

File No. 110667

Committee Item No. _____

Board Item No. 54

COMMITTEE/BOARD OF SUPERVISORS

AGENDA PACKET CONTENTS LIST

Committee: _____ Date _____

Board of Supervisors Meeting

Date June 7, 2011

Cmte Board

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| <input type="checkbox"/> | <input type="checkbox"/> | Legislative Digest |
| <input type="checkbox"/> | <input type="checkbox"/> | Budget Analyst Report |
| <input type="checkbox"/> | <input type="checkbox"/> | Legislative Analyst Report |
| <input type="checkbox"/> | <input type="checkbox"/> | Youth Commission Report |
| <input type="checkbox"/> | <input type="checkbox"/> | Introduction Form (for hearings) |
| <input type="checkbox"/> | <input type="checkbox"/> | Department/Agency Cover Letter and/or Report |
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| <input type="checkbox"/> | <input type="checkbox"/> | Grant Information Form |
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| <input type="checkbox"/> | <input checked="" type="checkbox"/> | Legal Description | _____ |
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Completed by: Alisa Somera Date June 2, 2011

Completed by: _____ Date _____

1 [Authorizing the Use of Real Property Located at 701 Lombard Street - Joe DiMaggio
2 Playground Master Plan Project]

3 **Resolution authorizing the use of real property located at 701 Lombard Street**
4 **(Assessor's Block No. 0074, Lot No. 001) for purposes consistent with the Joe**
5 **DiMaggio Playground/North Beach Library Master Plan Project; adopting**
6 **environmental findings and findings of consistency with the General Plan and City**
7 **Planning Code Section 101.1.**

8
9 WHEREAS, On February 10, 2004, the Board of Supervisors adopted Resolution No.
10 106-04 authorizing the acquisition of Lot 001 of Assessor's Block 0074, commonly known as
11 701 Lombard Street, San Francisco, which is more particularly described in Exhibit A and
12 shown in Exhibit B, (the "Property"). A copy of said Resolution is on file with the Clerk of the
13 Board in File No. 031551. Copies of Exhibits A and B are on file with the Clerk of the Board of
14 Supervisors in File No. 110667. Said Resolution and Exhibits are incorporated herein by
15 reference; and,

16 WHEREAS, Resolution No. 106-04 authorized the acquisition of the Property "for the
17 development and maintenance of open space under the Neighborhood Park Bond and Open
18 Space Programs" and,

19 WHEREAS, The Joe DiMaggio Playground/North Beach Library Master Plan area
20 encompasses 701 Lombard Street, on the southeast corner of Lombard Street and Columbus
21 Avenue (Assessor's Block 0074, Lot 001); Mason Street between Lombard Street and
22 Columbus Avenue; and the entire block bounded by Lombard, Powell, and Greenwich Streets
23 and Columbus Avenue, known as 2000 Mason Street (also known as 661 Lombard Street),
24 (Assessor's Block 0075, Lot 001) (the "Project Area"). A copy of the Master Plan is on file
25

1 with the Clerk of the Board of Supervisors in File No. 110316 and is incorporated herein by
2 reference; and,

3 WHEREAS, Implementation of the Joe DiMaggio Playground/North Beach Master Plan
4 Project (the "Project") involves a full street vacation of a 195-linear-foot portion of Mason
5 Street; interdepartmental transfer of the former street area to the Recreation and Park
6 Department; landscaping improvements in the former Mason Street right-of-way; construction
7 of an 8,500-square-foot branch library on 701 Lombard Street parcel and a portion of the
8 former right-of-way; demolition of the existing branch library at 2000 Mason Street;
9 excavation, renovation and reorganization of the playground features pursuant to the Master
10 Plan; rezoning of 701 Lombard Street to Public Use and Open Space Height and Bulk district;
11 and other related actions; and,

12 WHEREAS, On April 21, 2011, at a duly noticed hearing, the San Francisco Planning
13 Commission adopted Motion No. 18323, finding that the Project was consistent, on balance,
14 with the City's General Plan and priority policies of Planning Code Section 101.1. Said
15 Motion, including the Commission's findings in support of the Project, is in Clerk of the Board
16 of Supervisors File No. 110312 and is incorporated herein by reference. This Board adopts
17 the findings of the Planning Commission as its own for purposes of the action contemplated in
18 this Resolution; and,

19 WHEREAS, On April 25, 2011, at a duly noticed joint public hearing, the San Francisco
20 Public Library Commission ("SFPL"), in Resolution No. 2011-03, approved those portions of
21 the Project within its jurisdiction, including the demolition of the existing branch library at 2000
22 Mason Street and construction of a new North Beach Library in the Project Area. Said
23 Resolution, including the Commission's findings in support of the Project, is in Clerk of the
24 Board of Supervisors File No. 110312 and is incorporated herein by reference; and,

1 WHEREAS, On April 25, 2011, at a duly noticed joint public hearing, the San Francisco
2 Recreation and Park Commission ("SFRPC"), in Resolution No. 1104-023, approved those
3 portions of the Project within its jurisdiction, including, but not limited to, approval of the
4 Master Plan and authorization to the SFPL to demolish the existing branch library and
5 construct a new North Beach Library in the Project Area. Said Resolution, including the
6 Commission's findings in support of the Project, is in Clerk of the Board of Supervisors File
7 No. 110312 and is incorporated herein by reference; and,

8 WHEREAS, As part of San Francisco Recreation and Park Commission Resolution No.
9 1104-023, the Commission also incorporated the Property (701 Lombard Street) and the
10 portion of Mason Street to be vacated into the Joe DiMaggio Playground; and,

11 WHEREAS, As set forth above, SFPL and SFRPC propose to use the Project Area,
12 including the Property, for the public purpose of increasing open space, expansion,
13 improvement and reorganization of the playground features and recreational facilities at the
14 Joe DiMaggio Playground, demolishing the North Beach Branch Library and constructing a
15 new library, and related actions; and,

16 WHEREAS, The Project will provide a new North Beach Branch Library commensurate
17 with other branch libraries in the San Francisco Public Library system coupled with an
18 increase in 3,200 square feet of library floor area, and increase onsite open space by 20
19 percent over existing conditions, or roughly 12,000 square feet of programmed recreational
20 open space in one of San Francisco's densest neighborhoods. The Project affirms the
21 neighborhood vision of a new library and expanded park developed through the involvement
22 of hundreds of neighborhood residents who participated in master plan meetings and
23 hearings. The Project provides a high quality civic and cultural space for the surrounding
24 community and members of the public through the configuration of the new library and the
25 playground features of Joe DiMaggio Playground with a connecting plaza visible with clear

1 sight lines and access between the parks recreational facilities. The Project also allows the
2 new library project to proceed independent of the timing or availability of funding for the park
3 renovation portion of the Master Plan; and,

4 WHEREAS, The Project provides many benefits to the public and improvements to the
5 public facilities including, but not limited to:

6 (a) Adds needed open space to North Beach and Chinatown communities, an identified
7 "high needs area" for the addition of Open Space in the City's General Plan. As discussed in
8 the Master Plan Environmental Impact Report, the area around the park is estimated to have
9 approximately 0.45 acres of open space per 1000 residents, 95 percent below the city-wide
10 average of 9 acres per 1000 residents. Many residents live in multi-unit buildings with limited
11 or no open space such as yards and rely heavily or exclusively on public amenities such as
12 parks. A copy of said Environmental Impact Report is on file with the Clerk of the Board of
13 Supervisors in File No. 110614 and incorporated herein by reference;

14 (b) Increases over-all park open space to accommodate an expanded and improved
15 children's play area which will meet new safety and ADA requirements, add new features
16 such as games and picnic tables, and provide additional landscaping and seating throughout
17 the expanded park;

18 (c) Increases park safety through a unified site design, by placing the children's
19 playground in a more central part of the park and moving it away from the street and
20 related-traffic at the park's edge, enhancing playground visibility and supervision from the
21 clubhouse and other park areas;

22 (d) Improves the design of the park facilities and their arrangement on the site. By
23 rearranging the bocce, tennis courts and the children's' play area and adjusting the grades in
24 these areas, the entire park is unified with improved site circulation, ADA accessibility and
25 visibility. This new park layout would strengthen connectivity, both visually and functionally;

1 (e) Preserves current park features during the construction of the new library and
2 allows for the reorganization of such features and uses in an optimal way once funding for
3 park improvements is available;

4 (f) Transforms one block of Mason Street from a street with vehicular traffic into public
5 park space.

6 (g) Strengthens the visual connection between the library and the park through the
7 creation of a new plaza open space on Mason Street; and

8 (h) Promotes Objective 2 of the Recreation and Open Space Element of the General
9 Plan (Policies 2.1, 2.2, 2.4) that aims to develop and maintain a diversified and balanced
10 citywide system of high quality public open space. The Master Plan increases public open
11 space and integrates park and library uses consistent with this objective; and,

12 WHEREAS, The Property, as described above, is required for the completion of the
13 Project; and,

14 WHEREAS, At the hearing before this Board on October 21, 2003, in support of this
15 Board's adoption of Resolution No. 106-04, the department heads of the City's Recreation and
16 Park Department and the SFPL testified that acquisition of the Property would facilitate the
17 City's efforts to increase green open space and enhance facilities at the Joe DiMaggio
18 Playground, as well as to expand the North Beach Branch Library; and,

19 WHEREAS, The former owners of the Property challenged the City's right to take the
20 Property in the City's lawsuit to condemn the Property, *City and County of San Francisco v.*
21 *Coyne, et al.*, San Francisco Superior Court No. 429018 (Eminent Domain Lawsuit); and,

22 WHEREAS, After a trial on the issue of the City's right to take the Property, the San
23 Francisco Superior Court issued its Statement of Decision, in which the court concluded that
24 the City had the right to acquire the Property through eminent domain, and that this Board's
25 decision to adopt Resolution No. 106-04 was supported by substantial evidence in the

1 administrative record, including evidence that acquiring the Property would provide additional
2 green space in Supervisorial District 3 and would help to expand the North Beach Branch
3 Library. A copy of the Statement of Decision is on file with the Clerk of the Board in File No.
4 110667 and is incorporated herein by reference; and,

5 WHEREAS, California Government Code Sections 37350.5, 37351, 37352, 38010 and
6 40404 and California Code of Civil Procedure Sections 1240.010 through 1240.050, inclusive,
7 authorize this Board to acquire any property necessary to carry out any of the powers or
8 functions of the City by eminent domain, including the power to acquire property by eminent
9 domain for open space, park and related uses; and,

10 WHEREAS California Code of Civil Procedure Section 1240.680 provides that
11 acquiring property for park, open space or recreation area use is a presumed to be
12 appropriation for "the best and most necessary public use;" and,

13 WHEREAS, As part of its adoption of various actions relating to the Project, this Board,
14 in Ordinance No. _____, adopted environmental findings in compliance with the
15 California Environmental Quality Act ("CEQA") (California Public Resources Code sections
16 21000 et seq.) and local law. A copy of said Ordinance and supporting materials, including
17 the environmental findings, is in the Clerk of the Board of Supervisors File No. 110314. For
18 purposes of this Resolution, the Board relies on such findings; and

19 WHEREAS, This Board finds and determines that each person who is entitled to notice
20 has been given such notice and a reasonable opportunity to appear and be heard on this date
21 on the matter referred to in California Code of Civil Procedure Section 1245.245 in
22 accordance with California Code of Civil Procedure sections 1245.235 and 1245.245(c); now,
23 therefore, be it

24 RESOLVED, That this Board Finds that based on the findings set forth herein that the
25 use of the Property for the Project is consistent with the purposes set forth in Resolution No.

1 106-04 and as evidenced in the administrative record before this Board when it adopted
2 Resolution No. 106-04; and, be it

3 FURTHER RESOLVED, That, to the extent that the use of the Property for the Project
4 is in any way inconsistent with the purposes for which the Property was acquired pursuant to
5 Resolution No. 106-04, this Board authorizes the City's Recreation and Park Department and
6 the SFPL to use the Property for the public purpose of developing and implementing the
7 Project; and, be it

8 FURTHER RESOLVED, That by at least a two-thirds vote of this Board pursuant to
9 California Code of Civil Procedure Sections 1240.030 and 1245.230, this Board finds and
10 determines each of the following:

- 11 1. The public interest and necessity require the Project;
- 12 2. The Project is planned and located in the manner that will be most compatible with
13 the greatest public good and the least private injury; and
- 14 3. The Subject Property is necessary for the Project.

15
16
17 APPROVED AS TO FORM:
18 DENNIS J. HERRERA, City Attorney

19 By:

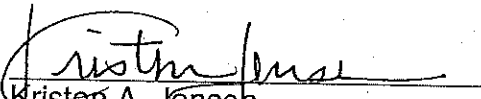

20 Kristen A. Jensen
21 Deputy City Attorney
22
23
24
25

Exhibit A

**Legal description for the real property commonly known as
701 Lombard Street, San Francisco, California (Assessor's Block 0074, Lot 001)**

THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, AND IS DESCRIBED AS FOLLOWS:

BEGINNING AT THE POINT OF INTERSECTION OF THE SOUTHERLY LINE OF LOMBARD STREET WITH WESTERLY LINE OF MASON STREET; RUNNING THENCE SOUTHERLY ALONG SAID WESTERLY LINE OF MASON STREET, 99 FEET AND 5-3/8 INCHES, MORE OR LESS, TO THE NORTHEASTERLY LINE OF COLUMBUS AVENUE; THENCE NORTHWESTERLY ALONG SAID LINE OF COLUMBUS AVENUE, 128 FEET AND 9 INCHES, MORE OR LESS, TO THE SOUTHERLY LINE OF LOMBARD STREET; THENCE EASTERLY ALONG SAID LINE OF LOMBARD STREET, 82 FEET AND 10 INCHES, MORE OR LESS, TO THE POINT OF BEGINNING.

BEING A PORTION OF 50 VARA BLOCK NO. 179.

Lot 001, Block 0074

Exhibit B

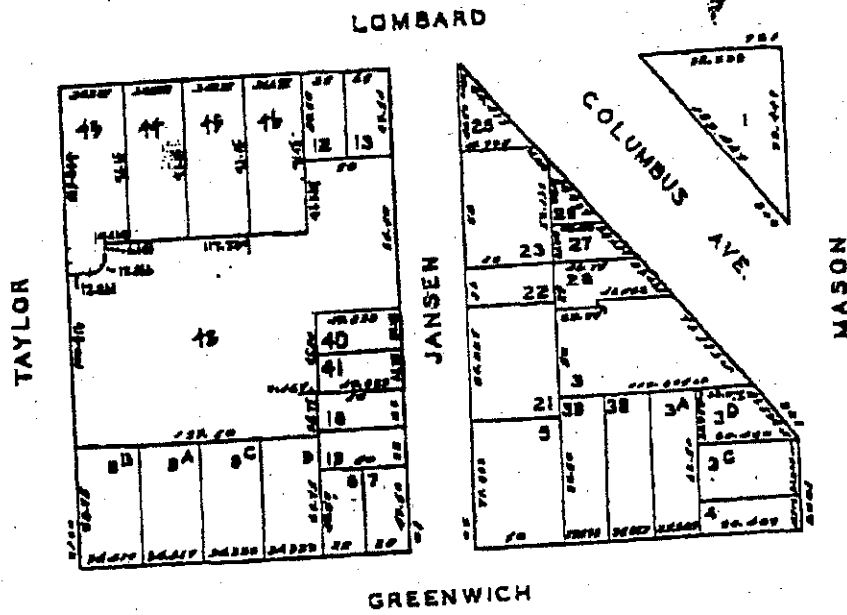
**Assessor's Map for the real property commonly known as
701 Lombard Street, San Francisco, California (Assessor's Block 0074, Lot 001)**

74

50 VARA BLK 179

LOTS MERGED
19 20 21 22
23 24 25 26
27 28 29 30

REVISED 19
REVISED 20
REVISED 21
REVISED 22
REVISED 23
REVISED 24
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REVISED 28
REVISED 29
REVISED 30



Important: This plot is not a survey. It is merely furnished as a convenience to locate the land in relation to adjoining streets and other lands and NOT to guarantee any dimensions, distances, bearings, or acreage.

ASSESSED 66,200 SQ. FT.
BLK TOTAL 66,200 SQ. FT.

FILED
San Francisco County Superior Court

AUG 03 2006

SUPERIOR COURT OF CALIFORNIA **GORDON PARK-LI, Clerk**
BY: *[Signature]* Deputy Clerk
COUNTY OF SAN FRANCISCO

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9 CITY AND COUNTY OF SAN FRANCISCO,)
a municipal corporation,)

Court No. 429018

10 Plaintiff,)

11 vs.)

12 MARTIN J. COYNE, an individual,)
MARGARET G. COYNE, an individual,)
13 BRIAN MURPHY O'FLYNN, an)
individual, PENINSULA REAL ESTATE)
14 CORPORATION, a California corporation,)
PENINSULA BANK OF COMMERCE, a)
15 California corporation, all persons)
unknown claiming an interest in the)
16 Property, and DOES 1 through 100,)
inclusive,)

STATEMENT
OF DECISION

17 Defendants.)
18)
19)
20)

21 The above-entitled case came on regularly for trial on April 24,
22 2006, in Department 611 of the above-entitled court, the Honorable Diane
23 Elan Wick, Judge presiding. Kristen A. Jensen, Esq., and Rafal Ofierski,
24 Esq., appeared as counsel for Plaintiff City and County of San Francisco;

STATEMENT OF DECISION

1 Jonathan R. Bass, Esq., and Howard A. Slavitt, Esq., appeared as counsel
2 for Defendants Martin J. Coyne and Brian Murphy O'Flynn.

3 The court in Phase I of this eminent domain proceeding first
4 considered preliminary issues separate from fair market value to be
5 presented to the jury in Phase II. Counsel agreed that after the court heard
6 evidence on the Phase I issues, written legal briefs and argument would be
7 submitted to the court, and Phase I would be submitted to the court with the
8 court issuing a proposed statement of decision that would determine
9 whether a second phase of the trial on fair market value of the property
10 would be presented to a jury. The filing of a tentative statement of decision,
11 as well as the time requirements of Code of Civil Procedure section 632 and
12 California Rule of Court, Rule 232, were waived by counsel until such time
13 as the court issued its proposed statement of decision. A proposed
14 statement of decision was entered on July 18, 2006 and Defendants' filed a
15 request for an amended statement of decision on July 28, 2006. Plaintiff
16 responded to Defendants' request on August 2, 2006.

17 PARTIES

18 A default judgment was entered against Defendant Margaret G.
19 Coyne on September 3, 2004. A stipulation between Plaintiff City and
20 County of San Francisco, Defendant Martin J. Coyne, Defendant Brian
21 Murphy O' Flynn, Defendant Peninsula Real Estate Corporation and
22 Defendant Peninsula Bank of Commerce was entered into on April 20, 2006.
23 While the stipulation directs how any judgment or settlement proceeds shall
24 first be applied, the stipulation failed to address the status of the parties in

1 this action. Accordingly, Defendant Peninsula Real Estate Corporation and
2 Defendant Peninsula Bank of Commerce remain as Defendants in this case.

3 REQUESTS FOR JUDICIAL NOTICE

4 Defendants requested that the court take judicial notice of
5 sections 4 and 16 of the Charter of the City and County of San Francisco,
6 the Urban Design (Part I) Plan Element of the General Plan of the City and
7 County of San Francisco, and the Plaintiff's reply memorandum of points
8 and authorities in support of its motion for summary adjudication filed in
9 this action on January 15, 2005. There was no opposition to the request by
10 Plaintiff. Accordingly, Defendants' request is granted.

11 In connection with its *motion in limine* #3 the City requested that
12 the court take judicial notice of a page of the transcript from the hearing on
13 the motion for summary adjudication before Judge Quidachay on January
14 20, 2005. There was no opposition to the request and the court granted the
15 request.

16 MOTIONS IN LIMINE

17 Plaintiff filed nine *motions in limine* in Phase I of the trial.

18 *Motion in limine* #1 sought to exclude evidence in support of
19 Defendants' loss of business goodwill claim. Ruling on this motion was
20 deferred during Phase I of the trial and will be addressed below.

21 *Motion in limine* #2 sought to exclude extra-record evidence re
22 the Defendants' 8th affirmative defense that the Plaintiff failed to comply with
23 the California Environment Quality Act. The court denied this motion on
24 May 9, 2006 and admitted extrinsic evidence of legislative discussions and

1 events leading to adoption of the Resolution of Necessity by the Board of
2 Supervisors. Commissioners' or staff members' personal opinions or
3 understanding of the project was excluded. The court has reconsidered this
4 ruling and grants the motion. The extra-record evidence presented has not
5 been considered by the court in reaching its decision on Defendants' 8th
6 affirmative defense.

7 *Motion in limine #3* sought to exclude evidence re Defendants' 1st
8 and 3rd affirmative defenses. As to the Defendants' 1st affirmative defense
9 that the Plaintiff did not intend to devote the property to the purpose stated
10 in the Resolution of Necessity, the court denied this motion on May 9, 2006
11 and admitted evidence in the administrative record and extrinsic evidence.
12 Evidence of the motives of members of the Board of Supervisors to acquire
13 the property was excluded.

14 As to the Defendants' 3rd affirmative defense that the Resolution
15 of Necessity is contrary to the City's Charter because the City's Recreation
16 and Park Department did not vote to appropriate Open Space Fund money to
17 acquire the property until after the adoption of the Resolution, the court
18 admitted evidence that the Recreation and Park Department did not
19 authorize the open space funds.

20 *Motion in limine #4* sought to exclude evidence of the Plaintiff's
21 precondemnation conduct. To the extent that documents of the City's
22 alleged precondemnation conduct are part of exhibits marked for
23 identification by the parties, the court discusses its rulings on exhibits
24 below.

1 *Motion in limine #5* sought to exclude evidence of the Defendants'
2 specific plan of development. The motion is granted with respect to evidence
3 of possible occupation of the subject condominiums by the Defendants or
4 family members, or that the building might contain handicapped-accessible
5 units. The motion is denied as to evidence offered on the issue of loss of
6 business goodwill.

7 *Motion in limine #6* sought to exclude evidence of Plaintiff's
8 alleged motives and intent in acquiring the subject property. This motion
9 was denied on May 9, 2006 with the court admitting evidence in the
10 administrative record and extrinsic evidence on the Plaintiff's exercise of
11 eminent domain, but excluding evidence of the motives of members of the
12 Board of Supervisors.

13 *Motion in limine #7* sought to exclude evidence of Walter Ricci's
14 comparable sale No. 1. This motion was denied on May 11, 2006.

15 *Motion in limine #8* sought to exclude certain loss of business
16 goodwill evidence as a sanction for the Defendants' failure to preserve notes
17 taken by Defendant O'Flynn at the depositions of the four valuation expert
18 witnesses. The motion was denied on May 11, 2006.

19 *Motion in limine #9* sought to exclude testimony of Martin Coyne
20 and Brian Murphy O'Flynn on the issue of property valuation. The court on
21 May 11, 2006 granted this motion as it relates to the Defendants offering any
22 expert opinion testimony, but denied it as it relates to Defendants providing
23 foundational fact testimony.

1 Defendants filed one *motion in limine* to exclude evidence of the
2 prices paid by the Defendants for the subject property. The court granted
3 the motion on May 11, 2006 as it relates to the fair market value of the
4 property, but denied the motion as it relates to valuation of loss of business
5 goodwill.

6 EXHIBITS

7 Plaintiff marked for identification Exhibits 201 through 242.
8 With its post-trial briefing, Plaintiff submitted Exhibits 243-245. Defendants
9 objected to Plaintiff's Exhibits 208(D), (F), and (K) on the grounds that they
10 contain hearsay. Defendants objected to Exhibit 212 on the ground that Mr.
11 Amster's deposition is hearsay and the City had the opportunity to impeach
12 Mr. Amster with his deposition at trial. Defendants objected to Exhibits 214
13 and 215 on the grounds that they lack authentication, are hearsay, and are
14 irrelevant. Defendants objected to Exhibit 229 on the grounds that it lacks
15 authentication. The court overrules the objections to Exhibits 208(D), (F),
16 (K), and 212. 214, 215, and 229. The court sustains the objections to
17 Plaintiff's Exhibits 214, 215, and 229.

18 Defendants marked for identification Exhibits 1 through 13.
19 Plaintiff objects to Exhibit 1(F), 1(G), 1(I), and 1(J), on the ground that they
20 are personal opinions of legislators. Plaintiff objected to Exhibit 19 on the
21 ground that it post-dates the Resolution of Necessity. Plaintiff objected to
22 Defendants' Exhibit 5 on the ground that it is unintelligible and to Exhibit 23
23 on the ground that it contains legal argument. The court overrules the
24 objections to Defendants' Exhibits 1(F), 1(G), 1(I), 1(J), 19, and 23 and will

1 Defendants filed one *motion in limine* to exclude evidence of the
2 prices paid by the Defendants for the subject property. The court granted
3 the motion on May 11, 2006 as it relates to the fair market value of the
4 property, but denied the motion as it relates to valuation of loss of business
5 goodwill.

6 EXHIBITS

7 Plaintiff marked for identification Exhibits 201 through 242.
8 With its post-trial briefing, Plaintiff submitted Exhibits 243-245. Defendants
9 objected to Plaintiff's Exhibits 208(D), (F), and (K) on the grounds that they
10 contain hearsay. Defendants objected to Exhibit 212 on the ground that Mr.
11 Amster's deposition is hearsay and the City had the opportunity to impeach
12 Mr. Amster with his deposition at trial. Defendants objected to Exhibits 214
13 and 215 on the grounds that they lack authentication, are hearsay, and are
14 irrelevant. Defendants objected to Exhibit 229 on the grounds that it lacks
15 authentication. The court overrules the objections to Exhibits 208(D), (F),
16 (K), and 212. 214, 215, and 229. The court sustains the objections to
17 Plaintiff's Exhibits 214, 215, and 229.

18 Defendants marked for identification Exhibits 1 through 13.
19 Plaintiff objects to Exhibit 1(F), 1(G), 1(I), and 1(J), on the ground that they
20 are personal opinions of legislators. Plaintiff objected to Exhibit 19 on the
21 ground that it post-dates the Resolution of Necessity. Plaintiff objected to
22 Defendants' Exhibit 5 on the ground that it is unintelligible and to Exhibit 23
23 on the ground that it contains legal argument. The court overrules the
24 objections to Defendants' Exhibits 1(F), 1(G), 1(I), 1(J), 19, and 23 and will

1 give those exhibits the weight to which they are entitled. The court sustains
2 the objection to Defendants' Exhibit 5 as it is illegible and a duplicate of two
3 pages of Plaintiff's Exhibit 230.

4 Accordingly, all exhibits except for Plaintiff's Exhibits 214, 215,
5 and 229, and Defendants' Exhibit 5 are admitted into evidence.

6 OBJECTIONS TO TESTIMONY

7 Plaintiff objected to Defendants' designation of testimony from
8 Lizzy Hirsch's deposition on the ground that the testimony represents her
9 personal opinion, and is excludable under the court's ruling on *Motion in*
10 *Limine #2*. The court sustains the objection and excludes Lizzy Hirsch's
11 deposition excerpts with respect to Defendants' 8th affirmative defense.

12 Defendants objected to the testimony of Chris L. Carneghi and
13 David K. Bohegian on the grounds that neither expert is qualified to render
14 an opinion on the issue of whether Defendants are entitled to recover for loss
15 of business goodwill. The court overrules Defendants' objections. The City
16 offered these experts to show that Defendants were attempting to recover for
17 speculative lost profits, not loss of business goodwill. The experts were
18 qualified to testify in this regard and their testimony is admitted.

19 Objections to other testimony and exhibits made by counsel
20 during trial for which argument was not presented in the parties' Phase I
21 briefs are deemed waived.

22 Having considered the admissible evidence, arguments of
23 counsel, and being fully advised, the court issues the following statement of
24 decision.

1 closure of the affected block of Mason Street, which is a reasonably probable
2 consequence of the acquisition of the subject property. Defendants' primary
3 argument in its Phase I briefs, however, is that the City attempted to avoid
4 the environmental review process of CEQA by improperly defining the scope
5 of the project to exclude the closing of Mason Street so as to qualify for a
6 categorical exemption.

7 When a Defendant raises failure to comply with CEQA as an
8 affirmative defense to a condemnation proceeding, the standard of review is
9 the same as the standard that would apply if the issue had been raised in a
10 petition for writ of mandate. *Burbank-Glendale-Pasadena Airport Authority v.*
11 *Hensler* (1991) 233 Cal.App.3d 577, 588-89. Public Resources Code section
12 21168 governs the standard of review when non-compliance with CEQA is
13 raised in a petition for writ of mandate – the court determines whether the
14 act or division is supported by substantial evidence in light of the whole
15 record. In making that determination the court asks two questions: 1)
16 whether the agency's factual determinations are supported by substantial
17 evidence, and 2) whether the agency proceeded in the manner required by
18 law. *Western States Petroleum Ass'n. v. Superior Court* (1995) 9 Cal.4th 559,
19 573.

20 In this case the description of the property to be taken by
21 eminent domain is 701 Lombard Street. The Board of Supervisors, the City's
22 agency empowered to adopt a Resolution of Necessity, adopted the findings
23 made by the City's Director of Planning that the acquisition of 701 Lombard
24 Street is categorically exempt from environmental review under CEQA, the

1 Board held a public hearing on the acquisition issues, and then made a
2 factual determination that acquisition of 701 Lombard Street by eminent
3 domain is necessary for public use of the City for development and
4 maintenance of open space.

5 After review of the administrative record this court finds that
6 there is substantial evidence to support the Board of Supervisors' decision to
7 factually define the scope of the project as 701 Lombard Street:

- 8 • Exhibit 208(D), Board of Supervisors' minutes in which Paul
9 Maltzer (Planning Department) and Elizabeth Goldstein (Recreation
10 and Park Department) told the Board of Supervisors that the
11 project was limited to the acquisition of 701 Lombard Street
- 12 • Exhibit 208(G) Cover letter to the General Plan Referral from Gerald
13 Green (Director of the City Planning Department) to Larry Ritter
14 (Principal Real Property Officer) describing the project as
15 acquisition of 701 Lombard Street, approximately 4,116 square feet
- 16 • Exhibit 208(J) Letter from Kenneth Winters (Director of Property)
17 and Elizabeth Goldstein to Allan E. Low (Defendants' former
18 counsel) stating that the project is limited to the acquisition of 701
19 Lombard Street
- 20 • Exhibit 208(K) Memorandum from Paul Maltzer to the Board of
21 Supervisors stating that the project is the acquisition of 701
22 Lombard Street
- 23 • Exhibit 208(L) E-mail from Susan Hildreth to Larry Ritter telling
24 him not to go forward with plans for the street vacation
- The project approval states: "[t]his General Plan Referral is
considering only the acquisition of Assessor's Block 0074 Lot 001.
If a proposal to change the use of Mason Street is advanced another
General Plan Referral will be necessary." B0086.

22 The court recognizes the record reflects discussions by City
23 representatives that two adjacent City facilities, the Joe DiMaggio Playground
24 and North Beach Library, might benefit by being physically connected to

1 701 Lombard Street and that several potential design configurations of the
2 properties have included a component of vacating Mason Street as it is
3 adjacent to those properties. Nonetheless, there is insufficient evidence to
4 establish that the description of the property to be taken was improperly
5 limited to "701 Lombard Street" to qualify for a categorical exemption so as
6 to avoid CEQA's environmental review process or that it was reasonably
7 probable that the City would vacate the affected block of Mason Street in the
8 future.

9 Accordingly, the court finds that at the time of the Board's
10 adoption of the Resolution of Necessity that it was the intent of the City to
11 acquire 701 Lombard Street as a stand-alone open space. Defendants have
12 failed to establish that the City improperly defined the scope of the project to
13 exclude the closing of Mason Street so as to qualify for a categorical
14 exemption.

15 Gross Abuse of Discretion:

16 Defendants in their 3rd affirmative defense allege that the Board
17 of Supervisors' adoption or contents of the Resolution of Necessity were
18 without authorization and influenced or affected by a gross abuse of
19 discretion. They further allege that the Resolution of Necessity violates the
20 Charter of the City and County of San Francisco because the Resolution
21 authorizes the acquisition only for open space and only pursuant to the
22 Neighborhood Park Bond and Open Space Programs and that the Recreation
23 and Park Commission voted not to expend public funds to acquire the
24 subject property.

1 A gross abuse of discretion in adopting the Resolution may be
2 shown by substantial evidence that the Board's adoption of the Resolution
3 was arbitrary, capricious, or entirely lacking in evidentiary support. The
4 court's review is limited to a review of the agency's proceedings; no additional
5 evidence may be admitted. *City of Saratoga v. Hinz* (2004) 115 Cal.App.4th
6 1202, 1221.

7 After review of the administrative record, this court finds that
8 Defendants failed to prove that the Board of Supervisors lacked substantial
9 evidence to adopt the Resolution of Necessity or that at the time of the
10 administrative hearing the Board committed itself to the taking regardless of
11 the evidence presented. This court further finds that there is substantial
12 evidence in the record to support the Resolution's adoption by the Board:

- 13 • Elizabeth Goldstein, the General Manager of the Recreation
14 and Park Department at the time, testified that 701 Lombard
15 Street could provide additional green space in District 3, one of
16 the most underserved districts for open space and parkland in
17 the city. (B0408-B0410)
- 18 • Susan Hildreth from the City Library testified that the
19 acquisition could help expand the North Beach library.
20 (B0410-0412).
- 21 • A number of North Beach residents testified at the Board of
22 Supervisors' hearing that the neighborhood would benefit from
23 acquisition of 701 Lombard Street. B0403-B0528.

24 Additionally, while Defendants make much of the fact that the
Recreation and Park Commission had previously decided not to expend
Neighborhood Park Bond and Open Space funds to acquire 701 Lombard

1 Street, the Commission's decision was not a determination that the
2 acquisition of the property was not in the public interest and does not defeat
3 the Board's finding of necessity to acquire the property for development and
4 maintenance of open space. Since California Code of Civil Procedure section
5 1245.210 vests power in the Board of Supervisors to determine whether the
6 acquisition of a piece of property is in the public interest, the Recreation and
7 Park Commission did not have the authority to determine that the
8 acquisition of 701 Lombard was not in the public interest. That power
9 resided with the Board of Supervisors and the Board exercised its power by
10 adopting Resolution No. 106-04.

11 Impermissible Purpose:

12 Defendants claim in their 1st affirmative defense that the City
13 does not intend to devote the subject property to the stated purpose and in
14 their 5th affirmative defense that the City's purpose in taking the property is
15 to prevent Defendants from developing their specific development project
16 rather than for a park.

17 The Resolution of Necessity states "the City intends to use the
18 property for the development and maintenance of open space under the
19 Neighborhood Park Bond and Open Space Programs." Acquiring property for
20 open space is a statutorily endorsed public use. California Code of Civil
21 Procedure section 1240.680 states:

22 "(a)...property is presumed to have been appropriated for
23 the best and most necessary public use if the property is
24 appropriated to public use as any of the following: (1) A state,
regional, county, or city park, open space, or recreation area."

1 A necessary component of preserving property as open space is
2 preventing development of the property.

3 Defendants have failed to establish by substantial evidence that
4 the City does not intend to use 701 Lombard Street as open space.

5 LOSS OF BUSINESS GOODWILL

6 As part of the damages sought in this case, Defendants seek to
7 be compensated for goodwill of their real estate development project allegedly
8 lost as a result of the City's eminent domain action. Loss of business
9 goodwill damages may be sought by condemnees pursuant to California
10 Code of Civil Procedure section 1263.510.

11 The City's motion to strike Defendants' claim for lost goodwill
12 was previously granted by the trial court, but that order was vacated by the
13 First District Court of Appeal in a peremptory writ of mandate. Thus,
14 Defendants were permitted to present evidence in Phase I of the trial on that
15 issue.

16 Code of Civil Procedure section 1263.510 provides for the
17 compensation of lost goodwill by an owner of a business conducted on the
18 property taken if the owner proves all of the following:

- 19 (1) The loss is caused by the taking of the property or the injury to
20 the remainder;
- 21 (2) The loss cannot reasonably be prevented by a relocation of the
22 business or by taking steps and adopting procedures that a
reasonably prudent person would take and adopt in preserving
the goodwill;
- 23 (3) Compensation for the loss will not be included in payments
24 under Section 7262 of the Government Code;

1 (4) Compensation for the loss will not be duplicated in the
2 compensation otherwise awarded to the owner.

3 While the owner of a business conducted on the property taken
4 shall be compensated for loss of goodwill in a condemnation action, not every
5 person with an interest in property may recover for lost goodwill as a result
6 of an eminent domain proceeding. In *Redevelopment Agency of the City of*
7 *Concord v. International House of Pancakes, Inc. (IHOP)* (1992) 9 Cal.App.4th
8 1343, 1350 the court held that a franchisor did not have a claim for goodwill
9 as a result of a taking of a franchisee's restaurant. The court reasoned that
10 the franchisee, not the franchisor, was the owner of the business conducted
11 on the property. The court also rejected the franchisor's argument that it
12 was entitled to compensation because it actively pursued its own business
13 interests on the property. The court stated: "the Legislature did not
14 authorize compensation for any and all business owners whose goodwill
15 might have been affected by the taking of a particular parcel of real property.
16 The Legislature has declared unambiguously that only the 'owner of a
17 business conducted on the property taken' may claim compensation for loss
18 of goodwill...." *Id.*

19 In this case, Defendants have failed to meet their burden of
20 proving that they are the owners "of a business conducted on the property
21 taken...." Code of Civil Procedure section 1263.510(a). The evidence is that
22 Defendant Brian Murphy O'Flynn, a fifty percent owner of the subject
23 property, has been in the real estate development business for ten years.
24 Among the projects he is planning or has worked on is the four-story

condominium with nine residential units and two retail units on the ground
STATEMENT OF DECISION

1 floor planned for 701 Lombard Street. Defendants presented no evidence on
2 the business affairs or development projects of the other Defendant owner of
3 the property.

4 Defendants currently receive income from a commercial tenant
5 operating a parking lot on the property pursuant to a month-to-month rental
6 agreement, but Defendants have no real estate development office on the
7 property and do not receive mail at that address. While the Defendants
8 occasionally park their vehicles on the property to review documents or
9 conduct meetings or use their cell phones to conduct business with others,
10 files containing correspondence and documents are maintained elsewhere
11 and another address was used by Defendants when registering their limited
12 liability corporation relating to the project with the state.

13 The purpose of Code of Civil Procedure section 1263.510 is
14 "unquestionably to provide monetary compensation for the kind of losses
15 which typically occur when an ongoing small business is forced to move and
16 give up the benefits of its former location." *People ex rel. Dept of*
17 *Transportation v. Muller* (1984) 36 Cal.3d 263, 270. Here, Defendants have
18 failed to establish that they suffered a loss of goodwill typical of an ongoing
19 small business forced to move and give up the benefits of its former location.
20 Defendants have not shown that they lost patronage or name recognition as
21 another business might if it was forced to move. Defendants failed to
22 establish the loss of any benefits that accrue to a business as a result of its
23 location, reputation for dependability, skill or quality, and any other
24 circumstances resulting in probable retention of old or acquisition of new

1 patronage. Defendants have not shown that they lost anything other than
2 an amount remaining after the fair market value of the land, as well as
3 construction and marketing costs, are deducted from the projected income
4 from the sale of the units. Since the complex was never built or marketed
5 and no units were sold, this remaining sum - labeled by Plaintiff as "profit"
6 and a portion of which is labeled by Defendants as "goodwill" - is somewhat
7 speculative.

8 At the commencement of Phase I of the trial, this court deferred
9 ruling on Plaintiff's *motion in limine* #1 to exclude evidence by the Defendants
10 in Phase II of the trial on lost business goodwill. Having heard and reviewed
11 the evidence, the court at this time grants said motion as the court finds that
12 Defendants have not proved that the statutory requirements of Code of Civil
13 Procedure section 1263.510 have been met and that they are entitled to
14 recover compensation for lost business goodwill.

15 Accordingly, Defendants are precluded from introducing
16 evidence of lost business goodwill in Phase II of this trial.

17 Although the Court determines that Defendants may not recover
18 for lost goodwill under Code of Civil Procedure section 1263.510 because
19 they were not conducting a business on the property, Defendants have met
20 the other threshold requirements of the statute:

21 (1) Defendants have shown that the loss is caused by the taking of
22 the property. But for the taking of the property, Defendants would not have
23 lost future profits.

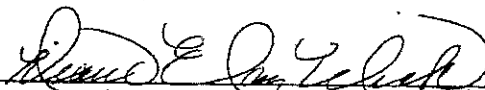
24

1 (2) Defendants have shown that the loss cannot reasonably be
2 prevented by a relocation of the business or by taking steps and adopting
3 procedures that a reasonably prudent person would take and adopt in
4 preserving the goodwill. Defendants' business is the development of 701
5 Lombard, and they could not have prevented the loss by relocating to
6 another site.

7 (3) Defendants have shown that compensation for the loss will not be
8 included in payments under Section 7262 of the Government Code.
9 Government Code section 7262 provides compensation for moving expenses,
10 lost personal property, and expenses to re-establish a business at its new
11 site. The compensation Defendants seek does not include any of these
12 payments.

13 (4) Defendants have shown that compensation for the loss will not be
14 duplicated in the compensation otherwise awarded to the owner.
15 Compensation for this loss will not be duplicated by compensation that
16 Defendants will receive for the value of the land and the value of the permits
17 to build on the land.

18
19 Dated: August 2, 2006
20

21 

22 Diane Elan Wick
23 Judge of the Superior Court
24

FILED
San Francisco County Superior Court

AUG 03 2006

GORDON PARK-LI, Clerk
BY: *Rani Edwards*
Deputy Clerk

Superior Court of California
County of San Francisco
DEPARTMENT 611

CITY & COUNTY OF SAN
FRANCISCO

PLAINTIFF

vs.

MARTIN J. COYNE, ET AL

DEFENDANTS

CASE : 429018

CERTIFICATE OF MAILING
(CCP 1013a (4))

I, Rani Edwards, Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On August 3, 2006, I served the STATEMENT OF DECISION by placing a copy thereof in a sealed envelope, addressed as follows:

JONATHAN BASS, ESQ.
HOWARD SLAVITT, ESQ.
COBLENTZ, PATCH, ET AL
ONE FERRY BUILDING, STE. 200
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KRISTEN JENSEN, ESQ.
RAFAL OFIERSKI, ESQ.
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ANGELA MARY BRADSTREET
CARROLL, BURDICK & MCDONOUGH
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SAN FRANCISCO, CA 94104

and, I then placed the sealed envelopes in the outgoing mail at 400 McAllister Street, San Francisco, CA. 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practices.

Dated: August 3, 2006

GORDON PARK-LI, Clerk

Rani Edwards

By: RANI EDWARDS, Deputy Clerk

