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Board Members at the
April 25, 2024 CBOA Meeting
by Assistant Attorney
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San Luis Obispo Superior Court
By: Rodriguez, Angelina

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

Richard W. Ferris,

Petitioner,

v.

City of San Luis Obispo,

Respondent.

Case No.: 23LC-0410

**ORDER UPHOLDING THE
ADMINISTRATIVE CITATIONS
ISSUED BY THE CITY OF SAN LUIS
OBISPO AND THE FINES IMPOSED
BY THE CITY'S CONSTRUCTION
BOARD OF APPEALS.**

The Court's Ruling

As explained more fully below, the court upholds the Construction Board of Appeal's ("CBOA") determination that the two violations in question were valid and enforceable by the City of San Luis Obispo ("City"), and the fines levied were properly imposed on Petitioner.

Facts from the Administrative Hearing

The Ferris family bought the property at 4080 Horizon Lane in 1997. At that time, the County was the governing jurisdictional body for this parcel of land. In 2008, the City annexed the property and became the governing entity. Prior to this annexation, the Ferris family sought a permit to alter the waterway running through their property, but this permit was never issued by

the County and was extinguished upon City annexation. The waterway does appear in aerial photos prior to the Ferris family's ownership of the property. [CBOA Resolution, Finding 12(i).]

In 2006, the City adopted their Conservation and Open Space Element of the General Plan ("COSE") in which they designated the intermittent waterway running through the Ferris property as a "creek." [CBOA Resolution, Finding 12(h)& (i).]

In March of 2017, the City's Code Enforcement staff were contacted by Game Warden Terri Hickey from the California Department of Fish and Wildlife ("CDFW"). Warden Hickey alerted the City about an unauthorized channelization on the property, and the construction of a retaining wall system within the property's watercourse.

On March 9, 2017, an inspection of the property revealed the unpermitted channelization of the watercourse with "substantial alterations to the bed, bank, and channel of the creek," as well as an unpermitted retaining wall system within the creek's required setback. [CBOA Resolution, Findings 12(l)&(m).]

CDFW issued an NOV on March 30, 2017, finding "the creek channel has been narrowed" and "the activities substantially altered the bed, bank, and channel of the stream." [CBOA Resolution, Finding 12(n).] No permits were obtained for these alterations. As a result, the City Code Enforcement staff issued an NOV on April 10, 2017, for "the unpermitted construction of the retaining wall system within a creek area and the placement of retaining walls, multiple storage containers, vehicles, and other equipment within the 20-foot creek setback area." (CBOA Resolution, Finding 12(p).)¹ This notice was sent to the Ferris family on July 15, 2021, identifying in relevant part, a violation of San Luis Obispo Municipal Code section 12.23.030, subds. (A), (L) and (N), and section 17.70.030, subd. (E). Petitioner was given notice he could take remedial action by July 25, 2021, to nullify the violations, but petitioner elected to request the Director of Community Development voluntarily withdraw the NOV. The Director declined this request on September 12, 2018.

COVID restrictions delayed compliance inspection, but in July of 2021 City Code Enforcement reinspected and determined no corrections were made by the property owners, and no applications for permits or other statutory exceptions were submitted.

¹ Separate enforcement proceedings were initiated by CDFW and the San Luis Obispo District Attorney's Office, but are unrelated to the NOV at issue in this case.

Following three separate hearing over an eighteen-month period,² the CBOA upheld the citations at issue in a formal resolution dated May 16, 2023. The Ferris family was notified of their right to appeal the CBOA decision pursuant to California Government Code section 53069.4(b)(1), which petitioner elected to do on June 1, 2023.

The administrative record was filed on June 27, 2023. On September 5, 2023, petitioner filed a Notice of Related Case, (23CV-0467), along with statements on appeal and exhibits. A second continuance was granted due to illness, followed by a joint request for a continuance to pursue joinder of the two cases pursuant to Code of Civil Procedure, section 1040. The cases were not joined, so a trial de novo commenced on January 23, 2024.

Opening statements were given and two witnesses for the City – John Mezzapesa and Robert Hill – testified. The hearing recommenced on January 25, 2024, with Robert Hill resuming the stand, City exhibits were introduced into evidence and the testimony of David Wolff, an expert witness for the Ferris family, was taken. Mr. Richard Ferris took the stand, concluding his testimony on January 26, 2024. Closing statements were made and a request for additional briefing was granted, resulting in a continuance for submission of briefs to February 2, 2024. Only the City submitted briefing and the matter was taken under submission on February 2, 2024.

Evidence Presented at the Trial de Novo

The City's code enforcement officer, Mr. Mezzapesa, testified he was first alerted to alterations of the waterway running through 4080 Horizon when a neighbor complained about the alterations and identified potential flooding issues. Mr. Mezzapesa confirmed he was present for the initial inspection, and what he saw was an obvious impermissible alteration to a creek, prior channelizing did not alter the creek designation, and there were violations of setback requirements regarding storage and a retaining wall next to, and in, the creek. Section 12.23.020(A) of the municipal code was identified as the controlling definition for a City creek, and section 17.70.030 of the municipal code was identified as the controlling statute for creek-setback requirements. Mr. Mezzapesa described the watercourse as a watershed from as far away

² The first hearing occurred on November 29, 2021, the second hearing occurred on December 13, 2021, and the third and final hearing occurred on April 25, 2023.

as the South Hills, confirming the watercourse terminated at the Pacific Ocean in Avila Beach via the East Fork of San Luis Obispo Creek. He also confirmed the watercourse met the definition of creek found in section 17.158.010 of the City's zoning code.

Mr. Mezzapesa testified the watercourse is not a ditch because the COSE map demarks and differentiates between watercourses as "creeks," "ditches," channels," as well as other designations. This map, adopted by the City in 2006 in their Open Space Element, marks the Ferris' watercourse as a creek. Mr. Mezzapesa confirmed the Ferris family could apply for an exception under the Director's Review process, but to date they have not done so.

On cross-examination, Mr. Mezzapesa stated it was not for him to determine if the City's definition of creek was "wrong" because ordinances are passed only after public notice, open and public hearings with public comment sessions, and the process of adopting findings occurs in a noticed resolution made by the City Council.

Robert Hill, the City's Natural Resources Manager with twenty-three years of experience in environmental planning, stated in looking for the definition of what constitutes a creek he first consults the municipal code, and then the General Plan. He was on site at 4080 Horizon Lane and was familiar with the hydrology of the area. He confirmed the City's ordinances in question were adopted through a very public process, including thirty public hearings, advisory body reports, as well as numerous meetings in conformance with state-law requirements. These ordinances were adopted only after a rigorous public review process, with public participation throughout.

Mr. Hill confirmed the watercourse extends from the South Hills area, it overlays the San Luis Obispo Groundwater Basin, and it terminates at the Pacific Ocean in Avila Beach. He also confirmed the watercourse met the definition of a creek in SLOMC 12.23.020(A) and SLOMC 17.158.010. The City intentionally labeled the waterway as a creek because it was shown as a creek in the City's mapping of the area, while other features were designated as ditches or other land features. Mr. Hill stated the creek was "unequivocally . . . a tributary of San Luis Obispo Creek." Mr. Hill acknowledged the City's definition of a creek was very broad, but the City has the authority to adopt an expansive definition.

David Wolff testified as an expert for the Ferris family. He has done biological consulting for thirty years and did a lot of the Tank Farm area's original surveying work for

Unocal. He had viewed the watercourse once, and had reviewed historical records and aerial photographs of the site. He believed the watercourse was cut by Unocal to function as a ditch, and was part of the original Tank Farm development. He did not believe the Ferris watercourse was naturally created, noting the urbanization of the area in recent history. He believed the watercourse was manmade, and therefore should never be designated as a creek. He believed the City adopted their expansive creek definition in error. He disagreed with the broad sweep of what constitutes a creek under the City's municipal code, contending the definition even captures the City's storm-drain system. Mr. Wolff agreed the watercourse terminated at the Pacific Ocean, but still maintained the position that the watercourse was a ditch.

Mr. Ferris testified he was never properly notified by the City regarding their adoption of the definition found in section 12.23.020 of the municipal code, and he was not notified of the designation in the COSE that the intermittent waterway running through his property was now designated as a creek. Mr. Ferris believed the manner in which these events occurred amounted to a "taking" and violated his property rights.

Mr. Ferris believed Chevron created the ditch back in 1910. He put the retaining wall in to help with erosion, but noted it was not a permanent structure; it was just stacked blocks. Mr. Ferris stated he publicly objected to parts of the County's EIR for the airport (prior to City annexation of his property), and believed his objections were ignored. He contended he did not need to apply for an exception to the rules regarding creeks, because the intermittent waterway is a ditch, not a creek. Mr. Ferris believed the City told the County not to proceed with his original permit prior to City annexation in 2008. In 2007, Mr. Ferris wrote a letter to the San Luis Obispo City Council that their actions amounted to disenfranchisement of the property owners because sixty percent of his property lost value when the waterway was defined as a creek.

In March of 2017, after receiving the NOV, Mr. Ferris wrote a letter explaining his position, but nothing came of it and no movement occurred on the case for some time. He thought the NOV had been resolved until recently.

Decision

The sole issue before this court is whether the waterway running through the Ferris property is a creek within the meaning of the City ordinances which prohibit unpermitted

alterations to creeks, and prohibit unpermitted development, storage, and encroachment within twenty feet of any creek. While reasonable minds can differ about what might be a creek, or what could be more properly labeled a ditch, the only entity with the power to define what constitutes a creek in this situation is the City of San Luis Obispo. This court has been invited by the petitioner to adopt a definition different from the City's definition found in sections 12.23.020(A) and 17.158.010 of their municipal code. However, no authority has been cited to support their contention that this court can take such action, and indeed, this court does not believe it has the power to do what petitioner requests.

a. The Court's Jurisdiction

Limited civil cases "are subject to restrictions on the types of injunctive and declaratory relief available, as well as the breadth of discovery." (*Dedication & Everlasting Love to Animals, Inc. v. City of El Monte* (2022) 85 Cal.App.5th 113, 121, citing Cal. Code Civil Proc. §§ 89, 91-94.) In addition, in proceedings pursuant to section 53069.4 of the California Government Code, the court must accept the entire administrative record – where, in this case, a creek finding was made – as prima facie evidence of the violation listed in the NOV. [See, Gov't Code section 53069.49(b)(1).]

Moreover, the rules of statutory construction must be adhered to when a court is called upon to interpret a statute adopted by the Legislature. These rules require the court to look to the plain language of the statute itself to give it meaning and require courts to "promote its purpose, render it reasonable, and avoid absurd consequences. (*Pebworth v. Workers' Comp. Appeals Bd.* (2004) 116 Cal.App.4th 913, 916, citing *Ford v. Gouin* (1992) 3 Cal.4th 339, 348.) The court is tasked with harmonizing and reconciling all relevant statutes "in a manner that carries out the Legislature's intent." (*Ibid.*, citing *Ziesmer v. Sup. Ct.* (2003) 107 Cal.App.4th 360, 366.) The legislative body's interpretation and purpose is "entitled to deference" from the court and requires judicial officers to give great weight to the Legislature's express meaning and scope of its ordinances. (*Harrington v. City of Davis, et. al.* (2017) 16 Cal.App.5th 420, 438.)

b. The City's Broad Authority to Regulate Health, Welfare and Zoning Issues

In contrast to the court's limited jurisdiction, the powers of local cities to enact legislation are quite far-reaching. California's Constitution permits cities to make and enforce all local health, welfare and zoning ordinances and regulations within their jurisdiction, as long as they

are in conformance with general laws. (See, Cal. Const. Art. 11, §7.) In addition, the City of San Luis Obispo is a charter city and “has plenary powers over its municipal affairs.” [*Ribakoff v. City of Long Beach* (2018) 27 Cal.App.5th 150, 170, – rule prohibiting interruptions of City Council proceedings did not violate free speech under the First Amendment.] Land regulation and use provisions are “quintessential state and local powers.” (*Rapanos v. United States* (2006) 547 U.S. 715.) Even a state has no power to take over areas of regulation constitutionally assigned to local government. (*County Mobilehome Positive Action Committee, Inc. v. County of San Diego* (1998) 62 Cal.App.4th 727, 734.) Plus, a city’s general plan acts as a “constitution” for future development and sits “at the top of the hierarchy of local government law regulating land use.” (*Foothill Communities Coalition v. County of Orange* (2014) 222 Cal.App.4th 1302, 1310, rev. denied.)

c. Violation of SLOMC section 12.23.030, subdivisions (A), (L), and (N)

First, the court addresses the allegation that section 12.23.030 of the municipal code was violated by building a retaining wall within the watercourse on the Ferris’ property.

Section 12.23.020 sets forth a very broad definition of what constitutes a creek within the City of San Luis Obispo. This definition states:

“Creeks include San Luis Creek and its tributaries *and* any other ‘Water of the United States as defined in 40 CFR 122.2, including all surface watercourses and waterbodies, natural waterways and definite channels and depressions in the earth, or such sections or connections of such waters that have been lined with concrete, covered or channelized in the past, that may carry water, even though such waterways may only carry water during rains and storms and may not carry surface water at and during all times and seasons.’” (SLOMC §12.23.020, emphasis added.)

Section 12.23.030 outlines prohibited activities and conditions within the City’s creeks. The three subdivisions charged in this NOV are subdivisions (A), (L), and (N). Subdivision (A) addresses, in pertinent part, any “disturbance of any natural or cultural resources . . . removal of materials or any other activities” within a creek. Subdivision (L) prohibits “[m]aking any excavation or unauthorized encroachment,” and subdivision (N) prohibits, in pertinent part, violation of any regulation of the California Department of Fish and Game.

The facts of this case demonstrate, and both experts agreed, the Ferris watercourse fits within the creek definition outlined in section 12.23.020 stated above. No one disputes that the watercourse was disturbed by the insertion of a lengthy block retaining wall within its banks. In addition, no one denies excavation of the watercourse occurred to insert those blocks. The purpose and scope of the City's obligation and plenary power to regulate and enforce "the protection of its creeks, tributaries, riparian corridors and associated natural resources" is found in chapter 12.23, which "specifically (prohibits) deleterious activities within these areas, whether located on public or private property." (SLOMC §12.23.010(B) and (C).)

Based on the facts presented and the applicable law and authority, the City had the obligation and authority to issue the NOV because the watercourse is a creek within the City's municipal codes and this creek was impermissibly altered. Therefore, the court must affirm the CBOA's determination to uphold the administrative citation, as well as the fine levied against petitioner as it relates to section 12.23.030(A), (L), and (N).

d. Violation of SLOMC section 17.70.030, subdivision (E)

As for the second allegation, alleging violations of the City zoning regulations found in section 17.70.030(E) which prohibits improvements and structures within twenty feet of a creek, the record supports upholding this allegation as well.

Section 17.158.010 also defines "creek" very broadly for purposes of City zoning regulations, and both experts agreed the Ferris watercourse fits within the definition found in this section. In addition, section 17.70.030(B) states the City's setback requirements apply to "all creeks as defined in the General Plan Open Space Element (COSE) and shown on that element's creek map." [See, SLOMC §17.70.030(B); see also, *Foothill v. County of Orange*, *supra*, at 1310 – a city's general plan acts as a "constitution" for future development and sits "at the top of the hierarchy of local government law regulating land use."]

Based on the facts presented, and the applicable law, the City, through its zoning powers adopted a broad interpretation of "creek" which captures the Ferris watercourse within its legislative scope. No one disputes there were structures within twenty feet of this watercourse. Therefore, the court must affirm the CBOA's determination to uphold the citation as to section 17.70.030(E) and affirms the fine levied against petitioner in relation to this violation.

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Conclusion

The City has the legal authority to define what constitutes a creek within its boundaries in the expansive manner found in its municipal code. As a result, the NOV is upheld and the fine of \$200.00 remains due and payable within thirty days of this decision. This court has no authority to waive these fines, as requested by counsel for the petitioner.

It is so ORDERED.

DATED: February 28, 2024



LESLIE H. KRAUT
Commissioner of the Superior Court