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UNITED WALNUT TAXPAYERS

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF LOS ANGELES – CENTRAL DISTRICT**

UNITED WALNUT TAXPAYERS, a California Nonprofit Fictitious Business Entity,

Plaintiff and Petitioner,

v.

MT. SAN ANTONIO COMMUNITY COLLEGE DISTRICT; WILLIAM SCROGGINS, in his official capacity as President and CEO of Mt. San Antonio Community College, and DOES ONE through TEN, inclusive,

Defendants and Respondents,

TILDEN-COIL CONSTRUCTORS, INC. and DOES ELEVEN through TWENTY, inclusive,

Real Parties in Interest.

**Case No.: BC 576785**

[Action Filed: March 24, 2015]

**MEMORANDUM IN SUPPORT OF EX PARTE APPLICATION FOR THE ISSUANCE OF A TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION**

Hearing Date: March 30, 2015
Time: 8:30 a.m.
Dept.: 71
I/C Judge: Hon. Suzanne G. Bruguera

## I. INTRODUCTION AND STATEMENT OF FACTS

All facts relevant to this Application are established in the concurrently filed declarations of Dennis Majors ("Majors Decl.") and Craig A. Sherman ("Sherman Decl."), and the *Verified Complaint* filed in this action attached hereto as Exhibit D to the Sherman Declaration.

On Tuesday, March 24, 2015, plaintiff United Walnut Taxpayers ("United Walnut"), after objecting through non-judicial administrative channels, initiated this lawsuit against defendants and respondents the Mt. San Antonio Community College District, its President and CEO William Scroggins (collectively "District") and real party in interest Tilden-Coil Constructors, Inc. (collectively "Defendants") for violations of local zoning ordinances, CEQA, and waste of public funds according to California Code of Civil Procedure § 526a and Proposition 39.

United Walnut has requested that Defendants refrain from building and continuing construction of a planned 2,300[1] space parking structure, at the northeast outer boundary of the Mt. SAC campus directly adjacent to a single family residential neighborhood, in violation of City of Walnut local planning and zoning ordinances (the "Project") until the resolution of this litigation. (Sherman Decl. ¶ 2, Exhibit A thereto.)

However, immediately after United Walnut gave notice of filing suit on March 24, the next few days saw Defendants respond hurriedly and recklessly by launching into what appears to be full-scale construction as quickly as possible. (Majors Decl. ¶¶ 8-10, Exhs. A, B & C [photos]; Sherman Decl. ¶¶ 2, 4-5.) Over the last two days, Defendants have begun grading, trenching, and removing mature trees.

The pace of the construction is attempting to be done so rapidly that Defendants have not even put in proper safety measures to protect the public from the effects of construction. (Majors Decl. ¶ 9 [lack of safety measures].) Additional irreparable harm will occur to the public who live around the construction site, as well as harm to expected nesting habitat for sensitive and

[1] United Walnut alleges and believes the parking structure to be 2,300 spaces (Complaint at ¶ 1.a.), however defendant District's website currently states 2,085 spaces (http://www.mtsac.edu/news/2015-March-23-parking-structure-construction-begins.html, last accessed on March 29, 2015)

other bird species, based on the thousands of truckloads of dirt fill to be exported over the next 4 to 6 months. (Majors Decl. ¶ 11.)

Most significant, because United Walnut is likely to prevail in this lawsuit, every wasted dollar spent on construction, and every additional dollar Defendants are spending to expedite construction, is a tax liability and *waste of funds* for the voters who approved Measure RR and whose tax dollars will eventually be used to pay back for the waste and harm done. (Sherman Decl. ¶ 10 [each spent dollar is a liability for taxpayers who must pay back with yet additional taxpayer funds, as well as continued interest on the initial payments].)

Without an immediate halt to the current frenzied construction, the harm will only increase. The Project contemplates the massive removal of hundreds of thousands of cubic yards of earth for the subterranean aspect of the parking garage Project and will require a constant stream of heavy duty dump trucks rumbling through neighborhoods for 8 or more hours every day extended over an approximately 4-month period. (Majors Decl. ¶ 11.)

Further, it is a common practice for defendants who are building in violation of CEQA, and the other causes of action present in the *Verified Complaint*, to adopt a strategy of building as quickly as possible and afterwards claim that because a project was completed during active litigation, that it would be a waste, or otherwise impractical, to remove the project. It is further irreparable harm to the interests of United Walnut and members of the public to *not* have this litigation resolved in the interest of justice, but instead be impaired by the speed at which a defendant can build while justice is administered.

## II. ARGUMENT

### A. The Legal Standard for Interim Injunctive Relief

The primary purpose of a preliminary injunction is to preserve the *status quo* until a court can make a final determination on the merits of the action. (Continental Baking Co. v. Katz, (1968) 68 Cal.2d 512, 528.) A temporary restraining order ("TRO") is properly granted on *ex parte* notice in order to maintain the *status quo* or to prevent irreparable injury pending a hearing on the application for a preliminary injunction. (Code Civ. Proc. § 527(c).)

Whether a TRO should issue is based on the evaluation of two interrelated factors: (1) the likelihood that the plaintiff will succeed on the merits of its claims at trial; and (2) the harm that plaintiff is likely to suffer if the TRO does not issue, balanced against the harm that the defendant is likely to suffer if it does issue. (Cohen v. Board of Supervisors (1985) 40 Cal.3d 277, 286; IT Corp. v. County of Imperial (1983) 35 Cal.3d 63, 69-70.). When addressing these factors, the plaintiff must prove the likelihood that it will suffer immediate and irreparable harm due to the inadequacy of other legal remedies. (Triple A Machine Shop, Inc. v. State of California, (1989) 213 Cal.App.3d 131, 138.)

Where injunctive relief is authorized by statute and the statutory conditions for its issuance have been satisfied, irreparable injury need not be shown to obtain injunctive relief. (*See* IT Corp. v. County of Imperial, (1983) 35 Cal. 3d 63, 70-72); Paul v. Wadler, (1962) 209 Cal.App.2d. 615, 625 ["[W]here an injunction is authorized by statute, a violation is good and sufficient cause for its issuance."].) The Paul court also held that "the same rule should apply to the less drastic relief afforded by temporary restraining order." (Id. at 625.)

"A trial court should grant a preliminary injunction if it finds the plaintiff has a "reasonable probability" of prevailing at trial and will suffer more harm from denial of the preliminary injunction than defendant would suffer from its grant." (Friends of Westwood v. City of L.A., (1987) 191 Cal.App.3d 259, 264.)

A "balance of harms" evaluation considers: "(1) the inadequacy of any other remedy; (2) the degree of irreparable injury the denial of the injunction will cause; (3) the necessity to preserve the status quo; [and] (4) the degree of adverse effect on the public interest or interests of third parties the granting of the injunction will cause." (Kane v. Chobani, Inc., (2013) 2013 U.S. Dist. LEXIS 99359, 7, 2013 WL 3776172, c*iting* Vo v. City of Garden Grove, (2004) 115 Cal. App. 4th 425, 435.)

**B. Law and Facts of This Case Support that a Temporary Restraining Order Should Issue**

1. United Walnut is Likely to Prevail on Its First Cause of Action Which Expressly Provides for Injunctive Relief

Taxpayer waste actions under California Code of Civil Procedure § 526a provide for injunctive relief to restrain and prevent illegal expenditures by local agencies. (*See* Blair v.

Pitchess, (1971) 5 Cal.3d 258, 26 ["actions by a resident taxpayer against officers of a county, town, city, or city and county to obtain an injunction restraining and preventing the illegal expenditure of public funds"]; superseded by statute on other grounds as stated in Simms v. NPCK Enterprises, Inc. (2003) 109 Cal.App.4th 233, 242-243.)

Under the Standard for TROs, as stated in Section II.A above, when an injunction is authorized by statute, the simple violation of that statute is grounds for a TRO upon a finding that the plaintiff is likely to prevail. Irreparable injury need not be shown because it is presumed.

United Walnut is likely to prevail on its *First Cause of Action*. The recently decided case Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist, (2013) 215 Cal.App.4th 1013, is directly on point. The Taxpayers court confirmed the Constitutional requirement under Article XIIIA, § 1(b),(c) that a project funded with bond proceeds authorized by voting taxpayers under Proposition 39 must be specifically listed as a project in the proposition and bond measure. (*See* Id., 215 Cal.App.4th at pp. 1029-1030.)

It is an easily determined and **uncontroverted fact** that nowhere in Measure RR is there a mention of the term "parking structure" or "parking garage," nor is there any language that specifically lists the Project. (*Verified Complaint* at ¶¶ 19-20.)

Even if this Court were to balance the harm that the Defendants are likely to suffer by the issuance of a TRO enjoining spending of Measure RR funds on the Project, the balances weighs heavily in favor of United Walnut. In conjunction with the request for a TRO against construction, Defendants are likely to suffer very little harm, especially for the short amount of time until a hearing on the OSC and preliminary injunction can be heard. In contrast, the harm of a TRO not issuing is great. Defendants are already engaging in construction on an accelerated time schedule. (Majors Decl. at ¶¶ 6-10; Sherman Decl. ¶¶ 2, 4-5.) Accelerated construction comes at a higher cost and Defendants are likely to front-load the spending in order to commit as much money and resources to the Project as quickly as possible. (Sherman Decl. at ¶ 11.)

Because United Walnut is likely to prevail on its *First Cause of Action* and because there is no need to show irreparable harm for the issuance of a TRO to enjoin spending of Measure RR funds on the Project, this Court should grant the TRO.

2. United Walnut is Also Likely to Prevail on its Third and Fourth Causes of Action; Violations of the City of Walnut's Zoning Ordinance Would Result in Irreparable Harm

United Walnut is also extremely likely to prevail on its *Third and Fourth Causes of Action* alleging the Project is currently in violation of City of Walnut zoning ordinances. (*Verified Complaint* ¶ 40, citing Walnut Municipal Code § 25-89.1 (b)(4)(g) ["All permitted structures shall not exceed thirty-five feet in height."].) (*See* supporting City laws at Sherman Decl. ¶¶ 13-16, Exhs. E-H thereto.) Coupled with the zoning code violation is that further legal defect, **as a matter of law**, that **Defendants cannot exempt themselves from local zoning regulations under Government Code § 53094** because Defendants are not a "school district" and the subject parking structure is not a "classroom facility." (*Verified Complaint* ¶¶ 45-49.) As its name suggests, defendant Mt. San Antonio Community College District is a "Community College District" and therefore is specifically *required* by California Education Code § 81951 to comply with all applicable county and city zoning, and building regulations for the Project.

Chapter 25 of the Walnut Municipal Code provides that the purpose of the Residential Planned Development Zone (RPDZ) – as the zoning applicable to the Project site - is to encourage "appropriate and desirable use of land which is sufficiently unique in its physical characteristics and other circumstances to warrant special methods of development[.]" (Walnut Mun. Code § 25-88 [entitled "Intent of Zone"].) (*See* Sherman Decl. at ¶¶ 13-16.)

Defendants are currently destroying the "unique . . . physical characteristics" of the Project site resulting in great harm to the environment, community and public interest in general. Any potential harm to Defendants is purely monetary and temporary and cannot compare to the *permanent* alteration of the physical characteristics of the land on the Project site that are contrary to the intent and purpose of the local legislature in enacting the zoning and development regulations for the Project site.

3. United Walnut is Additionally Likely to Prevail on its Second Cause of Action Alleging CEQA Violations

Defendant District has failed to do a project specific EIR and has made no official determination that the Project is within the scope of a Progammatic EIR. (Sherman Decl. ¶ 18.)

Although defendants failed to perform an EIR study for the Project, they attempt to rely on broad campus-wide master plan program EIR. However, **as a matter of law**, the colleged

district defendants are under the obligation to make a determination of whether a subsequent activity is within the scope of a program EIR. As explained in the recently decided May v. City of Milpitas:

> If a local agency approves or determines to carry out a project that is subject to [CEQA]", it must "file notice of the approval or the determination," otherwise known as a notice of determination (NOD), indicating "whether the project will, or will not, have a significant effect on the environment" and "whether an environmental impact report has been prepared pursuant to [CEQA] An NOD "announces the agency's ultimate conclusion about the project's expected environmental consequences.

(May v. City of Milpitas, (2013) 217 Cal.App.4th 1307, 1322 [internal citations removed, brackets in original] *citing* (§ 21152, subd. (a); *see* CEQA Guidelines, §§ 15075, 15094, 15373; Committee for Green Foothills v. Santa Clara County Bd. of Supervisors ("Foothills"), (2010) 48 Cal.4th 32, 46, fn. 10.)

Further, under Foothills, the court analyzed a situation where the challenge was not to the initial approval of a project, but instead to subsequent activities within the initial project and the court still found that subsequent activities must be examined "in light of the EIR to determine whether additional environmental review is necessary." (Id., 48 Cal.4th at pp. 44-45 *citing* CEQA Guidelines, § 15168, subd. (c).)

Here, the Board has not filed a Notice of Determination ("NOD") or Notice of Exemption ("NOE"). (Sherman Decl. ¶ 18.) United Walnut lawsuit is a facially correct and timely legal challenge based on the District's final approval to exempt and build the Project.

A TRO is immediately necessary to prevent the *further* irreparable harm to the environment through Defendants' actions. Defendants have removed mature trees and other vegetation in violation of the Mt. San Antonio 2012 Facilities Master Plan ("2012 FMP") and Draft Facilities Master Plan Subsequent EIR ("DSEIR"). (Sherman Decl. ¶ 17, Exhibit I thereto.) The removal of trees and plant-life has the additional direct impact on raptor species such as the Cooper's Hawk (admitted by Defendant District to be a "state species of special concern," and Defendants are proceeding during the very nesting time that was identified as causing the most severe and irreparable harm. (Sherman Decl. ¶ 17, Exhibit I, thereto.)

This Court should immediately issue a TRO in order to prevent Defendants from further removal of protected mature trees and the impairment nesting activities to Cooper's Hawks and other nesting birds' habitat.

4. United Walnut's Likelihood of Prevailing, on One or More (or ALL) of the First Through Fourth Causes of Action, Justifies the Issuance of a Preliminary Injunction

Throughout this *Memorandum,* United Walnut has justified the issuance of a TRO enjoining and restraining Defendants from (1) spending any further Measure RR bond funds on the Project; and (2) immediately halting all construction activities on the Project.

The standards for a preliminary injunction are comparable to those met by United Walnut for a TRO – based on the ongoing threat of irreparable injury and likelihood of United Walnut prevailing on its *First* through *Fourth Causes of Action*. As established throughout this Memorandum, this Court should issue a preliminary injunction on the same grounds as United Walnut is asking for the TRO. (*Cf.* (Scripps Health v. Marin, (1999) 72 Cal.App.4th 324, 334; Butt v. State of Calif, (1992) 4 Cal.4th 668, 677-678; Friends of Westwood v. City of L.A., (1987) 191 Cal.App.3d 259, 264.)

5. A Bond is not Required for a Temporary Restraining Order; any Required Bond for the Preliminary Injunction Should be Nominal

A bond is not required for a TRO (Biasca v. Superior Court of California, (1924) 194 Cal. 366, 367-368) and one should not be required here. However, recognizing that a bond is required for a preliminary injunction, United Walnut requests that the required bond be nominal.

California courts have yet to determine in published decisions whether only nominal bonds should be imposed in environmental litigation. However, Ninth Circuit decisions have so held even where a defendant may suffer substantial economic loss as the result of the injunction. (*See, e.g.*, People ex rel. Van De Kamp v. Tahoe Regional Plan (9th Cir. 1985) 766 F.2d 1319; Friends of the Earth, Inc. v. Brinegar (9th Cir. 1975) 518 F.2d 322; Natural Resources Defense Council, Inc. v. Morton (D.D.C. 1971) 337 F. Supp. 167, affd. on other grounds (D.C. Cir. 1972) 458 F.2d 827.) Here, the college district defendants have not suffered substantial economic loss, and it is only without the injunction that Defendants *could* suffer substantial economic loss through its own attempts to build before the result of United Walnut's successful litigation and

entry of a judgment against Defendants. The danger of the Court not issuing a nominal bond is that the door is closed to public interest litigation. This is the purpose and effect that Defendants so hurriedly will be striving: (1) to obfuscate the project and ignore community input and environmental review; (2) to accelerate construction to bypass the judicial system through a mootness argument; and (3) to claim stopping the project would cause harm to the developer and demand an exorbitant bond to severely impair a clearly well-pleaded bond spending and environmental land use challenge.

## III.

## CONCLUSION

As set forth in the concurrently lodged [Proposed] Order, United Walnut requests that this court issue a temporary restraining order against Defendants, and each of its officers, agents, employees, representatives, contractors, and all persons acting in concert or participating with them, that they immediately be restrained and enjoined from engaging in or performing, directly or indirectly, any and all of the following acts unit this lawsuit is heard of the merits:

(1) Spending any Measure RR bond funds on any aspect of the Project;

(2) conducting any construction, dirt removal, or other environmental destruction activities at or on the Project site.

Dated: March 29, 2015

LAW OFFICE OF CRAIG A. SHERMAN

Craig A. Sherman, Esq.
Attorney for Plaintiff and Petitioner
UNITED WALNUT TAXPAYERS

# Proof of Service

*United Walnut Taxpayers v. Mt. San Antonio Community College District, et al.*
Los Angeles Superior Court Case No.: BC 576587

I, the undersigned, declare under the penalty of perjury that I am over the age of eighteen years, my place of business is in the County of San Diego, located at 1901 First Avenue, San Diego, CA; and I served the below-named person(s) the following document(s):

**MEMORANDUM IN SUPPORT OF EX PARTE APPLICATION FOR THE ISSUANCE OF A TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION**

on March 29, 2015 on the following person(s) in a sealed envelope or package, addressed as follows:

| | |
|---|---|
| Dr. William Scroggins, President and CEO<br>Mt. San Antonio Community College District<br>1100 North Grand Avenue<br>Walnut, CA 91789<br>bscroggins@mtsac.edu | Stan Barankiewicz, Esq.<br>Jessica E. Ehrlich, Esq.<br>ORBACH, HUFF, SUAREZ, & HENDERSON<br>1901 Avenue of the Stars, Sutie 575<br>Los Angeles, CA 90067<br>jehrlich@ohshlaw.com<br>dbarankiewicz@ohshlaw.com |

in the following manner:

1) ☐ By personally delivering copies to one or more of the person(s) served (at the March 30, 2015 hearing).

2) ☐ By placing a copy in a separate envelope, with postage fully pre-paid, for each person and address named above and depositing each with an overnight carrier at San Diego, CA.

3) ☐ By faxing copies to the above person and printing confirmation of the success of said transmission and retaining a copy of said successful transmission

4) ☒ By sending to each person named above via electronic delivery to each of the the above email address(es).

I declare under the penalty of perjury under the laws of the State of California that the above foregoing is true and correct.

Executed on March 29, 2015 at San Diego, California.

Craig Sherman