City land may be available for fire station development within the given radius. AR 0223, 0919. These factors narrow the potential project area to the point where the City could easily identify a discrete number of potential project sites and perform CEQA review.

The record thus reveals much more than an indefinite funding plan. Instead it evidences the City's commitment to chose between three well-defined project options *and* to perform – no matter what option is ultimately selected – specific improvements to Station 68. AR 0623. For this reason, the Opinion's determination that CEQA review would be premature is in error. Opinion p. 16. The firehouse improvement commitments, when viewed in light of the record, are like those approved by the City of Plymouth in *Amador, supra*, 149 Cal.App.4th at 1109, and consequently should have undergone CEQA review prior to the City's signing of the MSA.

IV. THE OPINION ERRONEOUSLY DISMISSES THE CITY'S OFFICIAL SUPPORT OF THE CASINO AS INCONSEQUENTIAL BASED ON ITS MISREADING OF THE RELEVANT PROVISIONS OF THE INDIAN GAMING REGULATORY ACT

The Opinion's determination that the City's formal support of the project is inconsequential is premised on the incorrect assumption that the Band will attain gaming rights under 25 U.S.C. section 2719(b)(1)(B)(iii). To qualify for gaming under this provision, the Band would have to get Congressional approval of its restored lands status. *Id.* Nothing in the record shows that the Band will attain gaming right through this course of

action. Rather, it is clear that the Band may be required to proceed under 25 U.S.C. 2719(b)(1)(A), which *requires* consultation with "appropriate State and local officials" prior to any determination on the Band's eligibility to conduct gaming activities. Thus, the Opinion incorrectly dismissed the importance of the City's support of the project and the consequential requirement that CEQA review of the project should have been conducted prior to the City's commitment of such support.

V. CONCLUSION

For the foregoing reasons, this Court should grant rehearing, and upon rehearing, uphold the Judgment below.

Dated: March 11, 2010

Respectfully submitted,

By: _____

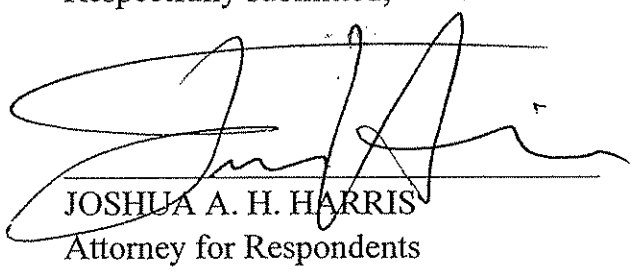
JOSHUA A. H. HARRIS
Attorney for Respondents
PARCHESTER VILLAGE
NEIGHBORHOOD COUNCIL, et al.

CERTIFICATE OF COMPLIANCE

Petitioners' Petition for Rehearing, pursuant to Rule 8.204 subdivisions (b)(4) and (c)(1), California Rules of Court, is in at least 13-point proportional type and contains 1,468 words.

Dated: March 11, 2010

Respectfully submitted,



JOSHUA A. H. HARRIS
Attorney for Respondents
PARCHESTER VILLAGE
NEIGHBORHOOD COUNCIL, et al.

PROOF OF SERVICE

I am over the age of eighteen years. I am not a party to the within action or proceeding. My business address is 436 - 14th Street, Suite 1300, Oakland, California 94612. My business telephone number is (510) 496-0600, and fax number is (510) 496-1366. On March 11, 2010, I served the following document:

PETITION FOR REHEARING

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Oakland, California, addressed as set forth below (C.C.P. §§ 1012, 1013, and 1013(a)). In accordance with the ordinary course of business, the above-mentioned document(s) was deposited with the United States Postal Service addressed as follows:

George A. Yuhas, Esq.
Sarah Marriott, Esq.
Orrick Harrington & Sutcliffe
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San Francisco, CA 94105-2669

Honorable Barbara A. Zuniga
Judge, Contra Costa Superior Court
Department 2
725 Court Street
Martinez, CA 94553-1233

California Supreme Court
350 McAllister Street
San Francisco, CA 94102-7303
(4 copies mailed)

I declare under penalty of perjury that the foregoing is true and correct.

Executed March 11, 2010, at Oakland, California.

Teddy Ann Fuss