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NOT CERTIFIED FOR PUBLICATION

NO CHANGE IN JUDGMENT

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

FILED

AUG 25 1995

Court of Appeal - Sixth App. Dist.

BY _____ DEPUTY

H012427

LSI LOGIC CORPORATION,

Plaintiff and Appellant,

vs.

CITY OF SANTA CLARA,

Defendant and Respondent;

MUSLIM COMMUNITY ASSOCIATION,

Real Party in Interest and Respondent.

_____/

(Santa Clara County Super.Ct.No. 736936)

ORDER MODIFYING OPINION

THE COURT:*

It is ordered that the opinion filed herein on August 21, 1995, be modified in the following particular:

1. The last sentence of the first paragraph on the first page is modified to read: We reverse.

There is no change in judgment.

DATED:

_____

Premo, Acting P.J.

_____

Elia, J.

* Cottle, P.J., did not participate.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

LSI LOGIC CORPORATION,

Plaintiff and Appellant,

vs.

CITY OF SANTA CLARA,

Defendant and Respondent;

MUSLIM COMMUNITY ASSOCIATION,

Real Party in Interest and Respondent.

_____/

H012427

(Santa Clara County Super.Ct.No. 736936)

LSI Logic Corporation (hereafter, LSI) appeals from a judgment denying its petition for a writ of mandate. We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

Real party in interest Muslim Community Association (hereafter, MCA) applied to respondent City of Santa Clara (hereafter, City) for a use permit to use the existing building at 3003 Scott Boulevard as a church, elementary school, and day-care center. The building is located in a light industrial zone.

City's Project Clearance Committee (hereafter, Committee) preliminarily reviewed MCA's application. The Committee recommended approval of the use permit subject to the conditions.

The initial study was conducted by City's planning department which concluded that "although the proposed project COULD HAVE a significant effect on the environment, there will not be a significant effect in this case because the MITIGATION MEASURES required by the conditions of approval have been added to the project. A NEGATIVE DECLARATION will be prepared."

The negative declaration was subsequently prepared by the Committee, based on the initial study's findings that "no significant environmental impacts have been identified to remain with appropriate mitigations."

Following the adoption by the Committee of the negative declaration, MCA's completed application was set for public hearing by City's Planning Commission (hereafter, Commission). After the hearing, the Commission's staff recommended denial, without prejudice, of the request "for a use permit for a school, pre-school and day-care facility." At the same time, the Commission's staff recommended approval of the intended church use, subject to certain conditions.

The Commission denied, without prejudice, MCA's application "for a use permit for a church, school, pre-school and day-care facility."

MCA appealed the Commission's decision to the city council. On November 16, 1993, following a public hearing on MCA's appeal, the city council voted, 4 to 3, to overrule the Commission and approve MCA's application.

LSI, a semiconductor manufacturer operating at nearby Alfred Street, directly across from 3003 Scott Boulevard (a corner

property bounded by Scott Boulevard and Alfred Street), Sobrato Development Companies (hereafter, Sobrato), which owns the buildings leased to LSI, and Brambles California, Inc. (hereafter, Brambles), which handles and disposes of toxic and hazardous materials and which is located less than 2,000 feet from the proposed project, petitioned the superior court for a writ of mandate directing the city council to rescind and withdraw its approval of MCA's application for a conditional use permit. Brambles later filed a request for dismissal from the action, which the court granted with prejudice.

On February 17, 1994, the trial court orally delivered its statement of decision denying the writ petition. On March 18, 1994, the court filed its judgment.

LSI and Sobrato filed a notice of appeal. Sobrato subsequently requested this court to dismiss its appeal. We granted that request and dismissed Sobrato's appeal on August 17, 1994.

CONTENTION

LSI contends the trial court abused its discretion in denying its petition for a writ of mandate and discharging the alternative writ because the conditional use permit was issued by City in violation of California's Environmental Quality Act (hereafter, CEQA) and City's zoning ordinance.

STANDARD OF REVIEW

In CEQA cases where the issue is the necessity of an

environmental impact report (hereafter, EIR), the correct standard of review is as summarized by this court in Leonoff v. Monterey County Bd. of Supervisors (1990) 222 Cal.App.3d 1337, 1348-1349: "A public agency should not file a negative declaration for a project if it can be fairly argued that the project might have a significant environmental impact. [Citations.] Where the agency has filed a negative declaration while granting a use permit, the concern of judicial review, by both trial and appellate courts, is whether there is substantial evidence in the record supporting a fair argument of significant environmental impact. If such evidence is found, it cannot be overcome by substantial evidence to the contrary. [Citations.] [¶] [] However, it remains the appellant's burden to demonstrate by citation to the record the existence of substantial evidence supporting a fair argument of significant environmental impact. [Citation.]"

In Stanislaus Audobon Society, Inc. v. County of Stanislaus (1995) 33 Cal.App.4th 144, 151, the Fifth Appellate District applied the same standard of review, adding: "Application of this standard is a question of law and deference to the agency's determination is not appropriate. Rather, we independently 'review the record and determine whether there is substantial evidence in support of a fair argument [the proposed project] may have a significant environmental impact, while giving [the lead agency] the benefit of a doubt on any legitimate, disputed issues of credibility.' [Citations.] An agency's 'decision not to require an EIR can be upheld only when there is no credible

evidence to the contrary.' [Citation.] The appellate court conducts a de novo review of the record. '[T]he trial court's findings are not dispositive.' [Citation.]"

Most recently, in Gentry v. City of Murrieta (July 18, 1995) ___ Cal.App.4th ___ [95 CDOS 5612, 5621], the court, agreeing with our analysis in Leonoff, concluded that under the fair argument test "the agency must prepare an EIR whenever substantial evidence in the record supports a fair argument that a proposed project may have a significant effect on the environment. [Citations.] 'If such evidence is found, it cannot be overcome by substantial evidence to the contrary.' [Citations.]"

"Substantial evidence" is evidence that is of "'ponderable legal significance . . . reasonable in nature, credible, and of solid value.' [Citation.]" (Lucas Valley Homeowners Assn. v. County of Marin (1991) 233 Cal.App.3d 130, 142.) In the CEQA context, "substantial evidence" is "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made is to be determined by examining the entire record. Mere uncorroborated opinion or rumor does not constitute substantial evidence." (Cal. Code Regs., tit. 14, § 15384, subd. (a).)

A "[s]ignificant effect on the environment," on the other hand, "means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora,

fauna, ambient noise, and objects of historic or aesthetic significance. An economic or social change by itself shall not be considered a significant effect on the environment. A social or economic change related to a physical change may be considered in determining whether the physical change is significant." (Cal. Code Regs., tit. 14, § 15382; see also Oro Fino Gold Mining Corp. v. County of El Dorado (1990) 225 Cal.App.3d 872, 881.)

With the foregoing standard of review in mind, we now address the question whether in this case the record supports a fair argument of significant environmental impact.

DISCUSSION

The record discloses that on October 4, 1993, Dr. Dave Parker, hazardous materials administrator for the fire department, had written the planning department expressing environmental concerns over MCA's proposed project. Because of the critical importance Parker's letter bears on the issue of environmental impact, we quote that letter extensively: "The subject facility is in a developed industrial area where hazardous materials are stored, handled and used. The proximity of businesses using hazardous materials poses a potential health and safety threat to the sensitive populations of both school and assembly uses in this building. The potential for off-site consequences from chemical spills and toxic gas releases is high because there are more than a dozen facilities in the immediate area with a history of hazardous materials releases. In addition, the area contains vacant land and buildings suitable

for hazardous materials uses. [¶] In addition to the nearby facilities posing a health and safety threat to the school and day care, the school and day care would impose a financial burden on nearby hazardous materials facilities. Any existing or new business within 1,000 feet of the proposed school facility will be required to develop and implement a Risk Management and Prevention Plan if they are using hazardous production materials. . . . [¶] A Risk Management and Prevention Program or 'RMPP' includes all the administrative and operational programs of a business which are designed to prevent hazardous materials accident risks (for example, design safety of new and existing equipment, operational procedures, training, emergency response planning, and all other related procedures.) The RMPP process involves (1) conducting a risk assessment, (2) preparing a plan based on the risk assessment, and (3) implementing the plan. In preparing this plan to reduce the risk to the community, the law requires special consideration be given to the proximity of the facility to schools, residential area, hospitals, health care facilities and child day care facilities. [¶] Thus, a facility which has hazardous materials and is located near a sensitive population would have to build and operate to a higher level of safety than otherwise would be the case. The additional costs associated with locating a facility near a sensitive population would vary with the nature of the hazardous materials involved, the size of the facility, how the materials are used, etc. The estimated costs of preparing a RMPP are in the range of a few thousand to the tens of thousands of dollars. The business must

update the RMPP every 3 to 5 years. The cost to implement the plan could be several times the cost of preparing the plan. In addition, there are additional on-going costs to maintain the safety conditions addressed in the plan, training employees, equipment maintenance, means of evacuation, etc. Moving a sensitive population into a hazardous materials zoned area increases the costs of doing business, decreases the desirability of locating there, and thus may result in de facto rezoning of the area. [¶] The Fire Department has responded to 36 hazardous materials incidents within a 1,000-foot radius of this site since 1984."

The same concerns had earlier been expressed by the fire department in a handwritten note to the Committee when that committee requested the fire department to comment on MCA's proposed project.

On October 13, 1993, the Planning Commission noted in its minutes that the concern over MCA's proposed project "related to the safety of children in an industrial zone where a variety of industrial processes occur with the presence, in many cases, or future likelihood of hazardous materials." The Commission pointed to "various businesses in the area with large storage facilities of hazardous/toxic materials and other flammables," and advised that "[u]nder State law, businesses which use hazardous materials and pose critical risks, can be required to prepare Risk Management and Prevention Programs." The Commission concluded that "[a]pproval of this school request could result in

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higher planning and implementation costs for some nearby businesses."

The Planning Commission's October 13, 1993, minutes also reflect that the Commission's staff, while recommending conditional approval of MCA's use permit application for a church, recommended unconditional denial, without prejudice, of MCA's use permit application for a school, pre-school, and day-care facility because "the proposed use will have an impact on surrounding properties and businesses as the consideration of industrial activities normally permitted in the area may be affected by the existence of a school and day-care facilities."

The same minutes likewise showed that Parker had told the commission that "if there were a hazardous materials incident, a dosage that an adult might be able to handle would affect a child differently, simply because children are smaller."

In light of the evidence of significant environmental impact that was before the Planning Commission, the Commission found, by a 4 to 1 vote, that MCA's proposed project would have an adverse environmental impact on the surrounding properties. The Commission therefore directed MCA to seek a more suitable location for its intended project.

MCA appealed the Commission's determination to the city council, which conducted a public hearing on November 16, 1993. One of the persons to speak at the public hearing was Fire Department Chief Gerald Simon. Simon advised the council that the site of the proposed project "is a particularly difficult location because of the amounts of hazardous materials that are

adjacent to that facility," and, additionally, the location is "a major transportation route for hazardous materials." Simon informed the council that "[w]e did have a major propane tank incident on Highway 101, which would have been directly adjacent to this particular site," and that "in the six, seven, and eight year timeframe, we've had three very, very major types of incidents that have occurred within 1,000 feet of this particular facility."

Simon continued: "The other part that's difficult from a hazard mitigation strategy is if we did have a significant release of hazardous material, particularly in this area, we would have to commit a second alarm response assignment directly to dealing with mitigation strategies. [¶] If we were to then have to address the concerns of the school site, the preschool, particularly with a non-mobile population, we would have to then devote a third alarm and possibly a fourth alarm assignment to just that particular locale. When we do that, we cut the resources in the City of Santa Clara down to three available units to respond to every other incident throughout the City. [¶] [] The other thing that we have a concern about is that the businesses in the area would then have to engage in a Risk Management Prevention Plan if we allowed a special Use in this particular area. They would then have to identify how they would begin to deal with the planning, implementation, and strategy for dealing with any kind of a release, which puts an additional burden on our business community and additional liability for them in terms of our planning."

Following the public hearing, the city council voted to overrule the planning commission by the narrowest of margins: 4 to 3.

On this record, we are persuaded there is substantial evidence to support a fair argument of significant environmental impact.

No Proper Mitigation of Significant Environmental Impact

MCA contends any significant environmental impact was properly alleviated through the mitigated negative declaration process followed by City. We disagree.

In 1993, Public Resources Code section 21080, subdivision (c),[1] provided: "If a lead agency determines that a proposed project, not otherwise exempt from this division, does not have a significant effect on the environment, the lead agency shall adopt a negative declaration to that effect. The negative declaration shall be prepared for the proposed project in either of the following circumstances: [¶] (1) There is no substantial evidence before the agency that the project may have a significant effect on the environment. [¶] (2) An initial study identifies potentially significant effects on the environment, but (i) revisions in the project plans or proposals made by or agreed to by the applicant before the proposed negative declaration is released for public review would avoid the effects

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1 Further statutory references are to the Public Resources Code unless otherwise indicated.

or mitigate the effects to a point where clearly no significant effects on the environment would occur, and (ii) there is no substantial evidence before the agency that the project, as revised, may have a significant effect on the environment." (See Stats. 1985, ch. 392, § 2.)[2]

In this case, the minutes of the Committee reveal that at the time of the preparation of those minutes (Sept. 13, 1993), an initial study was being prepared and the Committee had expected a negative declaration to be filed.

At the conclusion of the initial study on September 17, 1993, senior planner Kevin L. Riley determined that "although the proposed project COULD HAVE a significant effect on the environment, there will not be a significant effect in this case because the MITIGATION MEASURES required by the conditions of approval have been added to the project. A negative declaration will be prepared."

Among the potential significant environmental impacts that the initial study identified were: (1) the proposed project would result in a substantial alteration of the present land use of the area because "school activity and the presence of children on a regular basis may limit the ability of surrounding industrial properties to exercise full rights as permitted by zoning regulations"; and (2) the proposed project would create health

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[2] Section 21080 was amended by Statutes 1993, chapter 1130, effective January 1, 1994. The amendment does not apply here because all administrative proceedings in this case occurred in 1993.

hazards or expose people to potential health hazards because "[s]urrounding industrial activities may include processes as well as storage of hazardous materials which could present concerns of exposure of children in the facility." The initial report also noted that if the project is approved, "State law mandates that surrounding industrial facilities file certain reports and prepare emergency plans related to potential industrial disasters."

On January 11, 1994, the city council approved the agenda report of the director of planning and inspection which recommended adoption of the negative declaration and a finding that the issuance of the conditional use permit would have "no significant impact on the environment." The recommendation "to approve the use permit for church, school, and daycare use" was made "subject to the conditions of approval contained in the staff report for the Planning Commission meeting of October 13, 1993."

However, the October 13, 1993, staff report adverted to in the agenda report had specifically and unconditionally recommended denial of MCA's request to establish a school, pre-school, and day-care facility at the 3003 Scott Boulevard site. The only part of MCA's application that the staff report had recommended for approval was the request to establish a church, and then only when the conditions therein specified were met.

Therefore, the compliance by MCA of the conditions set forth in the October 13, 1993, staff report would only mitigate the impact on the environment that the establishment of a church

would create, but not the adverse impact on the environment that the establishment of a school, pre-school, and day-care facility would produce.

Granting arguendo that the mitigation conditions enumerated in the October 13, 1993, staff report were also intended to cover the establishment of the school and day-care facilities, a review of those conditions shows their inadequacy to mitigate the environmental concerns of the fire department. The conditions specified in the October 13, 1993, staff report related only to obtaining appropriate clearances and payment of fees; construction of driveways and sidewalks; restrictions on visual obstructions; requiring a private system of on-site water hydrants and water distribution facilities; installation of required landscaping, irrigation, and sewer facilities; compliance with standard requirements for the issuance of building permits; construction of fire apparatus access roads; installation of sprinkler and fire alarm systems; and compliance with other building code requirements.

Clearly, none of those conditions directly, specifically, and adequately addressed the serious environmental concerns of the fire department, such as the exposure of the building occupants to hazardous materials, the impairment of City's ability to deliver emergency services, or the significant additional burdens that would be imposed on neighboring industrial facilities.

We conclude that despite the mitigation conditions prescribed in the October 13, 1993, staff report, there remains

in the record substantial evidence supporting a fair argument of significant environmental impact.

Violation of Zoning Ordinance

Our finding of substantial evidence supporting a fair argument of significant environmental impact disposes of this appeal. Consequently, we need not reach the issue of whether City also violated its zoning ordinance.

DISPOSITION

The judgment denying LSI's petition for a peremptory writ of mandate is reversed. The cause is remanded to the superior court with direction to issue a writ of mandate directing City to vacate its approval of the challenged conditional use permit pending certification of a legally sufficient EIR. LSI is awarded costs on appeal as the prevailing party herein, such costs to be apportioned equally between City and MCA.

Premo, J.

WE CONCUR:

Cottle, P.J.

Elia, J.

LSI LOGIC CORPORATION v. CITY OF SANTA CLARA (MUSLIM COMMUNITY ASSOCIATION)
No. H012427

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CLARA

LSI LOGIC CORPORATION, SOBRATO DEVELOPMENT COMPANIES, and BRAMBLES CALIFORNIA, INC., Petitioners, v. THE CITY OF SANTA CLARA, Respondent. --- MUSLIM COMMUNITY ASSOCIATION, Real Party in Interest. ---	CASE NO. CV736936 **PEREMPTORY WRIT OF MANDATE** [C.C.P. § 1087]

TO: CITY OF SANTA CLARA, DEFENDANT AND RESPONDENT; AND THE MUSLIM COMMUNITY ASSOCIATION, REAL PARTY IN INTEREST:

WHEREAS, Petitioner served and filed herein its duly verified Petition for Writ of Mandate on December 15, 1993, and a hearing was held herein on January 31, 1994;

WHEREAS, the Superior Court of the State of California, County of Santa Clara, issued and filed a Judgment denying a Peremptory Writ of Mandate on March 18, 1994;

WHEREAS, Notice of Entry of Judgment was filed and served subsequent thereto;

WHEREAS, Petitioners filed a Notice of Appeal in the Court of Appeal of the State of California, Sixth Appellate District, on April 1, 1994;

WHEREAS, on August 21, 1995, the Court of Appeal of the State of California, Sixth Appellate District issued its decision reversing the denial of the Petition for Peremptory Writ of Mandate with directions to the Superior Court to issue a writ of mandate directing THE CITY OF SANTA CLARA to vacate its approval of the challenged conditional use permit; and issued an Order modifying the Decision to correct a clerical error on August 25, 1995; (True and correct copies of the Decision and Modification are attached hereto as Exhibits A and B, respectively);

WHEREAS, it appears to this Court that you have failed to perform your legal duty and failed to appropriately exercise your discretion by approving a conditional use permit at the request of the MUSLIM COMMUNITY ASSOCIATION to operate a day care, pre-school, elementary and secondary school, and a church at 3003 Scott Boulevard, City of Santa Clara, County of Santa Clara, State of California;

WHEREAS, it appears that you have further failed to perform your legal duty and failed to exercise your discretion by refusing Petitioners' request to reconsider your approval of the conditional use permit;

THEREFORE, you, THE CITY OF SANTA CLARA, are hereby commanded, immediately after receipt of this Writ to comply with the Judgment of the Court of Appeal of the State of California, Sixth Appellate District, and to perform the following acts:

1. To vacate your approval of the challenged conditional use permit for 3003 Scott Boulevard; and

2. To thereafter deny the subject application for use of the property as a day care, pre-school, elementary and secondary school, and church.

You are further commanded to make and file a return to this Writ within five days from the date a copy of this Writ is served on you showing that you have complied with this Writ.

DATED: 1-11-96

JUDGE OF THE SUPERIOR COURT
NANCY HOFFMAN

DATED: JAN 11 1996

MARGARET TAUTOLO
Clerk of the Superior Court

SUPERIOR COURT COUNTY OF SANTA CLARA, CA

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CLARA

LSI LOGIC CORPORATION, SOBRATO DEVELOPMENT COMPANIES, and BRAMBLES CALIFORNIA, INC., Petitioners, v. THE CITY OF SANTA CLARA, Respondent.	CASE NO. CV736936
MUSLIM COMMUNITY ASSOCIATION, Real Party in Interest.	AMENDED PEREMPTORY WRIT OF MANDATE [C.C.P. § 1087]

TO: CITY OF SANTA CLARA, DEFENDANT AND RESPONDENT; AND THE MUSLIM COMMUNITY ASSOCIATION, REAL PARTY IN INTEREST:

WHEREAS, Petitioner served and filed herein its duly verified Petition for Writ of Mandate on December 15, 1993, and a hearing was held herein on January 31, 1994;

WHEREAS, the Superior Court of the State of California, County of Santa Clara, issued and filed a Judgment denying a Peremptory Writ of Mandate on March 18, 1994;

WHEREAS, Notice of Entry of Judgment was filed and served subsequent thereto;

WHEREAS, Petitioners filed a Notice of Appeal in the Court of Appeal of the State of California, Sixth Appellate District, on April 1, 1994;

WHEREAS, on August 21, 1995, the Court of Appeal of the State of California, Sixth Appellate District issued its decision reversing the denial of the Petition for Peremptory Writ of Mandate with directions to the Superior Court to issue a writ of mandate directing THE CITY OF SANTA CLARA to vacate its approval of the challenged conditional use permit; and issued an Order modifying the Decision to correct a clerical error on August 25, 1995; (True and correct copies of the Decision and Modification are attached hereto as Exhibits A and B, respectively);

WHEREAS, it appears to this Court that you have failed to perform your legal duty and failed to appropriately exercise your discretion by approving a conditional use permit at the request of the MUSLIM COMMUNITY ASSOCIATION to operate a day care, pre-school, elementary and secondary school, and a church at 3003 Scott Boulevard, City of Santa Clara, County of Santa Clara, State of California;

WHEREAS, it appears that you have further failed to perform your legal duty and failed to exercise your discretion by refusing Petitioners' request to reconsider your approval of the conditional use permit;

THEREFORE, you, THE CITY OF SANTA CLARA, are hereby commanded, immediately after receipt of this Writ to comply with the Judgment of the Court of Appeal of the State of California, Sixth Appellate District, and to perform the following acts:

1. To vacate your approval of the challenged conditional use permit pending certification of a legally sufficient EIR.

You are further commanded to make and file a return to this Writ within twelve days from the date a copy of this Writ is served on you showing that you have complied with this Writ.

DATED:

JUDGE OF THE SUPERIOR COURT
NANCY HOFFMAN

DATED: JAN 1 2 1996

MARGARET TAUTOLO M. Tautolo
Clerk of the Superior Court

STEPHEN V. LOVE
County Clerk

SUPERIOR COURT COUNTY OF SANTA CLARA, CA

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FILED CMS

JUL 30 9 26 AM '96

STEPHEN V. LOVE
COUNTY CLERK
SANTA CLARA COUNTY
BY _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

LSI LOGIC CORPORATION, Petitioner, v. THE CITY OF SANTA CLARA, Respondent. MUSLIM COMMUNITY ASSOCIATION, Real Party in Interest.	Case No.: CV736936 **ORDER TO SHOW CAUSE RE FAILURE TO OBEY PREEMPTORY WRIT OF MANDATE (C.C.P. § 1097)**

TO THE CITY OF SANTA CLARA, RESPONDENT, AND THE MUSLIM COMMUNITY ASSOCIATION, REAL PARTY IN INTEREST:

YOU ARE HEREBY ORDERED to appear before this court in Department 13 on August 16, 1996, at 9:00 a.m., then and there to show cause, if any you have, why you should not be sanctioned for wilfully disobeying the preemptory writ of mandate on file in this proceeding that issued from this court on January 12, 1996, which writ and your disobedience thereof are more fully described in the Application for Ex Parte Order to Show Cause.

This Order shall be served on you by delivering a copy thereof attached to a copy of the Application for Ex Parte Order to Show Cause, at least 5 days prior to the date of the hearing.

Dated: 7/30/96

Honorable READ AMBLER
Judge of the Superior Court

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IN AND FOR THE COUNTY OF SANTA CLARA

LSI LOGIC CORPORATION, Petitioner, v. THE CITY OF SANTA CLARA, Respondent. MUSLIM COMMUNITY ASSOCIATION, Real Party in Interest.	Case No.: CV736936 **APPLICATION FOR EX PARTE ORDER TO SHOW CAUSE AND DECLARATION OF JEFFREY S. LAWSON (C.C.P. § 1097)** **DATE: July 30, 1996** **TIME: 8:30 a.m.** **DEPT: 13** **Hon. Read Ambler**

In support of Petitioner LSI Logic Corporation's ("LSI Logic") application under C.C.P. § 1097 for an order to show cause why the court should not impose penalties for refusal to obey a preemptory mandate, the undersigned Jeffrey S. Lawson, attorney for LSI Logic, declares:

1. I am an attorney for Petitioner LSI Logic.

2. On January 12, 1996, an Amended Preemptory Writ of Mandate was issued to the City of Santa Clara ("Council") and the Muslim Community Association ("MCA"), Real Party in

Interest, commanding the Council to vacate its approval of the challenged conditional use permit pending certification of a legally sufficient Environmental Impact Report.

3. The writ was issued because the Council had improperly, and over the objection of the Santa Clara Fire Department and a denial by the City's Planning staff, granted a school, preschool, daycare center and church a conditional use permit in an industrial zone. This placed the children using this facility in the immediate vicinity of a LSI Logic manufacturing facility which uses toxic gases, and ships and receives hazardous materials.

4. Despite the clarity of the court's order, the Council failed to comply with the court order and, instead, in its Return to Preemptory Writ of Mandate, submitted "findings" attempting to justify a six-month delay in compliance.

> A. This enforcement period is consistent with the normal enforcement process used by the City in similar matters involving unpermitted uses;
>
> B. It will allow the children to complete their school year and will avoid undue hardship on them;
>
> C. The six (6) month period will allow the completion of the environmental impact report (EIR), the period for public comment and for public hearing; and,
>
> D. The six (6) month period will allow the Muslim Community Association to observe the holy month of Ramadan. (Respondent's Return of Preemptory Writ of Mandate, 2:14-25.)

4. On January 25, 1996, LSI Logic objected to the City of Santa Clara's failure to vacate the conditional use permit, by pointing out that the Council's action defied the court's order by granting the MCA a six-month extension on their conditional use permit. Nevertheless, in the interest of not causing an

undue burden to the MCA, LSI Logic did not request a C.C.P. § 1097 order for enforcement by the court at that time.

5. In regard to the Council's Findings B and D, the six-month extension expired on January 24, 1996. The holy month of Ramadan has passed, it is summer and the children are out of school, and now is the least burdensome time for the MCA to move.

6. The Santa Clara County Superior Court's order and the District Court of Appeals' direction required vacation of the conditional use permit during the pendency of the EIR process--not a continuation of MCA's occupancy during the EIR process. The Council's Finding C turns the writ on its head and takes exactly the opposite course than the court ordered.

7. The Council's Finding A is simply a "make-weight" argument attempting to justify noncompliance with the court's order. Even assuming arguendo that the Council normally waits six months before enforcing against unpermitted uses, this is not a "normal" case. This is a case where the Council is under an unambiguous court order to vacate the conditional use permit.

8. LSI Logic's goal throughout this proceeding has been to enforce the zoning standards to avoid being forced into a situation where its legal operations in an industrial area are made more expensive by the proximity of a school, preschool, and daycare center and to avoid putting the MCA's children at risk. It was to avoid any undue burden on the MCA that LSI Logic simply filed its objection to the original Return to Preemptory Writ of Mandate but did not force the issue.

9. Now, however, the Council has filed an Amended Return

to Preemptory Writ of Mandate which indefinitely extends to the MCA permission to remain on the site and will allow the children to return to the school.

10. The EIR, which is controlled by the City, has already been substantially delayed. It was expected to be in the public review process by now, but instead, probably will not be completed until late fall.

11. The Council's action again places the children at risk of personal injury, and places additional costs upon LSI Logic in its manufacturing operations.

12. The Council has attempted to justify its continuing defiance of the court's order with four new findings:

> A. This additional enforcement period is consistent with the normal enforcement process used by the City in similar matters involving unpermitted uses;
>
> B. This additional period will allow completion of the environmental impact report (EIR), the period for public comment and for public hearing;
>
> C. The extended enforcement period will allow MCA to prepare a contingency plan for moving the school, mosque and daycare facility in the event the use permit is not granted after completion of the EIR; and,
>
> D. Not extending this enforcement period will cause a significant impact to MCA. (Respondent's Amended Return to Preemptory Writ of Mandate 3:26-4:10.)

13. Findings A and B are the same as before and carry even less credibility now. Finding C is an admission on the part of the MCA that they did not agree in good faith to the initial extension. If they had, they should be ready to move now. Finding D does not say anything other than they do not find the court order convenient.

14. The MCA asked for an additional six months at the time

of the court's writ in January 1996 in order to finish the school year. Now that summer is here and the time to move is upon the MCA, the Council is allowing the MCA to breach that understanding and is allowing them to stay in place and start another school year.

15. Once the school year starts, we will hear again that the MCA cannot move because it would disrupt the children's education. This cannot be allowed to go on endlessly. Now is the time for the MCA to move. That was the original understanding and LSI Logic has been more than patient.

16. There is no reasonable expectation that without further action of this court the Council will ever comply with the court's existing order. This matter needs to be resolved now, during the summer months while the children are out of school.

17. California Code of Civil Procedure § 1097 provides:

> When a preemptory mandate has been issued and directed to any inferior tribunal, corporation, board, or person, if it appears to the court that any member of such tribunal, corporation, or board, or such other person upon whom the writ has been personally served has without just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding $1,000. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ. (Emphasis added.)

18. An order to show cause is the appropriate method of seeking enforcement pursuant to section 1097. Carroll v. Civil Service Commission (1970) 11 Cal.App.3d 727, 730-731; 90 Cal.Rptr. 128. The extengency of resolving this matter quickly so that the MCA can find alternative facilities to conduct its

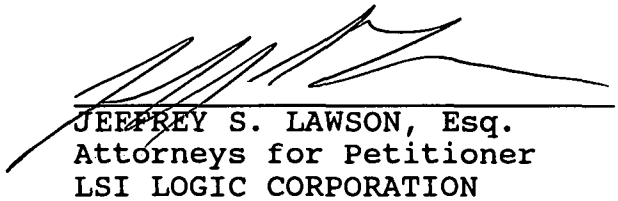
school and daycare activities outside the industrial zone before school starts require prompt action.

19. I have notified Julia Mandeville, attorney for The City of Santa Clara, and Stephen Gerrish, attorney for the Muslim Community Association, that this application would be made to this court at this time.

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

Dated: July 29, 1996

REED, ELLIOTT, CREECH & ROTH



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