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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

CITIZENS FOR UPHOLDING ZONING  
REGULATIONS et al.,

Plaintiffs and Respondents,

v.

CITY OF PALO ALTO et al.,

Defendants;

COURT HOUSE PLAZA COMPANY et  
al.,

Real Parties in Interest and  
Appellants.

H036691  
(Santa Clara County  
Super. Ct. No. CV078386)

Real parties in interest Court House Plaza Company and its successor in interest Hohbach Realty Company limited partnership appeal a decision of the trial court awarding certain attorney fees.

In a prior appeal by Hohbach, we affirmed the trial court's order awarding attorney fees. Following our order, respondents Citizens for Upholding Zoning Regulations et al. (Citizens) filed a second motion for attorney fees occasioned by the appeal to this court. Citizens requested \$137,701 plus fees incurred in bringing the fees motion as well as other fees incurred in the preparation of moving and reply papers. The

total requested was \$160,673. This figure did not include fees for the appearance and argument before the trial judge.

The trial court conducted a hearing after which it made an award of \$120,504.25 to Citizens. It did so after reviewing Citizens submissions and expressing the opinion that the hourly charges were excessive.

Appellant urges reversal of the judge's order on the grounds that the trial court abused its discretion by, among other things, refusing to state the reasons for the award. We see no basis for the claim in the record and will affirm.

### **PROCEDURAL HISTORY**

“On October 31, 2006, defendant City of Palo Alto circulated a mitigated negative declaration (MND) describing a mixed-use development proposal by real party in interest Court House Plaza Company (Developer) for three parcels on 2.41 acres adjacent to the Caltrain railroad tracks at the intersection of Page Mill Road and Park Boulevard in Palo Alto. We have taken judicial notice of this MND.

“The MND described a project involving construction of a three-story building with a subterranean garage for 274 vehicle spaces, a ground floor with space for research and development, and the remaining two stories for residential apartments.

“The MND referenced a geotechnical report by Jo Crosby and Associates that identified no toxic material on the property, though it noted the existence, since 1981, of a toxic plume (the Hewlett-Packard-Varian plume) of contaminated groundwater underneath the site. The MND stated, ‘The extent of the plume and its contaminants are well known and documented, and a number of developments have been built in the area, including residential uses, over this plume.’ As mitigation measure #3, the MND proposed that prior to issuance of a building or grading permit, ‘reports documenting the location of hazardous waste contaminants in the soil and/or groundwater shall be provided to the SCVWD and RWQCB for review and project approval.’ It would be up to the Regional Water Quality Control Board (Regional Board) either to confirm the

absence of contamination or the absence of dangers to workers or the public from contamination or to review and approve measures to mitigate the danger of exposure.

“The Regional Board responded by a letter dated November 20, 2006, of which we have taken judicial notice. The letter pointed out that an August 2006 soil gas survey by Kleinfelder Associates indicated the presence of volatile organic compounds (VOC’s), including PCE, TCE, and benzene, ‘in the soil gas phase sequestered in the non-saturated zone beneath the site’ at concentrations exceeding the Regional Board’s environmental screening levels. ‘Without further mitigation or mitigation proposals, we conclude the VOC’s beneath the site may present a threat to human health, due to the potential for vapor intrusion into indoor air.’ The Regional Board recommended developing plans to identify the VOC’s in the soil, to address potential vapor intrusion, and to protect the health of construction workers.

“Defendant City Council of defendant City of Palo Alto (collectively ‘City’) approved the MND either at the council’s meeting on November 20, 2006 or its meeting on December 11, 2006.<sup>[1]</sup>

“This lawsuit was filed in January 2007, to challenge this approval. Plaintiffs Robert Moss, Thomas Jordan, and an unincorporated association calling itself Citizens for Upholding Zoning Regulations (collectively ‘Citizens’) filed a petition for writ of mandate asserting, among other things, procedural and substantive omissions in the preparation of the MND. Among the allegations of the petition were: ‘CITY failed to identify a new potentially significant adverse impact and to propose measures to mitigate such impact in its Revised MND. CITY received written comments on the MND from the [Regional Board] regarding potentially significant impacts associated with the presence of [VOC’s] beneath the Project Site in the soil gas phase sequestered in the non-saturated zone.’ This information, at a minimum required a revision of the MND and its

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<sup>1</sup> “In the trial court, the parties disagreed about the date of the approval. The date of approval is not relevant to the issues in this appeal.”

recirculation for public review. Citizens also claimed that an environmental impact report (EIR) was required due to these hazardous materials as well as due to impacts on aesthetics and land use.

“Citizens also objected to City’s action as in violation of its general plan and zoning law and based on a misunderstanding of the density bonus statute (Gov. Code, § 65915). Citizens requested declaratory and injunctive relief.

“After a hearing on September 10, 2007, on the same date the trial court issued a written order partly granting a writ of mandate. The order explained that Citizens were entitled to assert only one environmental issue that had been raised in the administrative proceedings by the Regional Board, namely the inadequate mitigation by the original MND of volatile organic compounds in the soil beneath the project site. The court observed that ‘the City added new mitigation measures apparently taken from the [Regional Board’s] letter to the MND as part of its final findings, thereby effectively revising the MND without recirculating it.’ The court observed that the proposed mitigation measures may not be adequate and that members of the public may argue that the VOC’s required the preparation of an EIR. The court rejected Citizens’ claim that Government Code section 65916 had been misapplied and concluded that no declaration of future rights was needed. Injunctive relief was also unnecessary in light of the court’s ruling on the CEQA claim.

“On October 9, 2007, the trial court entered a judgment issuing a peremptory writ of mandate, ordering City to: ‘1. Set aside its decision approving and adopting a Mitigated Negative Declaration (“MND”) for the mixed-use development project proposed at 195 Page Mill Road and 2825, 2865, 2873, 2891 and 2901 Park Boulevard in Palo Alto, California (“Park Plaza Project”). This approval is remanded to the CITY which is hereby ordered to recirculate the MND in its final form for public comment, or otherwise comply with the California Environmental Quality Act (“CEQA”). (Public Resources Code §§ 21000 *et seq.*);

“ ‘2. Set aside its Action No. 2006-10 Record of the Council of the City of Palo Alto Land Use Action For 195 Page Mill Road and 2825, 2865, 2873, 2891 and 2901 Park Boulevard: 05PLN-00281 (Court House Plaza Company, Applicant) making findings in connection with its approval of the Park Plaza Project under CEQA. This Action No. 2006-10 is remanded to the CITY for reconsideration.

“ ‘3. Set aside in its entirety its decision to approve the Park Plaza Project.

“ ‘The CITY, and all of its officers, employees, agents and assigns, are FURTHER ORDERED to suspend and refrain from authorizing any and all demolition, excavation, construction or any other project related activities that could result in any change or alteration to the physical environment until the CITY has reconsidered its approval of the Park Plaza Project and brought it into compliance with the requirements of CEQA.

“ ‘IT IS FURTHER ORDERED that Real Party in Interest COURT HOUSE PLAZA COMPANY, and all of its officers, employees, agents and assigns, shall suspend and refrain from conducting any and all demolition, excavation, construction or any other project related activities that could result in any change or alteration to the Park Plaza Project site or its physical environment until the CITY has reconsidered its approval of the Park Plaza Project and brought it into compliance with the requirements of CEQA. To the extent necessary for CEQA compliance, activities required to investigate contamination on the Park Plaza Project site may proceed notwithstanding the prohibitions discussed above.’

“On December 14, 2007, Developer filed a motion seeking either enforcement or modification of the writ of mandate, arguing that City has misinterpreted the writ as invalidating the existing project approval, and requiring submission of a new application in order to obtain environmental review. Citizens and City opposed the motion. At a hearing on January 11, 2008, the court denied the motion. We subsequently summarily denied a writ petition challenging this denial.

“On January 11, 2008, Citizens filed a motion pursuant to section 1021.5 seeking an award of the fees of seven attorneys, including Lewis Soffer, Stephen Velyvis, and Robin Kennedy, in the Miller Starr Regalia law firm. In a declaration, Soffer totaled the litigation expenses at \$6,886.50 and the attorney fees at \$200,062.50 based on the hours worked at the regular hourly rates of the seven attorneys involved. The declaration was accompanied by bills itemizing the hours worked and services rendered over the time spanning January 4, 2007 through November 28, 2007.

“City and Developer each filed opposition to the motion seeking attorney fees. Citizens’ reply brief filed on February 19, 2008 attached a declaration by Stephen Velyvis identifying additional attorney fees and costs arising between the dates of December 3, 2007 and February 19, 2008.<sup>[2]</sup> This declaration also explained counsel’s involvement in hearings by the Architectural Review Board and City’s Planning Commission. All the hearings were related to review and approval of the project and counsel monitored the progress of Developer’s applications for demolition and building permits.

“After a hearing on February 26, 2008, the trial court issued an order granting Citizens ‘motion for attorneys’ fees and litigation expenses’ totaling \$175,000 jointly and severally against City and Developer.” (*Court House Plaza Company v. City of Palo Alto et al./Citizens for Upholding Zoning Regulations et al. v. City of Palo Alto et al.; Court House Plaza Company* (Jun. 30, 2010, H032872/H033204) [nonpub. opn.] [pp. 2-7].)

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<sup>2</sup> “The reply brief requested \$47,689.49 for the most recent fees and costs. The declaration itself did not state a total, though it attached bills and time details. We are unable to ascertain how this total was computed. The fees for December 2007 work were \$10,480.00, with costs of \$56.10. The fees for January 2008 were \$18,230.00, with costs of \$1,254.08. The fees for February 2008 were \$17,670.00. By our calculation, this amounts to fees of \$46,380.00 and costs of \$1,310.18, totaling \$47,690.18, 69 cents more than what the reply brief stated. Assuming without checking that Soffer’s declaration accurately totaled the initial fees and costs, we calculate that Citizens requested total fees of \$246,442.50 and total costs of \$8,196.68.”

Hohbach Realty Company (Hohbach) appeared here last to contest an award of attorney fees jointly against it and the City of Palo Alto. After reviewing the procedural history of the case as well as the evidence for and against an award of fees, we affirmed the trial court's order and allowed respondent Citizens its cost on appeal.

After remittitur Citizens filed a second motion for attorney fees and costs with support thereof for an award of \$160,504.25. After the hearing the court made an order in favor of Citizens of \$120,504.25. It is this order Hohbach appeals claiming abuse of discretion on separate grounds: 1) failure to show entitlement to fees because all Citizens did was to achieve a remand from a procedural defect in the City's handling of the mitigated negative declaration; 2) the court awarded fees for work done before the filing of the notice of appeal for the prior appeal; 3) the court awarded fees incurred in their settlement with the City of Palo Alto. As to the first ground raised (no entitlement because of procedural error only) Hohbach concedes that we ruled against him in the prior case and that decision is final. We accept the concession.

Hohbach is thus left with his argument urging us to find an abuse of discretion by the trial court in setting and awarding attorney fees to Citizens. Particularly, Hohbach urges that we adopt our reasoning in *Gorman v. Tassajara Development Corporation* (2009) 178 Cal.App.4th 44 (*Gorman*) and apply it to this case.

But the trial court in *Gorman* had before it the claim of fees plus the question of the Lode Star amount. There the trial court failed to give any reasons or cite any factor recognized in case law for reducing it. Moreover, we were unable to surmise any mathematical or logical explanation for the trial court's award. It appeared after a rather painstaking analysis of the record that the number had been, as we said, "snatched whimsically from thin air." (*Gorman, supra*, 178 Cal.App.4th at p. 101.) When a court makes a discretionary call, a reviewing court will have confidence in the decision to the extent the court has offered a reasonable explanation for its decision. Where nothing is

offered there is no way an appellate court can actually assess whether or to what extent discretion is exercised. We have no such doubts as to the decision here.

Contrary to Hohbach's claim as well as his reliance on *Gorman*, the trial court here did say on the record ". . . I felt [that] time expended overall was excessive." The trial court a little later explained, "The billings were always at least three tenths of an hour, four tenths of an hour, rarely I saw a few for one tenth, they were always up there and looking at some of the motions and so on." On the basis of that analysis the fee request was reduced by 25 percent, well within the realm of reasonable.

The two other claims raised by appellant's appeal, namely improper consideration of claimed fees in an earlier case and minimal success in having the project sent back to the city for correction of a procedural defect under CEQA have both been determined by this court in the prior appeal. They are thus governed by law of the case.

#### **FURTHER ATTORNEY FEES**

Citizens has filed a further motion for attorney fees and has asked us to award \$15,647.95 for legal expenses caused by this appeal. In addition, Citizens request additional fees for oral argument. Hohbach opposes the motion on several grounds none of which we will meet because we will agree with Hohbach that the trial court is in the best position to consider the evidence in support of the fee request, modest though it is.

**DISPOSITION**

The order of the trial court is affirmed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.