

ENDORSED  
FILED  
ALAMEDA COUNTY

JUN 30 2006

CLERK OF THE SUPERIOR COURT  
By SARA DALLESKE

Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

CITIZENS FOR A MEGAPLEX FREE  
ALAMEDA

Petitioner,

vs.

CITY OF ALAMEDA, et al.

Respondents,

ALAMEDA ENTERTAINMENT  
ASSOCIATES, L.P.,

Real Party in Interest

No. RG05 235478

STATEMENT OF DECISION  
AND ORDER DENYING  
PETITION FOR WRIT OF  
MANDATE

The Petition of Citizens For A Megaplex-Free Alameda ("Petitioners") for Writ of Mandate came on for hearing on April 27, 2006, in Department 512 of this Court, the Honorable Bonnie Sabraw, presiding. Petitioners appeared by Susan Brandt-Hawley. Respondents City of Alameda, Community Improvement Commission of the City of Alameda, Planning Board of City of Alameda, and Alameda City Council (jointly "City") appeared by Robert Perlmutter and Sheridan

J. Pauker. Real Party in Interest Alameda Entertainment Associates, L.P. ("AEA") appeared by Donald L. Black.

After full consideration of the Petition, the papers submitted in support and in opposition thereto, as well as the oral arguments presented at the hearing, and the matter having been submitted for decision, the Court rules as follows: The Petition for Writ of Mandate is DENIED. The reasons follow.

## I. INTRODUCTION

Petitioners challenge the City's approval of the Alameda Theater, Cineplex, and Parking Structure Project without an Environmental Impact Report having been prepared on the Project. An Initial Study and Draft MND for the Project was issued in December 2004. In May 2005, City approved a disposition and development agreement ("DDA") with Real Party in Interest AEA and adopted a Mitigated Negative Declaration for the Project. AR-1:12.<sup>1</sup>

The mitigation measures adopted to address historic and aesthetic impacts required that the City hire a professional engaged in historic preservation resources to conduct an independent review of the final project plans and specifications. They further provided that the Planning Board could not approve the required final design review, and the Historic Advisory Board could not issue the required certificate of approval, until each considered the final, more detailed architectural plans for the Project in light of the findings by that professional. There were also mitigation measures as to geotechnical impacts, hazardous materials, noise compatibility, and several as to traffic impacts.

In June 2005, the Planning Board approved a use permit and the final design review of the cineplex and parking structure. Petitioner appealed to City Council, which held a hearing on August 16, 2005. Petitioner's appeal included a

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<sup>1</sup> References to the Administrative Record are cited by Volume Number (Roman Numeral):page number.

letter stating that an EIR was needed because of fair arguments as to impacts to aesthetics due to bulk, massing and scale of project; impacts to historic resources, and inconsistencies with local regulatory and planning provisions. Petitioner cites to a newly prepared expert report by an architectural historian. Council upheld the Planning Board's actions, contingent on certain revisions to the exterior of the structures, and filed Notices of Determination regarding their action approving the use permit and design reviews on September 1, 2005. On October 3, 2005 Petitioner filed this action, challenging the City's actions in relation to the use permit and design review approvals as violating CEQA, alleging that the City failed to prepare and certify an EIR, and instead relied on a faulty Mitigated Negative Declaration.

In September 2005, the Planning Board approved a use permit for the cineplex, addressing the height, hours of operations (after midnight several nights a year), and use of the theater. Petitioner also appealed this approval to City Council, although it did not include any CEQA issue in its appeal. City Council rejected Petitioner's appeal of the use permit on November 1, 2005. Petitioner filed a Supplemental Petition for Writ in this action, adding a challenge to the City's action on November 1, 2005, as violating CEQA for the same reasons the earlier City action was challenged.

Petitioners assert that an EIR is required because there are four areas in which there is a fair argument of potential environmental impact: historic resources, aesthetics, traffic/planning, and inconsistency with land use plans.

**II. FACTUAL BACKGROUND**

There are three components to this Project: (1) renovation of the Art Deco-style Alameda Theater; (2) construction of a new two-level multiplex cinema adjacent to the old theater; and (3) construction of a six-level, 350-car parking garage next door. The Project also includes about 6000 square feet of retail space

at the bottom of the new structures. AR-II:254; AR-I:145. The old Alameda Theater and the cineplex are to operate as an integrated facility, with a single 500-seat cinema in the Theater itself, and with entry to the cinemas via the old theater. AR-II:391.

The Project is located at the corner of Central and Oak Streets in Alameda, and is part of the Park Street historic Commercial District. The old theater is mid-block on Central, in the block immediately next to Park, while entry to the parking garage will be around the corner, on Oak. The new theater is in between the old Theater and the parking garage. AR-I:239 On another corner of the Oak and Central intersection, is another "landmark" of the city, the Twin Towers United Methodist Church, with the Alameda High School and Alameda Free Library nearby.

The Alameda Theater was built in 1932, by a prominent architect, and is on the National Register of Historic Places. AR-II:448-458. The City has been working for years to try to get the Alameda Theater rehabbed and back in use. It was closed as a theater in 1979, and re-opened as a roller skating rink for several years. AR-V:1242. It was later leased to a gymnastics academy. AR-V:1252. It has been either closed or underutilized for two decades, and has not been maintained during that time, with current conditions including peeling paint, damaged theater curtains, broken marquee and holes in the walls. AR-II:448.

In 2000, the City adopted the Alameda Downtown Vision Plan, which included priority actions of restoring the Theater, improving parking, and developing a diverse retail strategy for Park Street. AR-VI:1341. Later that year, the City put out Request for Proposals for revitalizing the theater, but got no responses. AR-IV:851. City contacted various developers, and ultimately determined that a single screen cinema was not economically feasible. AR-II:453. Using its powers under Redevelopment Law, the City decided to enter into a

Disposition and Development Agreement (“DDA”) with a private developer to construct additional screens on the parcel adjacent to the old Theater. The Community Improvement Commission (“CIC”, the redevelopment agency of the City) entered into an Exclusive Negotiating Agreement with AEA in 2002 to negotiate an agreement for redeveloping the Theater and constructing a cineplex and parking structure next door. AR-IV:877-79.

Because the City sought federal funding for the Project, it planned for environmental review under NEPA as well as CEQA. In June and July 2004, City held public meetings re applications for federal grants for the “development and construction of a parking structure and/or commercial space” on the property on which the Project would eventually be set. AR-IV:895.

On November 8, 2004, the City held a “scoping” meeting on the joint CEQA/NEPA review for the Project. AR-IV:912-14, 922-35. The Notice of Scoping Meeting was published October 22, 2004 in The Alameda Journal, a local newspaper, giving notice of a November 8, 2004 Planning Board meeting. The published notice stated that the meeting was to address the proposed scope of environmental review of a proposed project that included a 350-space parking garage, an expanded theater with a total of 1250 new seats, plus 500 in the existing old Theater, and 3900 square feet of retail. AR-IV:912-14. The notice also described the potential expansion of the parking garage into adjacent property with another 158 parking spaces, and a net increase of 15,000 square feet of retail. AR-IV:912. This latter option for further expansion became known as “Option B”, with the rest of the Project referred to as “Option A”.

On December 10, 2004, the City published in The Alameda Journal its Notice of Intent to Adopt Negative Declaration of Environmental Significance with Mitigation Measures, which was combined with a Notice of Availability, Notice of Finding of No Significant Impact, and Notice of Intent to Request

Release of Funds. AR-III:768-69. That notice gave the project name as “Alameda Theater, Cineplex and Parking Structure Project”, and described the project as Option A, consisting of construction of a multi-level parking structure with 350 spaces; rehabilitation of the old Theater to include a 500-seat theater; construction of a cineplex adjacent thereto, with 1300 seats and 7-8 screens; and 3500 square feet of retail space included in the Project. Id. Option B was described as possible future expansion into adjacent property, for a bigger garage and 15,000 additional square feet of retail space. Id.

The December 10, 2004 notice states that the environmental records, including the Initial Study, are available for review at public offices, and that public comments will be received up to January 10, 2005. Id. The documents were also available at libraries in Alameda and the City’s website, and were distributed to various groups and individuals known to have interests in the project. AR-I:17

The Draft Initial Study / Environmental Assessment for the Project (AR-I:123-2:364) describes all three components of the Project in detail. AR-I:132-33, 239, II:240-255, and City’s RJN Exh. 2 (site maps, visual simulations, and project description). It contains detailed plans for the cineplex and parking structure’s internal layouts, and depicts and considers the structure’s mass, scale, and impact on surrounding views in simulations. AR-II:247-48, 254-55. Although the final details as to the design of the buildings are not included in the Initial Study, the Study does include and consider independently produced visual simulations. The simulations are based on information provided by the planning architects in October and November 2004, to “show the basic massing and component characteristics of the project” and “intended to provide preliminary ‘conceptual’ depictions of the potential basic project appearance—i.e., building height, building

mass, and building finish relationships to the adjacent existing theater and surrounding properties (i.e. historic and cultural resource values).” AR-I:20.

The CEQA checklist was used to analyze potential environmental impacts of the Project. The analysis was supported by detailed studies and reports as to the potential impacts on aesthetics (AR-II:259-268), historical resources (AR-II:269-355), and air quality (AR-II:356-364). There was also a parking and traffic study done to assess the potential impacts of the Project on downtown traffic. AR-VI:1554 (December 3, 2004 Traffic Study, referenced in Initial Study at AR-I:179.)

The conclusion in the Initial Study as to potential aesthetic impacts was as follows:

[T]he current conceptual design includes building heights, scales, and setbacks which are compatible with opposite streetscapes and the adjacent Park Street Historic Commercial District, as well as building placement, height, scale, massing, materials and finishes which appear to be visually sensitive and compatible with the Alameda Theater and surrounding historic and potentially historic structures.

Nevertheless, until the project architectural details are finalized, and these preliminary conclusions can be verified by the City of Alameda Historical Advisory Board and City of Alameda Planning Board during the City-required discretionary review process, it is assumed that the project final architectural design may have a *potentially significant adverse visual compatibility impact*.

AR-I:151 (emphasis in original). Similar findings of potentially significant adverse impacts were made concerning the existing visual character or quality of the site (AR-I:152) and the significance of the site as an historical resource (AR-I:158-160).

For each of these potential impacts, mitigation measures were included in the Mitigated Negative Declaration (“MND”), which the City intended would reduce the potential impact to a less than significant level. The mitigation

measures noted that before the architectural design of the project was finalized, the Planning Board was required to grant final design review and the History Advisory Board (“HAB”) had to issue Certificate of Approval. The mitigation measures required that the City hire an historical architect to review the plans and specifications of the Project independently, to see that they meet the standards of the Secretary of Interior’s Standards for Rehabilitation and Restoration. Further, the Planning Board and HAB were to include consideration of the findings and recommendations of the independent review as part of their approval/certification of the final design. (See, e.g., Mitigation AES-1, Mitigation HIST-1.)

There were also findings of potential impacts on other environmental factors, including Transportation/Traffic, for which several mitigation measures were included in the MND to reduce the impact to less than significant. (All the proposed mitigation measures are set forth at AR-I:137-143).

The City held several noticed public meetings regarding the Project prior to approval of the MND. On February 14, February 28, and March 15, 2005, the Planning Board held publicly noticed study sessions regarding design review guidelines for the project, which the City Council approved on March 15, 2005. See AR-IV:987-1028. On March 28, 2005, the Planning Board held a noticed public hearing regarding review of the parking garage design. AR-III:770. In April 2005, HAB had a public meeting for comments on the design of the cineplex and garage AR-IV:1053-54. Also in April 2005, the City’s Transportation Commission had a meeting for review and comments regarding the parking garage and streetscape designs, which included discussion of the transportation element of the MND. AR-IV:1078-011091.

Several individuals and entities provided written comments or objections to the Initial Study and Draft MND, including the Alameda Architectural Preservation Society and a resident complaining that the “big blank box” style of

the cineplex was inappropriate next to the historical old Theater. City staff prepared written responses and made several revisions to the proposed MND and Initial Study. AR-I:16 et seq. (April 19, 2005 memo to "Supervisor Planner", which was presented to the City Council and made an exhibit to the Resolution adopting the MND). In addressing concerns by the Architectural Preservation Society about some of the details in the visualizations in the report, City Staff responded that differences in the visualizations provided should not impact the conclusions and mitigations called for in the Initial Study in regards to the project's aesthetic and cultural resource impacts because: "Following normal City practice, the project design review process is ongoing and such design changes and refinements were anticipated by the Draft IS/EA authors to continue after adoption of the project CEQA/NEPA documentation. Following normal practice, mitigation recommendations, included in the Draft IS/EA pertaining to the project's potential aesthetic and historic/cultural resource impacts have been formulated in anticipation of future design review and refinement." AR-I:21

Notice was published on April 5 and 12, 2005 in The Alameda Journal stating that the CIC and City Council were to hold a joint public hearing on May 3, 2005 prior to acting on the leasing and the development of the properties at Central and Oak, including the historic Theater, pursuant to a proposed DDA between the Commission and AEA. The notice states that the DDA provided for the development of the property with renovation of the historic theater, and construction of an adjacent cineplex and parking garage. The public hearing was to address the adequacy of the proposed MND for the development project. The notice further states where copies of the proposed DDA and proposed MND were available for public inspection and/or copying. AR-III:285-787. The notice was also mailed to a list of interested parties. AR-III:788-792.

On May 3, 2005, several people attended the public hearing on the Project, and spoke with concerns as to impacts on traffic and parking, including safety for cyclists and pedestrians in light of traffic going in and out of the parking garage, as well as concerns that the project was too big and not in line with the size and scale of the rest of buildings in the area. One objector directly addressed the inadequacy of the proposed MND, asserting significant visual and aesthetic impacts caused by the size of the proposed project, a significant loss of open space, and an impact on traffic. See AR-III:0694-699; and Transcript of May 3, 2005 City Council Hearing.<sup>2</sup> Following the public hearing, and review of staff's responses to the written and the oral objections, the City Council and CIC each approved the DDA and adopted the revised MND, including the mitigation measures and a mitigated monitoring program. AR-I:07 (CIC Resolution 05-134) and AR-I:08-93 (City Resolution No.13834, including responses to comments on the Draft Initial Study, findings regarding mitigation of environmental impacts, and a mitigation monitoring checklist for the Alameda Theater, Cineplex, and Parking Structure). The Notice of Determination for this action by the City was filed May 4, 2005 ("May 4 NOD").

Even before the approval of the DDA, AEA had submitted a request for final design review for the parking garage, and for final design review and a use permit for the cineplex. The Planning Board granted preliminary approval of these requests on May 9, 2005. AR-III:700. Also in May 2005, the independent architectural historian hired by the City pursuant to the mitigation measures, Robert Bruce Anderson, prepared his Section 106 Review and Findings as to the impact of the Project on historical resources. AR-II:464-497.

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<sup>2</sup> This transcript has been added to the administrative record by Petitioner's Motion to Augment Record and Request for Judicial Notice, which the Court rules on *post*.

On June 2, 2005, HAB met regarding a Certificate of Approval for the Project and Section 106 Findings. HAP gave a Certificate of Approval for certain structural changes at the old Theater (AR-I:107-108), and a notice of determination was filed for that action, noting that an MND had been previously approved for the Project. Two individuals who eventually formed Petitioner, Ani Dinusheva and Valerie Ruma, appeared at this June 2, 2005 meeting to object to the approval.

The Planning Board held further hearings on the Final Design Review and Use Permit for Parking Garage, and Final Design Review for Cineplex on June 13 and June 27, 2005. At the June 27 meeting, the Planning Board granted approvals of both applications. AR-I:109, 112. In both resolutions, the Planning Board noted that a MND had been prepared and adopted for the project on May 3, 2005 and that, since that time, there had been no change to the Project, substantial change in circumstances, or new information that would warrant further environmental review. Notices of determination for both resolutions were filed on June 30, 2005. AR-I:6.10, 6.13.

These Planning Board approvals were appealed to the City Council on July 7, 2005 by Ms. Dinusheva and Ms. Ruma, on various grounds, none of which were specifically CEQA related. AR-V:1134.1-1135. One of the appellants spoke with a member of City staff on July 21, 2005 to ask if they needed to file a further appeal, beyond what they had already filed, to raise CEQA issues and was told no. (See Petitioner's Second Supplemental Request for Judicial Notice, at Exh. 1.) On August 16, 2005, the day of the City Council hearing on the appeals, counsel for Petitioner provided the City with a letter setting forth the pertinent CEQA grounds for an appeal of the Planning Board's decision, asserting that an EIR was necessary in light of the fair argument that the project could have potential adverse impacts on aesthetics and historical resources, based on the evidence in a new report which she was providing to them, by architectural historian Woodson Minor

