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CITY OF SANGER

CITY COUNCIL

CITY OF SANGER, CA

VINCENT WALL, JOSEPH VILLALOBOS, DONNA BAILEY, EFREN RUBIO, MELISSA BEASLEY, AND HENRY PROVOST, Individually

Appellants

vs.

CITY OF SANGER PLANNING COMMISSION,

Appellee

APPEAL FROM PLANNING COMMISSION'S APPROVAL OF THE CONDITIONAL USE PERMIT RESOLUTION NO. 2018-07

Jurisdiction

The City Council has jurisdiction under Sanger Code of Ordinances ("Sanger Code") § 90-1000(b) as this is an appeal from a conditional use permit approved by City of Sanger Planning Commission ("Commission")

Timeliness

Under Sanger Code § 90-1000(b)(2), "Any party other than the applicant may, within ten days after the date of adoption of the resolution, or within ten days after the expiration of the 40-day period mentioned in subsection (a)(2) of this section, file in writing with the city clerk an appeal to the council." (emphasis added) On September 13, 2018, Commission held a public hearing on resolution No. 2018-07. The resolution was for a conditional use permit for the Algonquin, LLC power plant located in Sanger, CA. The resolution passed by a 4 to 1 vote. This appeal has been filed before September 26, 2018 (10 days). As such it has been filed within the required time period.

Standing

Under Sanger Code § 90-1000(b)(2), "Any party other than the applicant may, within ten days after the date of adoption of the resolution, or within ten days after the expiration of the 40-day period mentioned in subsection (a)(2) of this section, file in writing with the city clerk an appeal to the council." (emphasis added) The above captioned, and below signed, individually are such any party other than the applicant.

APPEAL FROM PLANNING COMMISSION'S APPROVAL OF THE CONDITIONAL USE PERMIT RESOLUTION NO. 2018-07 - 1

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2 The Planning Commission's decision was an abuse of discretion, and was not supported by the evidence of
3 record.

4 On September 13, 2018, Commission held a public hearing on resolution No. 2018-07. It is noted that on
5 the agenda the conditional use permit was numbered as 2018-01. Due to this ambiguity created by the City the
6 appeal is against the resolution was for a conditional use permit ("CUP") for the Algonquin, LLC power plant
7 located in Sanger, CA ("Power Plant") to extend their operating hours from 3,300 hours to 3,600 hours. The
8 resolution passed by a 4 to 1 vote, and the CUP was granted. In the course of approving the CUP that planning
9 commission was required to make five (5) findings.

10 These five finding are found in Sanger Code §§ 90-999(1)-(5). Only Finding Five (5) is at issue here, and is
11 the only one which is being appealed.

12 Finding five states "the conditions of approval are necessary to protect the public health, safety, and general
13 welfare. The word "and" is important here as it requires a finding that addresses each of these individual elements:
14 1) public health, 2) safety, and 3) general welfare. The analysis provided by the Commission in support of finding
15 five is as follows:

16 The recommended conditions of approval increase the annual hours of operation
17 from 3,330 to 3,600. All other conditions of approval for Conditional use Permit
18 No. 89-1 and Conditional Use Permit No. 93-4 will remain in full force and
19 effect. These conditions protect the public health, safety, and general welfare of
20 the residents of Sanger.

21 No evidence, analysis, or factual underpinning was presented that would allow the commission to connect the dots
22 between Conditional Use Permits No. 89-1 and 93-4, the increase in hours of operation of the Power Plant, and how
23 increasing the operational hours of the Power Plant were necessary to protect the public health, safety, and general
24 welfare of the Citizens of Sanger. At its best CUP 89-1 and 93-4 provide evidence for the previous hours of
25 operation, 3300 hours, not an increase of 300 hours to 3600 hours of operation. Therefore, the Commission's
26 decision is not supported by evidence

1 It was presented by Mr. David Brletic, Senior Planner for the City of Sanger and Secretary for the
2 Commission, and by Mr. Cezary Niewiadomski (apologies for any misspelling) of Algonquin, LLC. (aka Liberty
3 Power), that since 2007 that the hours of operation of the Power Plant have been 3,300 hours. It was further
4 presented by Mr. Brletic and Mr. Niewiadomski that each of the pollution levels of 1) total organic gases, 2) reactive
5 organic gases, 3) carbon monoxide, 4) nitrogen oxides, 5) particulate matter, 6) fine particulate matter, and 7) sulfur
6 oxides have been at or below 10 tons per yr. Mr. Niewiadomski stated that this data was taken from the San Joaquin
7 Valley Air Pollution Control District ("SJVAPCD"). Mr. Niewiadomski further stated that the data from 2010 was
8 missing from the SJVAPCD website and is represented as zero although there were polluting emissions during 2010.

9 Mr. Brletic and Mr. Niewiadomski were asked how much more pollution was going to be put into the air in
10 and around Sanger, CA if the increase in hours was granted. Mr. Brletic did not know and instead stated that the
11 SJVAPCD wouldn't have allowed Algonquin to be permitted for 3,784 hours if it did not pass an environmental
12 impact report. No environmental impact report was presented to the Commission. Commissioner Wall stated that
13 SJVAPCD looks at the environmental impact for the entire region of which SJVAPCD is in charge of.

14 Commissioner Wall stated that SJCAPCD does not look at the environmental impact to the City of Sanger. Mr.
15 Brletic did not disagree with this statement. The the Algonquin, LLC representatives in attendance did not disagree
16 with this statement. Therefore, there no evidence was presented to the Commission on the impact to public health to
17 the Citizens of Sanger if the Commission granted the increase in the hours of operation of the Power Plant.

18 Commissioner Wall asserted the argument that if the power plant is allowed to run more it will also pollute
19 more. Mr. Burns or Mr. Grady of Algonquin, LLC. stated that this was correct. Mr. Niewiadomski stated that it
20 would be about 9%-10% more pollution using the 10 tons per year as the baseline for each year between 2007 and
21 2018. Mr. Brletic stated this is a zoning issue and not an environmental issue. Commissioner Wall then stated how
22 can an increase in pollution levels without an offset be protecting the public health as required by Finding Five?
23 Commissioner Wall further elaborated that protecting the public health was rationally related to the increase in
24 pollution levels of the power plant, as the increase of pollution levels will not stay in the area of the city zoned for
25 manufacturing. The pollution will float to other areas of the city, and effect the city as a whole. Commission Wall
26 stated that Finding Five required an analysis on impact of public health and thus is by default an environmental issue
27 as the pollution generated would affect the city as a whole.

1 No evidence was provided to the Commission to refute Commissioner Walls statements. No evidence,
2 analysis, or factual underpinnings were presented how CUP 89-1 or CUP 93-4 will moderate, offset, or otherwise
3 protect the public health from increasing the hours of operation of the Power Plant.

4
5 The conditions of approval for the Conditional use Permit Nos. 89-1 and 93-4 do not support the
6 Commission's action.

7 In order to understand why CUP 89-1 and 93-4 do not support the Commission's action one first needs to
8 look at when these CUP's were granted. CUP 89-1 was granted on September 14, 1989 when the power plant was
9 first built. CUP 93-4 was granted on October 28, 1993. CUP 89-1 is 29 years old and CUP 93-4 is 25 years old. The
10 conditions in the City of Sanger have changed in the last 25-29 years. The Power Plant has changed in last 25-29
11 years. The air quality in Sanger has changed in the last 25-29 years. The effects and the understanding of air
12 pollution have changed in last 25-29 years. Yet, the evidence used to support the Commissions decision has not
13 changed in last 25-29 years.

14 When the Power Plant was first built it produced electricity by burning wood and natural gas. To remediate
15 some of the pollution the City required, in CUP 89-1, the Power Plant to install biological test stations, requirement
16 22, comply with local air quality standards, requirement 27, set noise limits, requirement 28, use only untreated
17 wood as a fuel source, requirement 29, annual soil testing, requirement 30, establish monitoring and mitigation
18 measures, requirement 48, restricted when wood (biomass) could be burned, requirement 49, restricted the hours of
19 the wood (biomass) and natural gas generators, requirements 54 and 54, along with a requirement to plant trees
20 around the property, requirement 12. All these environmental requirements were conditions of granting CUP 89-1.

21 For granting CUP 93-4 the City required the power plant to establish an Air Quality Projects Fund to only
22 reduce NOx emissions in the City of Sanger, requirement 4. This fund could not be used to reduce any other
23 pollutants in the City of Sanger. This means that the City of Sanger cannot use the Air Quality Projects Fund to
24 clean up the 1) total organic gases, 2) reactive organic gases, 3) carbon monoxide, 4) particulate matter, 5) fine
25 particulate matter, and 6) sulfur oxides produced by the Power Plant. Thus, the increased production time of the
26 Power Plant will materially affect the public health of the Citizens of Sanger by increasing air pollution due to the

1 total organic gases, reactive organic gases, carbon monoxide, particulate matter, fine particulate matter, and sulfur
2 oxides being emitted from the Power Plant because of the increase hours of operation.

3 Further, the requirements of CUP 89-1 and 93-4 only apply to running the Power Plant for 3,300 hours.
4 CUP 89-1 requirement 54 and CUP 93-4 requirement 3. They do not address running the Power Plant for 3,600
5 hours. Thus, the Commission abused its discretion as there was no evidence presented for Finding Five in granting
6 CUP Resolution No. 2018-07 in extending the Power Plants hours

7
8 No evidence was provided for the effect on the Public Health by increasing the Power Plant's operating
9 hours.

10 No evidence was provided that increasing pollution without adequate offsets to these additional pollutants
11 would benefit the public health of the Citizen's of Sanger. The Commission's decision reads as though increasing
12 pollution is good for the adults and children of Sanger. This is a perversion of the term "public health". There is
13 clearly a nexus between increase stationary pollution sources, such as the Power Plant, and a detriment to the public
14 health. Severe asthma, and the inability for children and adults to play outside due to high pollution levels are but
15 two. In order to protect the public health an increase of pollution levels must be offset such that the net effect would
16 maintain the public health at or below the level it was before the increase of the pollution levels. Finding Five, and
17 CUP 89-1 and CUP 93-4 do not state how they accomplish this balancing act when the Power Plant is allowed to
18 operate longer than 3,300 hours, nor do they provide any analysis to support extending the operating hours of the
19 Power Plant. Therefore, the Commissions decision is not supported by the evidence, and no analytical bridge has
20 been formed between the increased levels of pollution, CUP 89-1 and CUP 93-4, and protecting the public health
21 from the increased levels of pollution. As such the Commission abused its discretion as there was no evidence
22 presented for Finding Five in granting CUP Resolution No. 2018-07 to extend the Power Plants hours.

1 Mr. Brletic improperly prevented the Commission from considering evidence about the effects of extending
2 the power plants hours on the public health.

3 As previously stated Mr. Brletic asserted at the Commission's meeting that this is a zoning issue, and not
4 an environmental issue. Mr. Brletic also stated that the Commission could not add conditions to the conditional use
5 permit resolution No. 2018-07.

6 Mr. Brletic's statements were taken to mean that the Commission was not allowed to entertain adding any
7 conditions authorized by Sanger Code § 90-999(5). However, as shown above CUP 89-1 and CUP 93-4 directly
8 contradicts Mr. Brletic. As previously stated, both CUP 89-1 and CUP 93-4 contain environmental restrictions of the
9 Power Plant. CUP 93-4 expressly requires Algonquin to create an Air Quality Projects Fund and to pay up to ten
10 thousand dollars (\$10,000) annually to this fund to offset nitrous oxide ("NOx") emissions from the Power Plant.
11 And, CUP 89-1 requires even more environmental conditions to protect the public health. Thus, contrary to what
12 Mr. Brletic informed the Commission the Commissioners were, and are, allowed to consider environmental impacts
13 in granting a conditional use permit. Therefore, Mr. Brletic, the senior planner of the City of Sanger, the secretary of
14 the Planning Commission, and the only source of information on the law and regulations to the Planning
15 Commission purposefully prevented the Commission from receiving evidence related to public health from being
16 considered by the Commission.

17 In addition to this, Mr. Brletic's statements to the effect that Commission cannot modify, or add
18 requirements to a conditional use permit are contrary to Sanger Code § 90-1000(a)(1), where the "The commission,
19 by written resolution, may approve, approve with stated conditions, disapprove, or disapprove without prejudice a
20 conditional use permit application." (emphasis added). As shown the ordinance allows the Commission to make the
21 decision of whether to approve the condition use permit with or without conditions. The ordinance does not require
22 an all or nothing vote. Mr. Brletic's statements to the Commission negated the Commissions ability to review the
23 evidence necessary to protect the public health as the Commission was under the belief that it must either only vote
24 for or against the resolution as written, and drawn up, by Mr. Brletic. Mr. Brletic's statements are further contrary to
25 the Commission's decisions in CUP 89-1 and CUP 93-4 as both of the CUPs contain conditions to protect the public
26 health, and were required before CUP 89-1 and CUP 93-4 were granted

1 Based upon all the above, Mr. Brletic improperly prevented the Commission from receiving and reviewing
2 evidence of the effect that extending the Power Plant's operation would have on the public health, and prevented the
3 Commission from requiring conditions that would offset the increased hazard of the public health of the Citizens of
4 Sanger. Thus, the Commission abused its discretion, could not and did not review the necessary evidence
5 concerning Finding Five as Mr. Brletic prevented evidence from being presented for Finding Five. Thus, when the
6 Commission granted CUP Resolution No. 2018-07 to extend the Power Plants hours it did so without evidence as to
7 Finding Five.

8
9 City Council has recently taken the similar action of remanding matters back to the City.

10 On Thursday August 2, 2018, the City Council was asked by the City and the Fire Department to approve
11 Resolution 2018-45, and amend the Master Fee Schedule by increasing the fees associated with inspecting
12 Automatic Fire Sprinkler Systems among others. The City Council voted 5-0 to deny the Resolution. The rationale of
13 the City Council was that the City and Sanger Fire Department had not provided any rationale or evidence as to why
14 the fee increase was necessary.

15 The action requested by the above captioned and below undersigned is based upon this similar, or same,
16 rationale. In that the City and the Planning Commission has not provided any rationale or evidence as to how CUP 89-
17 1 and 93-4 protect the public health from the increased levels of pollution caused by increase hours of operation of
18 the Power Plant. Based upon this lack of evidence and rationale the City Council should overturn the Planning
19 Commission's CUP Resolution No. 2018-07 for similar reasons that the City Council denied the City's and Fire
20 Department's request to increase the Master Fee Schedule Fees.

21
22 Action requested by the City Council.

23 The above captioned, and below signed, respectfully request a public hearing of this matter as required by
24 Sanger Code § 90-1000(b)(3).

25 The above captioned, and below signed, respectfully request the City Council overturn CUP Resolution No.
26 2018-07, remand it back to the Commission, and require the Commission to perform a proper analysis to support
27 Finding Five. The City Council must direct the Commission to connect the dots, to create a nexus, between

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RESOLUTION NO. 2018-07 - 7

1 increasing the Power Plants operational hours and protecting the public health, safety, and general welfare of the
2 Citizens of Sanger.

3 The above captioned, and below signed, respectfully request the City Council require the City Attorney at
4 all Planning Commission meetings to verify that the Planning Commission is given proper legal advice so the
5 Planning Commission can make fully informed decision when considering items brought by the City to the
6 Commissioners.

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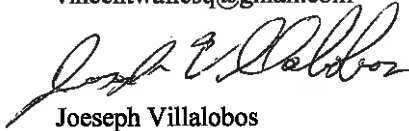
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Respectfully submitted,

this 20th of September, 2018.



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