

**FILED**  
LOS ANGELES SUPERIOR COURT

DEC - 4 2008

JOHN A. CLARKE, CLERK  
*M Vermilye*  
BY M. VERMILYE, DEPUTY

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**

<p>CITY OF CERRITOS, a California municipal corporation; CERRITOS REDEVELOPMENT AGENCY, a public body, corporate and politic; and ABC UNIFIED SCHOOL DISTRICT, a California public school district</p> <p>vs.</p> <p>ALL PERSONS INTERESTED IN THE MATTER OF THE VALIDITY OF AN AFFORDABLE HOUSING, FINANCING AND DISPOSITINO AND DEVELOPEMNT AGREEMENT, by and between the City of Cerritos, the Cerritos Redevelopment Agency, the ABC Unified School District, and the Cuesta Villas Housing Corporation, dated January 8, 2008</p>	<p>CASE NUMBER VC050114</p> <p>COURT'S RULING</p>
--	---

### Background

ABC Unified School District, City of Cerritos, Cerritos Redevelopment Agency (Public Agencies) and Cuesta Village Housing Corporation, a private, non profit corporation entered into an agreement entitled the Affordable Housing, Financing and Disposition and Development Agreement. This agreement provides that the District is to lease surplus property located at 16700 Norwalk Boulevard to the Cerritos Redevelopment Agency. Redevelopment will then assign its rights to this ground lease to Cuesta Village who will then construct a senior affordable housing community consisting of 247 one and two bedroom units, a senior center and a park. The City of Cerritos will purchase and renovate property at 12881 166<sup>th</sup> Street and 12880 Moore Street, the District will relocate to this property administrative and other facilities to this location that are presently located at the Norwalk property.

During this process the District and the City posted notices, mailed in excess of 19,000 notices to residents of Cerritos, Norwalk and Artesia, published notices in relevant newspapers of general circulation in the area, posted notices on their web sites, advertised on TV3 and held monthly public meetings for a 15 month period. At the end of this process the agreement among the agencies and Cuesta Village was approved.

### Present Action

A validation action was filed by the Public Agencies and the Corporation pursuant to Gov. Code Section 860 et seq. and Section 53511 seeking to validate the agreement and bind all parties. The Challengers filed an answer and a cross complaint in which they raised a number of challenges which are addressed below.

### THE BURDEN OF PROOF

The first argument proffered by the Challengers is that the Public Agencies bear the burden of proof in this case. This argument is based on the case of *Morris v. Williams* (1976) 67 Cal.2d. 733, 760 Challengers assert that since the Public Agencies "prepared the record" in this case that ergo the Agencies have "peculiar knowledge," that shifts the burden of proof to them. The case law and statute do not support this argument. The Public Agencies brought this action pursuant to Code of Civil Procedure Section 860, a validation action. Under Evidence Code 664, "It is presumed that official duty has been regularly performed..." This redevelopment project, its nature, purpose and execution are such matters that fall under the ambit of each of these agencies. See *Leach v. City of San Marcos* (1989) 213 Cal. App. 3d 648, 656-57 and *In Re Development Plan for Bunker Hill* (1964) 61 Cal. 2d 21, 38-41

The cases cited by the Challengers are inapposite. They are limited to those actions where the factual basis of the Agency's decision lies with the agency itself and those facts are not available to the public. In the present matter, the entire administrative record was available to both sides. The cases cited by the Challengers were not decided on "the administrative record" but further evidence was taken by the court. law."

It is clear in the present situation that the administrative record was equally available to both sides.

## DOES ARTICLE 34 COVER THE PROJECT

Challengers contend that the project should have been submitted to the voters for approval under Article 34 of the California Constitution. It states "low rent housing project" that is being "developed, constructed or acquired" by a public agency be approved by a public vote." (Cal. Const., art. 34, Sec. 1) The court finds that the project does not qualify as a "low rent housing project" under Art. 34 for two reasons. First, under Health and Safety Code Section 37001(a) it comes under a statutory exception. Under subdivision (a) a project does not qualify as a "low rent housing project if (1) the project is *privately owned* (emphasis by court); (2) the project receives no ad valorem property tax exemptions other than those granted under revenue and Taxation Code section 214, (f), (g); (3) no more than 49% of the units will be less occupied by persons of "low income."

Laying this grid over the present project:

1. Cuesta Village, a private non profit formed by the city, will construct, own and operate the project.
2. Challengers have offered no evidence of improper tax exemptions.
3. Only 16% of the units will be occupied by "low income" earners. The 16% is not in issue in this case, the issue has been phrased as, "who comprise "low income earners?" such that the project is over 49% of such earners. The court answers that the 16% is accurate for reasons set out in greater detail below. (AR 4919-20, 3636, 4715-16)

The project is exempt from Article 34 under H&S 37001. The court will not address items 1 and 2 as they are self evident from the record. However, the low income issue is not so self evident.

Challengers contend that the moderate income earners must be added to the 16% low income earners and ergo, the 49% thresh hold is breached and a public vote must occur. The law is clear that a project does not qualify as a low rent housing project *simply* because some of the units are low rent units. *California Housing Finance Agency v. Pattitucci* (1978) 22 Cal. 3<sup>rd</sup> 171, 176-77 The Supreme Court held that a project is outside of Article 34 if the percentage of low rent units is "relatively small" and the project does not give rise to aesthetic or economic concerns that led to the enactment of Article 34. (Id. 176-179)

The project was not challenged on aesthetic grounds and the court will not address this part. Challengers did raise economic concerns and these will be addressed more particularly below. These are: the construction loan is a gift of public funds; the financing agreement is invalid because some of the uses of the Low and Moderate Income Housing Funds(LMI)are improper and the City Council members have a conflict of interest.

A "Low Rent Housing Project" is a housing project made for "persons of low income." Cal. Const. Art. 34, Sec. 1 The Article further defines "persons of low income" as "persons or families who lack the amount of income which is necessary to enable them, without financial assistance, to live in decent, safe, and sanitary dwellings without overcrowding. (Ibid) The challengers argue that persons of "moderate" income meet this definition and should be included within the low income group with the result that the 16% would become a higher figure, i.e. greater than 50%. Challenger assert that the rent cap on the units as set forth in the Financing

Agreement (AR 3636) creates this hybrid income group. Health and Safety Code Sections 370001.3 and 50079.5 defeat this argument. With reference to Article 34, Sec. 37000.3 states the "Maximum income of "persons of low income"....shall not exceed the maximum income of lower income households as defined in section 50079.5." By necessity, if one's income exceeds the limit set in Section 50079.5, one cannot be a low income person. Section 50079.5 defines "Persons of low income" is defined to mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing or acquiring the housing project) to enable them, without financial assistance to live in decent, safe and sanitary dwelling without overcrowding." The Financing Agreement defines persons of "moderate" income as those persons who make *more than* "lower income households" as defined by section 50079.5. The Financing Agreement is quite specific in this regard. It states that "Moderate Income Restricted Units" are "Those Restricted Units designated to be occupied at Affordable Rent by Regulatory Agreement Qualified Residents whose income...is greater than the income limit for "lower income households" as defined in H & S Code Section 50079.5..." Emphasis by the trial court.

California Code of Regulations, Title 25, section 6932 provides actual numeric limits for lower income by county. Thus there are measurable data to determine who is a lower income earner. A reading of all of these sections and the Financing Agreement clearly defeats the Challengers' argument that "moderate" should be added to "lower income earners" to determine the true percentage of "low income units."

#### Project Rent Cap is A Form of Subsidy.

Challengers assert that the "Rent Cap" is a form of subsidy. They argue that Article 34 reference to "financial assistance" means that by virtue of the rent cap on the Project, any person living in the apartments will of "necessity" be receiving "financial assistance" and therefore, will be persons of "low income." The court does not understand how a rent cap converts a person, who is otherwise not low income, into a low income earner. Rent caps have been around for ages. New York City and Santa Monica are prime examples. This is an argument without any underpinnings.

#### The General Indemnity Argument; The Shell Corporation Argument

Challengers assert that the Financing Agreement contains indemnity provisions that require the City and the Agency to indemnify Cuesta Villages for all liabilities. It is clear that the Financing Agreement does bind the City to guarantee the ground lease payments. AR 4734, 4779 (Financing Agreement, Sections 3.1.3(a) 5118(Guaranty Section 2.5) A fair reading of these provisions is that "general fund" monies are *not* at risk, but guaranty payments are limited to LMI funds which must be spent on affordable housing projects. This is not a general indemnity agreement, it applies in one circumstance, the ground lease. If Cuesta Village does not have adequate cash flow to pay the rental payments on the ground lease, then and only then does the City have a obligation to pay the rents, but only with LMI funds.

Challenges further assert that the Cuesta Villages is a 'shell corporation' for the City and

the Agency and should not be considered a privately owned company. Challengers cite *Rider v. County of San Diego* (1991) 1 Cal.4th 1 (*Rider I*) to support their argument that Cuesta Villages is in fact the City and the Agency and not a separate entity. In *Rider I*, the City formed a local taxing agency for the purpose of evading Proposition 13. Proposition 13 established the requirement that certain new taxes must be approved by a public vote. The Supreme Court established the concept "essential control" in finding that this entity was created to circumvent Proposition 13 and its voting requirements on new taxes. *Rider v. the City of San Diego* (1998) (*Rider II*) limited the "essential control" test and held that it was not intended to create a new and broad standard for establishing "alter ego" to be applied to all government established corporations or even to be used outside of the proposition 13 context at all. (Id 1044) The court even recognized that a government may set up corporations for the purpose of shielding it from debt. (Id at 1044) This appears to be out present case. As in *Rider II*, the City and Agency's sole obligation is to pay rent if Cuesta Villages cannot. It is the same as the City of San Diego's obligation to pay the rent on the Convention Center. (*Rider II* 1040)

#### Blight and an Inadequate 33433 Report

Challengers make two arguments: there must be the actual elimination of Blight and concurrently under Section 33433 there was a lack of substantial evidence to support such a finding.

A reading of Section 33433 does support the Challengers' argument that Blight must exist in order to use LMI funds on a project. Section 33433(b) is quite specific. The resolution may find that the proposed sale or lease will either "assist in the elimination of blight or provide housing for low or moderate-income persons. Section 33433(b) Since the City and the Agency pursued this project for the purpose of providing additional affordable housing (AR 4039, 4697) (Report), 5206 Adopting Resolution) this projects falls within the parameters of this section and the court finds that amelioration of Blight is not a requirement.

Since the existence and amelioration of blight is not a requisite, the attack on the inadequacy of the report fails.

#### Unlawful use of LMI funds

Challengers argue that the project ( the School Administration site) lacks a nexus to the housing project and is an unlawful use of LMI funds. Challengers cite *Lancaster Redevelopment Agency v. Dibley* (1993) 20 Cal. App 4th 1656, 1662-63. No nexus between an overpass and a planned affordable housing project. *Craig v. City of Poway* (1994) 28 Cal. App. 4<sup>th</sup> 319, 333, 339-42 Street improvements improper where no relationship to any planned affordable-housing project. In the present case the purchase of the 166<sup>th</sup>/Moore Street properties and the relocation of the District there facilitates the housing project as it opens up the Norwalk Street property for the low and moderate income housing complex. In addition, pursuant to the lease option agreement, the funds are recouped either through rent payments or purchase of the subject property by the district. There are two reasons that this argument fails, the nexus exists and there is in the end recoupment of the LMI funds. That is no net payment out of these restricted funds. The court does not mean to imply that where there is no nexus, recoupment of funds excuses the need for nexus, just that in this case not only is there a nexus but the funds are recouped when it

is not legally required.

#### Gift of Public Funds

Challengers assert that the \$46,000,000 Construction Loan from the Agency to Cuesta Villages is a gift of public funds. Case law is in direct contradiction to this argument. In *Winkleman v. City of Tiburon* (1973) 342 Cal. App. 3<sup>rd</sup> 834, 845. The court in citing a number of cases noted that it is not a gift of public funds if they are for a "public purpose"...The determination of what constitutes a public purpose is primarily a matter for legislative discretion (citations) so long as it has a reasonable basis." Here the public purpose is clearly for the purpose of low and moderate income housing.

#### Incomparability of Office

Challengers argue that the City Council has too many hats on. They at one point are: The City Council, The Redevelopment Agency and Cuesta Villages and these hats violate the doctrine of "incompatibility of office." The problem is that this is limited to "Public Offices." Government Code Section 1099. Ergo, it cannot apply to membership on the board of a private non profit corporation. People sit on City Councils that are also officers and directors of a myriad of different types of public and private corporations. The argument does not make sense once ones looks at it in the context of what happens everyday.

The all the reasons stated the challenges to the project are denied and approval is granted.