COPY
Cal Ct of Appeal
1st Appellate Dist

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT.

DIVISION THREE

FILED

JUL - 5 2000

Court of Appeal - First App. Dist.
RON D. BARROW
By _____ DEPUTY

ALI SHIRAZIAN,

Plaintiff and Appellant,

v.

CITY OF OAKLAND,

Defendant and Respondent.

A083116

(Alameda County
Super. Ct. No. 7859975)

Ali Shirazian appeals the denial of his petition for writ of administrative mandamus in which he sought review of the decision of the City of Oakland (City) placing conditions on his existing zoning variance to operate a gas station in a residential neighborhood. Shirazian challenges the conditions placed on the variance requiring the abatement of gasoline contamination both on and off his property before he would be permitted to open and operate the gas station. Shirazian contends that to the extent the variance condition requires remediation of contamination be completed before he can open or operate his station, the condition exceeds the City's jurisdiction and is without legal authority. He further contends no substantial evidence supports the City's findings that a public nuisance existed on his property and that reopening his gas station before full remediation of the contamination could hinder the remediation. We conclude substantial evidence supports the City's findings, and that the City had the power to determine that a nuisance existed and to abate the nuisance. However, we strike the condition requiring that Shirazian remediate all *off-site* contamination on the grounds that the findings do not support this condition and it is unreasonable.

Post-it® Fax Note 7671	Date 11/8/00	# of pages ▶
To Tom Peacock	From Mark Wald	
Co./Dept.	Co. OCA	
Phone # 567-6782	Phone # 238-3540	
Fax # 337-9335	Fax # 238-6500	

I

BACKGROUND

In 1965, the city council granted a "major variance" to Shirazian's predecessor in title for the operation of a gas station in a residential neighborhood, apparently under the authority of Government Code section 65906. After the Loma Prieta earthquake in 1989, the station closed. Shortly thereafter, it was discovered that gasoline had leaked from the station's underground storage tanks into the residential properties downgrade of the station. Shirazian bought the property in 1996 from Desert Petroleum Corporation (Desert Petroleum), intending to reopen the gas station. As part of the purchase agreement, Desert Petroleum agreed to perform any remediation of the gasoline contamination that was required by Alameda County. Shirazian applied to the City to reopen the station, and for a determination that proposed design changes complied with the variance as issued in 1965. He proposed to reduce the number of on-site gas pumps from four to two, and change from a full-service to a self-service station. The city planning director approved the changes, but neighbors of the proposed gas station, including the Glenview Neighborhood Association (GNA), appealed the decision to the city planning commission.

On its own motion the planning commission notified the parties that in addition to the proposed variance changes it would review compliance with its zoning regulations, consider adding conditions of approval, determine whether a public nuisance existed, and consider revocation of the 1965 variance for the service station. On the original point before it, the planning commission affirmed the planning director's determination that the proposed changes to the station would be consistent with the 1965 variance if certain design changes and operating conditions were placed on the station.

As to the new matters before the planning commission, the evidence established that the release of gasoline from the station in 1989 resulted in contamination of residential properties downgrade from the station, and this off-site contamination had not been fully remedied. Evidence was presented regarding Desert Petroleum, which owned the property at the time the gasoline was discharged and was responsible for the off-site

remediation. It was established that as of the time of the hearing, Desert Petroleum had investigated the extent of contamination on the residential properties by drilling soil test holes, and had done some remediation, such as removing soil on-site, performing vapor extraction, and installing groundwater monitoring wells both on-site and on the contaminated residential properties. Extensive testimony established that the contamination of soil and groundwater on and under the residential properties was serious and potentially detrimental to the health of residents, and had adversely affected the values of the contaminated and uncontaminated residential properties near the station. At the time of the hearing, the remediation efforts focused on the contamination that had seeped into nearby residential properties; the exact extent of the off-site contamination was unknown, nor was how long it would take to complete remediation known. The county's supervising hazardous materials specialist, Thomas Peacock, characterized the contaminated off-site property as "one of our most important sites[,] . . . in the top 10" because "[i]t has free product and [is] under [a] residential neighborhood."

The property owners had removed the old underground storage tanks and 1,100 cubic yards of contaminated soil from the gas station site. The county's hazardous waste expert (Peacock) testified that "there is no further soil removal needed on the property." However, when asked if he anticipated that "additional remediation" would be required, he responded: "There's one corner of the site which still has too much contamination. It's right at the beginning of that slope down the sewer . . . ."

Peacock, responding to a question concerning whether reopening the station would have any impact on remediation efforts on-site, replied, "It does have an impact. We have a number of stations in this county that are doing both functions at the same time. Administratively, it's a little cumbersome, because we have to have two people that have different functions kind of work together . . . . [¶] . . . [¶] . . . There's an operating gas station, Grand and Telegraph, and it has an extensive groundwater remediation system installed . . . and one of the cumbersome things is that we have one operator for the station and it's a separate oil company that's doing the remediation on that site. [¶] . . . [¶] It's awkward for us to deal with this. It's not like one person is looking at everything,

and we have to work together, but we know how to do that because we have to do it in a lot of different sites. Also . . . the location of the tanks and other appurtenances in a gas station can affect what type of remediation can be done, what kind of work can be done." Another hazardous materials specialist opined in a report that if the gas station were reopened before full remediation was completed and the new storage tanks subsequently leaked gasoline, it "would likely be difficult to differentiate between the previous release [and the new release], thus complicating the issues of liability/responsible parties and cleanup."

From the evidence presented at the hearing, the planning commission made two factual findings relevant to this appeal: that off- and on-site remediation was not complete, and that reopening the station before the completion of *all* remediation *could* complicate on-site remediation efforts. It also reached two relevant legal conclusions: that the existing off- and on-site contamination constituted a "public nuisance" pursuant to sections 2002 and 9902 of the City's zoning regulations, and that there existed a "compelling public necessity" to have all *off- and on-site* remediation completed before any work to reopen the station could begin.

Based upon these findings and conclusions the planning commission imposed "conditions of approval to the original 1965 Major Variance." It required that all remediation work, both *off- and on-site*, be completed to the City's satisfaction before commencement of any work to reopen the station and before the issuance of any building permits. Shirazian appealed the planning commission's decision to the city council, which agreed with the planning commission and adopted its findings, decisions, and imposition of conditions as its own.

Shirazian filed a petition for writ of administrative mandate in the superior court pursuant to Code of Civil Procedure section 1094.5. The trial court, after examining the administrative record, found that on-site and off-site contamination had created a public nuisance constituting a compelling necessity for the City to abate the nuisance, and that the requirement the contamination be remedied before any work could commence to reopen the station was reasonably related to abating the public nuisance. The trial court

found the administrative record supported the City's findings and determinations under either the independent judgment or the substantial evidence standards of review. (See Code Civ. Proc., § 1094.5, subd. (c).) This appeal followed.

II

STANDARD OF REVIEW

Review of adjudicative action under administrative mandamus (Code Civ. Proc., § 1094.5) requires a determination of "whether substantial evidence supports the . . . agency's findings *and* whether the findings support the agency's decision." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514-515, italics added (*Topanga Assn.*); *Joint Council of Interns & Residents v. Board of Supervisors* (1989) 210 Cal.App.3d 1202, 1209; *Dore v. County of Ventura* (1994) 23 Cal.App.4th 320, 327 (*Dore*).)

The second step in the analysis involves an abuse of discretion standard, rather than a substantial evidence standard. "Unlike the substantial evidence rule, which measures the quantum of proof adduced in the proceedings below, the abuse of discretion standard measures whether, given the established evidence, the lower court's action 'falls within the permissible range of options set by the legal criteria.' (*Dorman v. DWLC Corp.* (1995) 35 Cal.App.4th 1808, 1815.)" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 1999) ¶ 8:88, p. 8-33.)

However, like the substantial evidence test, the test for abuse of discretion sets a deferential standard for appellate review. "Because the administrative agency has technical expertise to aid it in arriving at its decision [in land use cases], we should not interfere with the discretionary judgments made by the agency. [Citations.] Accordingly, '. . . the reviewing court must resolve reasonable doubts in favor of the administrative findings *and decision*.' ([*Topanga Assn., supra*, 11 Cal.3d at p. 514].) Our role is to consider whether the administrative agency committed a prejudicial abuse of discretion by examining whether the findings support the agency's decision and whether substantial evidence supports the findings . . . ." (*Dore, supra*, 23 Cal.App.4th at pp. 326-327, italics added.)

III

DISCUSSION

A. Substantial Evidence Supports the Critical Findings.

The City made two critical findings to support its decision to require Shirazian to abate the gasoline contamination both on- and off-site before he could begin work to reopen the station. First, the City found there is a current *on-site* public nuisance because there is still some gasoline contamination on the site; and second, reopening the station before remediation "could complicate" the remediation efforts. In the administrative mandamus proceeding below (Code Civ. Proc., § 1094.5), the trial court specifically found that substantial evidence supports these findings. Although not overwhelming, we agree the evidence is sufficient to support the City's (and the trial court's) findings.

Regardless of whether the trial court applied the "substantial evidence" test or "independent review" test in the administrative mandamus proceeding below, on appeal the only issue is whether substantial evidence supports the trial court's decision. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 824; *Mann v. Department of Motor Vehicles* (1999) 76 Cal.App.4th 312, 320; *Deegan v. City of Mountain View* (1999) 72 Cal.App.4th 37, 45; *Gromis v. Medical Board* (1992) 8 Cal.App.4th 589, 592.) Thus, we have no power to reweigh the evidence or to judge its credibility. (*Estate of Ivy* (1994) 22 Cal.App.4th 873, 881; compare *Deegan*, *supra*, 72 Cal.App.4th at p. 45 [when trial court reviews evidence under independent judgment rule it resolves evidentiary conflicts and is required to assess witnesses' credibility and to arrive at its own independent findings of fact].)

The evidence of one credible witness may constitute substantial evidence. (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1052.) Significantly, "[W]e must resolve all evidentiary conflicts and draw all legitimate and reasonable inferences in favor of the trial court's decision. [Citations.] Where the evidence supports more than one inference, we may not substitute our deductions for the trial court's. [Citation.]" (*Yordamlis v. Zolin* (1992) 11 Cal.App.4th 655, 659 (*Yordamlis*); *Lake v. Reed* (1997) 16 Cal.4th 448, 457.)

These rules of appellate review apply even where the evidence in the administrative record is undisputed. If the undisputed evidence is "subject to conflicting inferences with respect to the crucial issue" then the reasonable inferences the trial court draws are binding on the reviewing court. (*Interstate Brands v. Unemployment Ins. Appeals Bd.* (1980) 26 Cal.3d 770, 774, fn. 2; *Yordamlis, supra,* 11 Cal.App.4th at p. 659.)

1) The On-site Nuisance Finding

Shirazian first contends there is insufficient evidence to support the City's (and the trial court's) finding that there is currently an "on-site" nuisance.[1] In making this argument, Shirazian necessarily rejects the reasonable inferences the City and trial court drew from the undisputed evidence.

As we have stated, the property owners had removed the old underground storage tanks and 1,100 cubic yards of contaminated soil from the site. The county's hazardous waste expert (Peacock) testified that "there is no further soil removal needed on the property."

However, when asked if he anticipated that "additional remediation" would be required, he responded: "There's one corner of the site which still has too much contamination. It's right at the beginning of that slope down the sewer . . . ." The location of the contamination is significant, because Peacock had earlier testified that the on-site contamination "followed a sewer line through residential property which then veered downhill following the sewer line as it went to the next street." He explained that "it's flowed pretty far because it's been going through a sewer trench[.] [W]hen they put in sewer lines, they usually backfill with gravel, so anything--rainwater, leaking sewage . . .--can go pretty far down that sewer trench."

Thus, the City and the trial court could have inferred that "too much" contamination on the site meant there was a danger the on-site contamination — which

---

1 We note that Shirazian raised this issue for the first time in his reply brief. Although we have discretion in these circumstances to ignore it, we choose to address the issue.

was located at the beginning of the "slope down the sewer" — could migrate to other properties through the sewer line if there were no further remediation.

If we give credence to these inferences (i.e., conclude they are reasonable) then there is sufficient evidence that the remaining contamination on the site created a public nuisance; that is, it is "injurious to health . . . so as to interfere with the comfortable enjoyment of life or property" and affects a "considerable number of persons." (Civ. Code, §§ 3479, 3480.)

We will not substitute our deductions for those of the trial court. (*Yordamlis, supra*, 11 Cal.App.4th at p. 659.) The trial court and City apparently deduced that, given the location of the on-site contamination and the general description of gasoline's health effects, Peacock's statement that there was "too much" contamination at one corner of the site was tantamount to an opinion that the remaining contamination presented a health and environmental risk to adjacent parcels.

In short, the City and trial court concluded that, in the context of all the evidence, "too much" means "enough to constitute a public nuisance." Looking at the totality of the evidence, this inference is reasonable. As a reviewing court, we are bound to accept the reasonable inference the City and the trial court reached, even if we may have reached a different conclusion.

2) <u>The Finding That Reopening Will Hinder Remediation</u>

The planning commission imposed the following additional conditions on the "major variance" for the service station: "(a) Subject to subsection (b) below, all on- and off-site toxic remediation work shall be completed to the satisfaction of the Alameda County Environmental Protection Services, prior to the commencement of any work for the reopening of the service station . . . . (b) That [this major variance] shall be reviewed 12-months from this determination . . . with regards to the progress and completion of the toxic remediation work (on- and off-site) and dependent upon the owner's compliance with these conditions and the state of the toxic remediation work, the Planning

Commission, at that time, may allow the reopening of the service station." The city council adopted and approved this condition following the administrative appeal.

In support of this condition, the planning commission stated there was evidence that "installation of the new underground storage tanks for reopening of the station *could* potentially negatively impact toxic remediation work and *could* make it difficult to identify future on-site toxic releases." (Italics added.) The planning commission specifically found that "Remediation on- and off-site is incomplete. The reopening of the service station prior to completion of remediation work *could complicate* remediation efforts on the site." (Italics added.) The city council adopted and approved this finding.

It is important to note the planning commission and city council did not find reopening the gas station "would" hinder remediation, but only that it "could" effect remediation. In our view, the evidence is clearly sufficient to support this specific factual finding (that it "could" effect remediation). (See text, *ante*, pp. 3-4.) However, whether this finding is sufficient to support the City's decision to delay opening until all "off-site" remediation is complete is another matter.

The evidence supports the conclusion that reopening the station "could" complicate remediation efforts on the site. The evidence also supports the City's more specific findings that "installation of the new underground storage tanks for reopening of the station could potentially negatively impact toxic remediation work and could make it difficult to identify future on-site toxic releases."

B. The City Had Power to Find and Abate a Public Nuisance As a Condition to Reopening the Station.

Shirazian next contends the City had no "jurisdiction" to make a determination that a public nuisance existed on his property, or to condition the reopening of the station on remediation of that nuisance. We disagree.

It is now well established that "Once a licensee has acquired a conditional use permit, or has 'deemed approved' [grandfathered] status, a municipality's power to revoke the conditional use is limited. [Citation.] If the permittee has incurred substantial expense and acted in reliance on the permit, the permittee has acquired a vested property

right in the permit and is entitled to the protections of due process before the permit may be revoked. [Citation.]" (*Korean American Legal Advocacy Foundation v. City of Los Angeles* (1994) 23 Cal.App.4th 376, 391-392, fn. 5 (*Korean American*).) However, " 'When a permittee has acquired such a vested right it may be revoked if the permittee fails to comply with reasonable terms or conditions expressed in the permit granted [citations] *or if there is a compelling public necessity*. [Citations.]' [Citation.] *A compelling public necessity warranting the revocation of a use permit for a lawful business may exist if the conduct of a business as a matter of fact constitutes a nuisance* and the permittee refuses to comply with reasonable conditions to abate the nuisance. *In these circumstances a municipality has the authority to remove such a business under its police power to prohibit and enjoin nuisances*. [Citation.] . . . ." (*Id.* at p. 392, fn. 5, italics added.) Moreover, "it is clear revocation of a use permit could have the effect of putting the licensee completely out of business. It is consequently a very harsh remedy which requires the strictest adherence to principles of due process. *Whenever alternate remedies can achieve the same goal, such as the imposition of additional conditions or controls, these avenues ought to be pursued if feasible*." (*Id.* at pp. 392-393, fn. 5, italics added; see also *Bauer v. City of San Diego* (1999) 75 Cal.App.4th 1281, 1294.)

Here, the City was apparently proceeding under its authority to revoke a "vested"[2] permit right on the ground that the conduct of the business had created a public nuisance. Contrary to Shirazian's argument, no specific grant of statutory authority is required[3] for a city to carry out this function because "a municipality has the authority to remove such

---

2 Although the point is subject to debate, we will assume, for the propose of argument, that Shirazian had a "vested" right in the 1965 zoning variance.

3 Even if such a specific statutory grant were required, we believe it has been made. The Civil Code provides that "A public nuisance may be abated by any public body or officer authorized thereto by law." (Civ. Code, § 3494.) Section 2002 of the City's zoning regulations states that "The general purposes of the zoning regulations are to protect and promote the public health, safety, comfort, convenience, prosperity, and general welfare and to achieve" several specified objectives. In our view, these provisions, taken together, indicate that it is within the City's (and the zoning commission's) police power to identify and abate a public nuisance.

a business *under its police power* to prohibit and enjoin nuisances." (*Korean American, supra*, 23 Cal.App.4th at p. 392, fn. 5, italics added.) Moreover, as the *Korean American* court recognized, the power to revoke implies that a municipality has power to place additional conditions on a vested variance in order to abate a nuisance.

Here, the City stopped short of imposing the "very harsh remedy" of revoking the prior zoning variance. Instead, as *Korean American* suggests, the City fashioned an "alternate remedy" by imposing "additional conditions" before the station could reopen. This was wholly proper and within the City's power.

C. The Condition That All "Off-site" Toxic Remediation Work Shall Be Completed Prior to Reopening Is Invalid.

Finally, we agree with Shirazian that we must strike the condition that all "off-site" remediation be completed before reopening.

Shirazian contends the administrative findings do not support the condition that all contamination, both on- *and* off-site, be remediated before reopening. One of the purposes for requiring an administrative agency to set forth its findings is to "bridge the analytic gap between the raw evidence and ultimate decision or order" thereby aiding the reviewing court in understanding the "analytic route the administrative agency traveled from evidence to action." (*Topanga Assn., supra*, 11 Cal.3d at p. 515.)

As discussed above, the planning commission made several findings pertaining to the gasoline contamination and the conclusion that it constituted a nuisance. Among these were the findings that off- and on-site remediation was not complete, and that reopening the station before the completion of *all* remediation *could* complicate remediation efforts *on-site*. The planning commission also found that: "Because of the extent and duration of the public nuisance (since 1989), the location of the station in a residential neighborhood, the bankruptcy filing of Desert Petroleum (*the party currently responsible for the remediation work*), and the lack of certainty regarding actual remediation completion date, a compelling public necessity exists that all contamination, on- and off-site, shall be remediated prior to commencement of any work that would allow the reopening of the service station." (Italics added.)

Based on these findings, the City imposed the following additional condition on Shirazian's variance for the service station: "[A]ll *on- and off-site* toxic remediation work shall be completed to the satisfaction of the Alameda County Environmental Protection Services, prior to the commencement of any work for the reopening of the service station . . . ." (Italics added.)

In utilizing the City's findings to "trace and examine [its] mode of analysis" from the evidence to its action, we seek to understand the agency's decision making process, and to determine whether the imposition of the conditions was a proper exercise of its discretion. (*Topanga Assn., supra*, 11 Cal.3d at p. 516; Code Civ. Proc., § 1094.5, subd. (b).) Looking at the City's findings, we do not discern a reasoned basis for the requirement that *off-site* remediation be complete before Shirazian can commence work to reopen the service station. As reflected in the findings, the evidence at the hearing showed Shirazian was not the party responsible for cleaning up the off-site contamination.[4] Thus, the City effectively conditioned Shirazian's right to reopen his station on a condition that is beyond his power to satisfy.

"[I]n order to justify the interference with the constitutional right to carry on a lawful business it must appear that the interests of the public generally require such interference *and that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. . . .* 'The [agency] may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.' " (*O'Hagen v. Board of Zoning Adjustment* (1971) 19 Cal.App.3d 151, 159, italics added, citations omitted.) Put another way, although a municipality undoubtedly has power to place

---

4 Under Civil Code section 3483 successive owners of property who fail "to abate a continuing nuisance upon, or in the use of, such property, created by a former owner," are liable along with the former owner for the nuisance. To the extent that the contamination is not upon or in the use of property that Desert Petroleum owned or Shirazian owns, Shirazian cannot be liable under section 3483.

conditions on the granting of a variance, those conditions must be "reasonable." (*Anza Parking Corp. v. City of Burlingame* (1987) 195 Cal.App.3d 855, 859 (*Anza Parking*).)

We believe that requiring Shirazian to completely remediate the contamination *on* his property is reasonable and "not unduly oppressive." The same cannot be said for the requirement that he wait for a third party to remediate all "off-site" contamination. In short, we find that " 'the [off-site remediation] condition imposed by the [City] is, under all the circumstances and by reason of its nature, beyond the power of the [City] to impose in connection with the' " zoning variance in this case. (*Anza Parking, supra,* 195 Cal.App.3d at p. 859, quoting *Olevson v. Zoning Board of Review* (1945) 71 R.I. 303 [44 A.2d 720, 722].)

We therefore remand to the trial court to strike that condition.

D. Dismissal Was Not Required Under Code of Civil Procedure Section 389.

Finally, GNA asserts, as a separate basis for affirming the trial court's judgment, that it is an indispensable party to the proceedings under Code of Civil Procedure section 389,[5] Shirazian failed to name GNA as a real party in interest in his action filed in the

---

5 All statutory references in this part of the opinion are to the Code of Civil Procedure.

Code of Civil Procedure, section 389 provides in pertinent part: "(a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. [¶] (b) If a person as described in paragraph (1) or (2) of subdivision (a) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder."

trial court as required by section 389, and therefore the entire action should have been dismissed under the statute. GNA further contends the dismissal should have been with prejudice because the applicable statute of limitations has expired for filing a petition for writ of administrative mandamus. The contention is without merit.

Under section 389, the trial court has a duty to join an indispensable party to an action, or if the indispensable party cannot be joined, "the court shall determine whether in equity and good conscience the action should . . . be dismissed . . . ." (§ 389, subds. (a), (b).) Even if we accept GNA's dubious position that it is an indispensable party to the action, the trial court joined GNA as an indispensable party, thus fulfilling section 389, subdivision (a). It would be a manifest abuse of discretion, and an absurdity, for a court to dismiss an action for the inability to join an indispensable party under section 389, subdivision (b), where that party has been joined under subdivision (a). We reject GNA's contention.

IV.

DISPOSITION

The matter is remanded to the trial court for proceedings consistent with the views expressed in this opinion. In particular, the trial court is directed to enter a judgment disapproving the condition that all *off-site* toxic remediation work be completed prior to the commencement of any work for reopening the service station.

Costs are awarded to appellant.

Parrilli, J.

We concur:

Corrigan, Acting P. J.

Walker, J.