

Klein, Heather

From: Klein, Heather
Sent: Friday, January 08, 2016 10:00 AM
To: 'Leila H. Moncharsh'
Cc: Lee, Heather; Campbell Washington, Annie; Flynn, Rachel; Cappio, Claudia
Subject: RE: Head Royce appeal, presentation of new evidence or arguments

Leila,

I was not suggesting that these cases are related, but forwarded this email chain just to respond to your request that we provide legal authority for the City's ongoing position that arguments and evidence on an appeal is limited to that both presented to the Planning Commission and in the appeal when timely filed. We provided legal authority in the email exchange of 2013, and you have not provided a response on that subject. We would appreciate your earliest possible review and response.

Thanks,

Heather Klein, Planner III | City of Oakland | Bureau of Planning | 250 Frank H. Ogawa, Suite 2114 | Oakland, CA 94612 | Phone: (510)238-3659 | Fax: (510) 238-6538 | Email: hklein@oaklandnet.com | Website: www.oaklandnet.com/planning

From: Leila H. Moncharsh [mailto:101550@msn.com]
Sent: Wednesday, January 06, 2016 2:07 PM
To: Klein, Heather
Cc: Lee, Heather; Campbell Washington, Annie; Flynn, Rachel; Cappio, Claudia
Subject: RE: Head Royce appeal, presentation of new evidence or arguments

The Head-Royce expansion plans and its use permit have no relationship with the AMG project located at High & MacArthur Blvd. The neighbors who live near Head-Royce School are in a completely different part of District 4 from the neighbors involved with the AMG project. None of the legal issues are remotely the same. Also, the currently constructive relationship between the neighbors and AMG is very different from the decades-long contentious relationship between Head-Royce's leadership and its neighbors.

The NSC's issues raised in their appeal involve the use permit recently granted by the City Planning Commission for Head-Royce School, which does not correct major problems such as the "loop," which is required through a condition of approval and the TDM, 280 additional summer camp participants despite the intolerable noise already generated by the current 500 participants, and 180 events some of which are extremely large and negatively impact the residents living near the campus. Nor does the use permit constructively address several other issues, instead referring the residents to overburdened and under-funded non-planning departments including the police.

Currently, the NSC is going through the granted use permit and notes that there are parts of it that address the neighbors' concerns in a positive and constructive way. As to those parts, the NSC intends to withdraw its objections. As to other parts, the NSC's biggest criticism is that the use permit balances the rights of the school too heavily against the rights of the neighbors. The NSC is urging the City Council to better balance those rights.

As to the three major issues raised above, they remain and definitely form the basis for a CEQA lawsuit. However, the NSC has met with Rachel, Claudia, Heather K., and of course, their elected City Council representative. The neighbors feel that within this group of talented planners and with the help of their elected representative, the problems can be solved in a fair and reasonable way that do not prevent Head-Royce from operating a school at the current site, but also do not continue to overwhelm the narrow residential streets, create excessive noise inconsistent with any school, and cause such deleterious changes to the quality of the neighbors' lives.

Again, I do not think that the public is required to engage in "meet and confer" about the legal issues surrounding the administrative record at this point in the proceedings.

Respectfully,

Leila Moncharsh

cc: CRADL, Citizens4Oakland, NSC

From: HKlein@oaklandnet.com

To: 101550@msn.com

CC: HLee@oaklandcityattorney.org; ACampbellWashington@oaklandnet.com; RFlynn@oaklandnet.com; CCappio@oaklandnet.com

Subject: Head Royce appeal, presentation of new evidence or arguments

Date: Wed, 6 Jan 2016 19:46:46 +0000

Leila,

Thanks for your email of yesterday expressing your disagreement about the presentation of new evidence and arguments and expressing your view that the parties have preserved their arguments for later court proceedings. Preserving arguments, however, was not the purpose of my prior communications on this topic.

It has come to my attention that you previously have disagreed with the City on this subject, and the City responded by providing you with the legal basis for its longstanding position. I refer you to the email chain, below, in connection with your 2013 appeal of the High and MacArthur project, where the City provided you with legal authority in support of the City's position. To my knowledge, you did not further respond to our request for a substantive response on these issues when they were presented to you regarding that appeal.

As noted in Ms. Warner's October 13, 2013, there are mutual benefits to having as much information as possible provided significantly in advance of the hearing. We would encourage you to consider those benefits and provide information and the legal analysis that supports your position as soon as possible.

Best regards,

Heather Klein, Planner III | City of Oakland | Bureau of Planning | 250 Frank H. Ogawa, Suite 2114 | Oakland, CA 94612 | Phone: (510)238-3659 | Fax: (510) 238-6538 | Email: hklein@oaklandnet.com | Website: www.oaklandnet.com/planning

From: Warner, Lynn
Sent: Friday, November 01, 2013 3:41 PM
To: 'Leila H. Moncharsh'
Cc: Wald, Mark
Subject: RE: High and MacArthur appeal

Dear Leila,

Hope all is well. We have not heard back from you in response to our October 17th email. Can we assume that you agree with the City's position?

--Lynn

From: Warner, Lynn
Sent: Thursday, October 17, 2013 1:46 PM
To: 'Leila H. Moncharsh'
Cc: Wald, Mark
Subject: RE: High and MacArthur appeal

Leila,

We are writing to respond to your email of October 10, 2013.

The City appreciates your raising the points you have addressed in the appeal and subsequent correspondence. We believe it is beneficial to have as much information as possible provided significantly in advance of the hearing, which enables the City to provide meaningful responses and for all parties involved to have a clear understanding of the issues that are before the City Council. Moreover, should Appellants choose to bring a lawsuit challenging whatever decision the City Council may make, Alameda County local CEQA rules require the parties to meet and confer regarding the administrative record. Therefore, it is in the interest of both the City and the Appellants to resolve this matter now, or at least narrow down the issues that may need to be presented to the court. With that in mind, we provide the following responses, below.

First, the City does not agree that your client has the right to raise, for the first time after filing an appeal, "further and new" CEQA issues, including "expert" reports that were not provided in the comments on the Draft EIR or the public hearing on the Project. As outlined in our October 7th email, these issues should have been presented to the Planning Commission in order for them properly to be before the City Council on appeal. The Final EIR was released for public review on June 28th, 19 days before the City Planning Commission hearing on the Project, but Appellants elected not to challenge the contents of the Final EIR (as stated in your July 16th letter to the Commission). Likewise, your July 29th appeal (filed 31 days from the publication of the Final EIR) did not challenge the contents of the Final EIR, but, in part, essentially repeated comments that were previously made on the Draft EIR. In short, the City believes it is too late to raise new issues or challenge topics addressed in the Final EIR.

Second, regarding your statements that the property across from the proposed project is "now available" for development, this is not the kind of new information or new evidence that requires consideration by the City Council on appeal. The site was vacant at the time of the Planning Commission hearing and its future development, therefore, was reasonably foreseeable. Even if that were not the case, the fact that the neighboring property is now available for development is not relevant to the required CEQA and land use permit findings.

Third, Appellants include other Issues in the Appeal that were not previously presented before the Planning Commission, including without limitation the theory that the City's General Plan precludes minor variances that are allowed by the Planning Code. These Issues will be addressed in the City Council Agenda Report.

Fourth, the City Council Agenda Report typically does not introduce new Issues, but instead references the analysis and evidence contained in the record below, including without limitation the EIR and Planning Commission Reports. If the City were to raise new Issues for the first time in its report, Appellants are entitled to respond appropriately.

If you contest the points raised in this response, please provide information and the legal analysis that supports your position. This would include providing information as to when the vacant property across the street became available, how this fact became known to your clients, and what relevance it bears to the Issues being considered on Appeal.

We appreciate your interest in the project and look forward to your substantive response to the issues raised in this correspondence.

Lynn

From: Leila H. Moncharsh [<mailto:101550@msn.com>]
Sent: Thursday, October 10, 2013 5:39 PM
To: Warner, Lynn
Cc: Wald, Mark
Subject: RE: High and MacArthur appeal

Dear Mark & Lynn,

I am not sure why you wrote this email. I do not agree with your statement in the last email you wrote to me and am not required in a vacuum to respond to this one. What is it that you believe the Appellants are raising that you feel is inadmissible because it is untimely? If nothing, I suggest we wait until after the City Council appeal and then litigate in court the issue of whatever you believe the judge should not consider as somehow untimely. Otherwise, we are just trading general citations in emails to no purpose.

For example, we just learned that the property across the street from the proposed project is now available for a developer to develop it. Are you saying that because we did not raise the possible problem of the developer across from the project now wanting to also enjoy a 60-65' height, we are precluded from raising the issue before the City Council? Are you saying that we cannot respond to any issue the CITY might raise for the first time in its staff report?

Give me some specifics and I'll give you some cases.

Leila

Subject: RE: High and MacArthur appeal
Date: Thu, 10 Oct 2013 10:26:49 -0700
From: LWarner@oaklandnet.com
To: 101550@msn.com
CC: MWald@oaklandcityattorney.org
Dear Leila,

For the reasons stated below, the City disagrees with your position that new CEQA issues as well as “newly discovered evidence” may be introduced for the first time at/before the public hearing on the appeal. Please provide an explanation, as well as supportive legal authority, for your position.

State law recognizes that final decisions may be administratively appealed only in accordance with the applicable procedures of the agency whose action is challenged; this applies to both CEQA and non-CEQA appeals. (see *Mount Shasta Bioregional Ecology Center et al. v. County of Siskiyou*, 210 Cal.App.4th 184, 201-202 (2012); *Tahoe Vista Concerned Citizens v. County of Placer*, 81 Cal.App.4th 577, 590-591 (2000); *Park Area Neighbors v. Town of Fairfax*, 29 Cal.App.4th 1442, 1450 (1994); and CEQA Guidelines section 15185.)

As you know, both the 45-day public comment period on the Draft EIR and public hearing on the AMG Project under Public Resources Code section 21177(a) were closed by the City Planning Commission, a decision on the Project was made by the City Planning Commission on July 17, 2013, and a Notice of Determination for the Project was filed on July 18, 2013.

The City is planning to conduct a duly noticed public hearing on your appeal on November 19, 2013, in part, under CEQA Guidelines section 15185 (and not a public hearing on the Project under Public Resources Code section 21177(a)), as well as applicable Oakland Planning Code provisions, stated below. The forthcoming public hearing on the appeal is not a *de novo* hearing on the project-- in accordance with the Oakland Planning Code and the decision in *Mashoon v. City of Oakland* (Appeal No. A077608; filed December 9, 1997; First Appellate District, Division Five); rather, it is a hearing on the appeal that is limited only to the arguments, issues and/or evidence (hereafter, Issues) properly presented to the City Council, as stated below.

The requirement to present any and all Issues during certain time periods (and therefore limiting any appeal to such previously presented Issues) is provided for in (i) various notices/agendas for the Project, for which the Appellants had actual and construction notice; (ii) the City's Appeal Form (which has not been revised since May 2011); (iii) the City's July 22, 2013 decision letter on the Project; and (iv) various provisions of the Oakland Planning Code, including without limitation sections 17.130.050 (Presentation of written and documentary evidence); 17.134.040A1 (Procedure for Consideration of Major CUP at the Planning Commission hearing); and 17.134.070 (Appeal to City Council for Major CUP) (see below for Oakland Planning Code excerpts, which are the same for the other required land-use permits for the AMG Project; see also weblink at <http://www2.oaklandnet.com/Government/o/PBN/OurOrganization/PlanningZoning/s/codes/index.htm>).

As previously indicated in my email of October 7th, the only Issues properly before the City Council are those that were already raised in your July 29, 2013 Appeal and that were also raised (a) during the seventeen (17) day public comment period on the current Project, up to and including the July 17, 2013 City Planning Commission hearing on the Project; and/or (b) during the Draft EIR's 45-day public comment period and related to the current Project. Appellants must therefore limit Issues presented to the City Council at/before the November 19, 2013 appeal hearing accordingly.

Again, if you disagree with any of the information provided in this letter, please provide us with the legal basis for your position.

Thank you,

Lynn Warner

Relevant Oakland Planning Code Excerpts

17.130.050 - Presentation of written and documentary evidence.

Whenever, pursuant to the Oakland Planning Code, a matter of original jurisdiction, for which a hearing is required, is pending before the City Council or City Planning Commission, any interested party, while the hearing is open, may submit written and/or documentary evidence to the City Council or the Commission, whichever is applicable, for its consideration. Whenever, pursuant to the Oakland Planning Code, an appeal for which a hearing is required is pending before the City Council, City Planning Commission, or the Commission's Residential Appeals Committee, the appellant may not submit written and/or documentary evidence not previously submitted in the appeal form itself and presented: (a) prior to the close of the written public comment period for the underlying decision being appealed, in the case of appeals based on a decision by the Zoning Administrator or other administrative decisions, or (b) prior to the close of the City Planning Commission's public hearing for the underlying decision being appealed, in the case of appeals based on decisions made by the City Planning Commission, as applicable.

17.134.040 - Procedures for consideration.

A. Major Conditional Use Permits.

1. In All Zones. An application for a major conditional use permit shall be considered by the City Planning Commission which shall hold a public hearing on the application. Notice of the hearing shall be given by posting an enlarged notice on the premises of the subject property involved in the application. Notice of the hearing shall also be given by mail or delivery to all persons shown on the last available equalized assessment roll as owning real property in the city within three

hundred (300) feet of the property involved; provided, however, that failure to send notice to any such owner where his or her address is not shown in said records shall not invalidate the affected proceedings. All such notices shall be given not less than seventeen (17) days prior to the date set for the hearing. While the hearing is open, any interested party must enter into the record any issues and/or evidence to the Commission for its consideration; failure to do so will preclude the party from raising such issues during the appeal hearing and/or in court. The Commission shall determine whether the proposal conforms to the general use permit criteria set forth in Section 17.134.050 and to other applicable use permit criteria, and may grant or deny the application for the proposed conditional use permit or require such changes or impose such reasonable conditions of approval as are in its judgment necessary to ensure conformity to said criteria. The determination of the Commission shall become final ten (10) calendar days after the date of decision unless appealed to the City Council in accordance with Section 17.134.070. Any party seeking to appeal the determination will be limited to issues and/or evidence presented to the Commission prior to the close of the Commission's public hearing on the matter. In the event the last date of appeal falls on a weekend or holiday when city offices are closed, the next date such offices are open for business shall be the last date of appeal.

17.134.070 - Appeal to Council—Major conditional use permits.

A. With the exceptions of appeal for adult entertainment activities, appeals to the City Council shall be governed by the following:

Within ten (10) calendar days after the date of a decision by the City Planning Commission on an application for a major conditional use permit, an appeal from said decision may be taken to the City Council by the applicant, the permit holder, or any other interested party. In event the last date of appeal

falls on a weekend or holiday when city offices are closed, the next date such offices are open for business shall be the last date of appeal. Such appeal shall be made on a form prescribed by the Commission and shall be filed with the City Clerk, along with the appropriate fees required by the City's Master Fee Schedule. The appeal shall state specifically wherein it is claimed there was an error or abuse of discretion by the Commission or wherein its decision is not supported by the evidence in the record. The appeal itself must raise each and every issue that is contested, along with all the arguments and evidence in the record, previously presented to City Planning Commission prior to the close of its public hearing on the item, which supports the basis of the appeal; failure to do so will preclude the appellant from raising such issues during the appeal and/or in court. Upon receipt of the appeal, the Council shall set the date for consideration thereof. After setting the hearing date, the Council, prior to hearing the appeal, may refer the matter back to the Planning Commission for further consideration and advice. Appeals referred to the Planning Commission shall be considered by the Commission at its next available meeting. Any such referral shall be only for the purpose of issue clarification and advice. In all cases, the City Council shall retain jurisdiction and, after receiving the advice of the Planning Commission, shall hold a hearing on and decide the appeal. The City Clerk shall notify the Secretary of the City Planning Commission of the receipt of said appeal and of the date set for consideration thereof; and said Secretary shall, not less than seventeen (17) days prior thereto, give written notice to: the applicant; the appellant in those cases where the applicant is not the appellant; adverse party or parties, or to the attorney, spokesperson, or representative of such party or parties; other interested groups and neighborhood associations who have requested notification; and to similar groups and individuals as the Secretary deems appropriate, of the date and place of the hearing on the appeal. During the hearing on the appeal, the appellant will be limited to issues and/or evidence presented prior to the close of the City

Planning Commission's public hearing on the item. The appellant shall not be permitted to present any other evidence (written, oral, or otherwise) during the appeal process. In considering the appeal, the Council shall determine whether the proposed use conforms to the applicable use permit criteria, and may grant or deny a permit or require such changes in the proposed use or impose such reasonable conditions of approval as are, in its judgment, necessary to ensure conformity to said criteria. The decision of the City Council shall be made by resolution and shall be final.

From: Leila H. Moncharsh [<mailto:101550@msn.com>]
Sent: Monday, October 07, 2013 12:06 PM
To: Warner, Lynn
Cc: Wald, Mark; Alexis Gevorgian
Subject: RE: High and MacArthur appeal

Thank you for the courtesy notice. It is much appreciated.

On behalf of the appellants, we object to the legal notification in your email as incorrect as to CEQA issues. The appellants are allowed to raise further and new CEQA issues at the city council hearing. Further, appellants object to the extent that your email would limit them from presenting newly discovered evidence (such as the availability of the property across the street from the project site that occurred just recently) that could not have been known by the time that the appeal was due.

Thanks again,

Leila Moncharsh, attorney for appellants

Subject: High and MacArthur appeal
Date: Mon, 7 Oct 2013 11:54:32 -0700
From: LWarner@oaklandnet.com
To: 101550@msn.com
CC: MWald@oaklandcityattorney.org; agevorgian@amgland.com
Dear Appellant,

This is a courtesy notice that your appeal of the City Planning Commission's approval of the AMG Senior Housing Project is **tentatively** set to be heard by the City Council on Tuesday, November 19, 2013 at 6:30 pm in the City Council Chambers of City Hall. A formal notice will be sent no later than 17 days before the appeal hearing.

This email also serves as a reminder that the only arguments, issues and/or evidence (hereafter Issues) properly before the City Council are those that were already raised in your July 29, 2013 Appeal and that were also raised (a) during the seventeen (17) day public comment period on the current Project, up to and including the July 17, 2013 City Planning Commission hearing on the Project; and/or (b) during the Draft EIR's

45-day public comment period and related to the current Project. Appellants must therefore limit Issues presented to the City Council at/before the November 19, 2013 appeal hearing accordingly.

Sincerely,

Lynn Warner

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