

Mandel E. Himmelstein
Attorney at Law
P.O. Box 180519
Coronado, CA 92178
State Bar No. 174997

Administrative Hearing Officer,
City of San Diego

IN THE MATTER OF	)	
	)	
The Academy of Our Lady	)	
Of Peace	)	
	)	
4860 Oregon	)	
	)	
San Diego, CA	)	CIVIL PENALTY
	)	ADMINISTRATIVE ENFORCEMENT ORDER

I
STATEMENT OF THE CASE

This matter came on regularly for hearing before Mandel E. Himmelstein, Administrative Hearing Officer for the City of San Diego on July 27, 2007 at 9:00 a.m. and September 7, 2007 at 9:00 a.m. at The Neighborhood Code Compliance Department and the San Diego City Council chambers, and was heard on those dates, notice duly and regularly given.

The purpose of the hearing was to determine whether the Responsible Persons have caused or maintained a violation of the Municipal Code or applicable State Code that existed on the dates specified in the Notice and Order; and whether the amount of civil penalties assessed by the Director pursuant to the procedures and criteria outlined in Section 12.0805 were reasonable.

Brian Ziegler, Deputy City Attorney, Melody Negrete, Code Enforcement Coordinator, Deanna Walker, Criminal Investigator, and Michelle Sokolowski, Development Program Manager, appeared on behalf of the City of San Diego.

Testifying for the City was Al Stasukevich, Land Development Investigator II, Kelly Gee, subcontractor, Terry Cook, Dan Sullivan, Clive Turner, Diana Carlson, Ross Lopez and Tom McDonald, neighbors of Appellant.

Appellant appeared and was represented by its attorneys, Paul Robinson and Josh Sonne.

Testifying for Appellant was Sister Dolores Anchondo, school principal (PRINCIPAL), Dasan Mahadevan, school chief financial officer, Andy Schleafli and Patricia Butler, technical consultants, and Brian Newell, neighbor.

The City offered documentary evidence identified as C-1 through C-24. Appellant offered documentary evidence identified as A-1 and A-2. All documents were admitted into evidence.

II

FINDINGS OF FACT

1. Appellant, Academy of Our Lady of Peace, (OLP) is a parochial high school for girls (SCHOOL) operated by the Sisters of St. Joseph Carondelet.

OLP is the owner of real property at 4860 Oregon which has been occupied by the SCHOOL for more than 80 years (PROPERTY).

2. OLP applied for a Conditional Use Permit and Resource Protection Ordinance Permit on December 9, 1992. The purpose was to make certain improvements and to continue operation of the SCHOOL.

The application was approved by the San Diego Planning Commission on December 8, 1994 and executed by the Senior Planner on January 19, 1995 (CUP).

Appellant, through its PRINCIPAL, executed the CUP on June 16, 1995 as Permittee, agreeing to each condition and promising to perform each obligation.

The CUP was recorded in the official records of San Diego County on June 26, 1995.

3. The CUP was granted to Appellant subject to certain conditions, restrictions and limitations (CONDITIONS). Among those CONDITIONS were that:
 - A. Appellant maintain a maximum staff of 46 and a maximum enrollment of 640 students;
 - B. Appellant provide four off-street parking lots on the PROPERTY with a total of 106 spaces. The parking spaces were to be permanently maintained and not converted to any other use;
 - C. All private outdoor lighting was to be shaded and adjusted to fall on the premises where the lights were located;

- D. Appellant was to designate one entry loop at the corner of Copley Avenue and Oregon Street as one-way counterclockwise traffic, with appropriate signs and markings;
- E. The PROPERTY use was limited to the permit conditions and was subject to cancellation or revocation for any material breach or default.

- 4. Supporting the application process, Appellant submitted a site plan identified as Exhibit A, which detailed the location of the mandated four parking lots.
- 5. Responding to a large number of complaints by the neighboring community, the PROPERTY became the subject of observation and investigation by the City of San Diego to determine whether Appellant was compliant with the CUP.

On April 4, 2007, the City of San Diego issued a Civil Penalty Notice and Order (CPNO) to Appellant for violations of the CUP and the San Diego Municipal Code (SDMC).

Appellant was specifically cited for violation of the CONDITIONS (exceeding student enrollment, exceeding staff, not providing required off street parking, not shading outdoor lighting and not providing the entry loop) and for violation of SDMC Sections:

- A. 121.0302(a) (use contrary to permit);
- B. 121.0302(b) (change in density or intensity and creating a public nuisance);
- C. 126.0306 (use contrary to conditions of existing CUP).

Violations of 126.0306 are treated "as strict liability offenses regardless of intent".

Appellant was granted until June 30, 2007 to correct the violations. The violations remain uncorrected.

- 6. The City assessed Civil Penalties to Appellant of \$1,000.00 per day from April 4, 2007 until compliance.
- 7. Appellant was aware of these violations almost from the issuance of the CUP.

Appellant admits that it became aware of violations of the CUP at least as early as 2005; it acknowledged the violations but did not take a single step to correct any violation.

8. Appellant did not deny the violations of the CUP or the allegations in the CPNO, but maintained it took no corrective action because it was in the planning stages of a massive modernization program requiring the approval of many levels of City regulators.
9. These violations substantially impacted the neighboring community as evidenced by the many complaints and by uncontested testimony concerning traffic, parking, safety, noise and related issues detailed by several neighbors.

One day before this hearing, City of San Diego police officers issued 20 traffic tickets or warnings to OLP students arriving at and departing from the PROPERTY for various violations including speeding, failure to stop and parking.

Neighbors testified that students blocked driveways, double- and triple-parked, intermittently blocked the streets, parked on sidewalks, narrowly missed children while speeding, reduced resident parking availability and otherwise caused the neighbors' continuing concern.

Neighbors did not urge closure of the SCHOOL. They wanted Appellant to comply with the CUP and relief from the negative impact on their community.

10. The seriousness of the violations is magnified by their long duration, frequency, impact upon neighbors, lack of compliance even after admitting knowledge and disregard for the law and CUP CONDITIONS.

In further aggravation, uncontested testimony established that:

- A. As early as March 4, 1993, in an Appellant Board of Directors meeting, Appellant projected enrollment "to a maximum student body of 740 students".

- B. On August 25, 1993, PRINCIPAL, in a letter to the City of San Diego Planning Department, stated

"During 1992-1993, 631 students were enrolled at the Academy at year's end. Thirty nine full time faculty and six staff members were employed. The enrollment figures for the upcoming 1993-1994 academic year will be similar. It is anticipated that the enrollment figures will remain constant in the future as the facilities will not house additional students."

- C. After obtaining the CUP, Appellant's general contractor directed a subcontractor to prepare one designated parking

lot (UPPER PLAZA) with special material prior to striping so that the striping could be easily removed and erased. The striping was removed.

D. Neither the UPPER PLAZA nor a large, beautiful lawn area used as the traditional graduation location, were ever used for parking. Both areas were designated on Exhibit A of the CUP application as parking lots.

E. Student enrollment for the past 8-10 years exceeded the CUP limit by 110 students and the faculty limit of 46 grew to 60 or 61.

Appellant testimony established that in 1995, when the CUP was first issued, student enrollment was 650 or more students, already exceeding the limit of 640.

F. The entry loop was never utilized.

G. After issuance of the CUP, no evidence was presented to establish any effort by Appellant to comply with the CONDITIONS.

H. Knowing it continued in violation of the CUP and the CPNO, Appellant began the current school year on August 27, 2007 with 740-750 students.

11. There are mitigating factors:

A. Appellant operates a parochial girls' school providing high quality education to a large number of children;

B. Appellant is non-profit;

C. Appellant has engaged consultants to assist it in applying for an amendment to the CUP to reflect the reality of its campus, enrollment, faculty and physical condition;

D. Appellant has sought input from its neighbors;

E. Appellant admitted the CUP violations and the allegations of the City in the CPNO;

F. Neighbors do not support closure of the SCHOOL.

12. The City assessed Appellant a civil penalty of \$155,000.00 (155 days at \$1,000.00 per day from April 4 through September 7, 2007). It seeks

accruing penalties of \$1,000.00 per day from September 8, 2007 until compliance.

The City expended \$2,431.97 in administrative costs in prosecuting this case. The City seeks reimbursement from Appellant for those costs.

13. SDMC 126.9396 mandates that these violations be treated as strict liability offenses. Lack of knowledge, negligence, inattention, acting at the direction of others or being misled by others are not defenses to these violations.
14. All Notices and Orders including written notice of the times and places of these hearings were served upon Appellant according to law.
15. The responsible party is Appellant.

III

DETERMINATION OF ISSUES

1. By reason of the facts found in Findings of Fact paragraph 15, Appellant is the Responsible Party.
2. By reason of the facts found in Findings of Fact paragraph 14, the Appellant was notified of the CPNO and this Administrative Hearing.
3. By reason of the facts found in Findings of Fact paragraph numbers 5, 6, and 8, the Appellant failed to comply with the CUP and CPNO.
4. By reason of the facts found in Findings of Fact paragraph numbers 5, 6, 8 and 10, the Appellant violated the SDMC Code as listed in Paragraph 6.
5. By reason of the facts found in Findings of Fact paragraph numbers 2, 5, 6, 7, 8, 9, 10, 12, 13 and 15, the civil penalty assessed against Appellant in the amount of \$155,000.00 is affirmed. Administrative costs of \$2,431.97 are awarded to the City of San Diego.

IV

ORDER

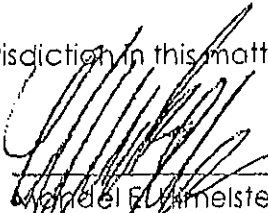
THEREFORE, the following order is made:

1. Appellant is ordered to pay the City of San Diego the sum of \$105,000.00 in civil penalties and \$2,431.97 in administrative costs (\$107,431.97). Payment shall be made to the City Treasurer upon receipt of invoice.

2. The balance of \$50,000.00 plus accruing civil penalties of \$500.00 per day from September 8, 2007 is stayed pending Appellant's compliance with the following:
 - A. On or before October 1, 2007, shade and adjust on-campus lighting consistent with the CUP.
 - B. On or before October 15, 2007:
 - a. Activate the entry loop at the corner of Oregon and Copley Streets, consistent with the CUP and supervise the dropoff and pickup of students pre-assigned to either the entry loop, the West parking lot or other convenient area to ease congestion and improve efficient and safe movement of traffic;
 - b. Provide only trained, qualified employees, security personnel or off-duty police officers to supervise and monitor the dropoff and pickup to ensure student and faculty safety, compliance with traffic laws, and to minimize disruption in the neighboring community.
 - c. Formally adopt on-going effective and appropriate procedures to educate, inform and require its students, and especially its student drivers, to comply with traffic laws, to respect the rights of its neighbors and to act lawfully and with courtesy and consideration toward them.
 - d. Report to and meet with the NCCD of the City of San Diego to detail these efforts and their results.
 - C. On or before November 1, 2007:
 - a. Provide an additional 45 off-street parking spaces, either on the PROPERTY or at private parking facilities;
 - b. Provide shuttle service for students and staff utilizing the private facilities;
 - c. Ensure the safety of students, staff and neighbors by the use of well-maintained vehicles and qualified drivers;
 - d. Report to and meet with City of San Diego NCCD to detail these efforts and their results.

- D. On or before July 1, 2008, reduce student enrollment to 640 and reduce staff to 46, or complete amendment of the CUP to reflect conditions at the SCHOOL, including physical, personnel, student or general changes as shall be consistent with law and authorized by the City of San Diego.
3. If the Appellant does not timely comply, the balance of \$50,000.00 plus \$500.00 per day accruing civil penalties is awarded and shall be payable upon receipt of invoice from the City of San Diego. Total civil penalties shall not exceed \$250,000.00.
- If the Appellant does comply, the balance of \$50,000.00 and accruing civil penalties are dismissed.
4. The penalties and administrative costs shall be a personal lien against the Appellant and shall be recovered by the use of all appropriate legal means.
5. The Hearing Officer retains jurisdiction in this matter.

Dated: September 18, 2007



Mondel E. Edelstein
Administrative Hearing Officer