

1 SHANA LAZEROW, State Bar No. 195491
2 ROGER LIN, State Bar No. 248144
3 COMMUNITIES FOR A BETTER ENVIRONMENT
4 1904 Franklin Street, Suite 600
5 Oakland, CA 94612
6 T: (510) 302-0430
7 F: (510) 302-0437
8 slazerow@cbeal.org; roger@cbeal.org

9 *Attorneys for Communities for a Better Environment*

ENDORSED
FILED
ALAMEDA COUNTY

DEC 10 2013

CLERK OF THE SUPERIOR COURT

Anita Dhir

10 IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF ALAMEDA

12 COMMUNITIES FOR A BETTER
13 ENVIRONMENT, a non-profit corporation,

14 Petitioner and Plaintiff,

15 vs.

16 CITY OF OAKLAND, a municipal corporation,
17 THE PLANNING COMMISSION OF THE
18 CITY OF OAKLAND, and DOES I through X,
19 inclusive,

20 Respondents and Defendants.

21 STEWART ENTERPRISES, INC., and SE
22 COMBINED SERVICES OF CALIFORNIA,
23 INC., and DOES I through X, inclusive,

24 Real Parties in Interest.

Case No.:

RG13706245

**VERIFIED PETITION FOR WRIT OF
MANDATE AND COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

**[California Code of Civil Procedure §§
1094.5 and 1085]**

1 Petitioner and Plaintiff COMMUNITIES FOR A BETTER ENVIRONMENT brings this
2 action on its own behalf, on behalf of its members, on behalf of the general public, and in the public
3 interest and hereby alleges as follows:

4 INTRODUCTION

5 1. For over two years, Petitioner, local businesses and hundreds of members of the
6 public have sent letters, signed petitions, testified at City Council and Planning Commission
7 meetings and protested the City of Oakland's permitting of Stewart Enterprises' proposed
8 crematorium in East Oakland. This proposal would site one of the largest crematoriums on the
9 West Coast, burning up to 3600 bodies per year, emitting pollutants such as arsenic, hexavalent
10 chromium, lead and mercury, in a low-income community of color. According to the Alameda
11 County Public Health Department ("Public Health"), this community already suffers greatly
12 elevated risks of cancer, asthma, heart attacks and other serious health problems. Public Health
13 attributes these risks to the disproportionate share of environmental harms in East Oakland,
14 including higher exposures to toxic air contaminants and other pollutants.

15 2. For several years this part of Oakland has been engaged in serious efforts to fight
16 blight, establish green businesses, and plant community gardens. Community members from
17 Columbia Gardens, Sobrante Park, Elmhurst and Brookfield Village - the neighborhoods closest to
18 the proposed crematorium - regularly work with and appear before decision-makers in the City of
19 Oakland to advance their vision of a sustainable Oakland. Despite these efforts, without any notice
20 to the public, the City Council, or any other governing body, the City of Oakland ("City") Planning
21 Department granted Stewart Enterprises a building permit for its proposed crematorium in East
22 Oakland under the use classification "General Manufacturing."

23 3. General Manufacturing typically includes activities such as glass manufacturing,
24 textile mills and wood manufacturing. The City permits these activities, with a small buffer zone,
25 as a matter of right in much of East and West Oakland: no notice to the public, no conditional use
26 permit, and no environmental review is required.

27 4. However, the City's zoning laws do not, and *never* have allowed new crematoriums
28 to operate as a matter of right. The City's regulations in fact classify crematoriums as Extensive

1 Impact Civic Activities. Such activities, which also include cemeteries, mausoleums, and
2 columbariums, must first obtain a Major Conditional Use Permit (“CUP”) prior to operation. A
3 CUP is the City’s opportunity to review a proposed project. The City provides public notice prior
4 to the issuance of the CUP and considers what impacts the facility may have, and what conditions
5 must go in the permit. This brings an opportunity for public comment, a study of potential impacts,
6 including environmental, socio-economic and psychological, of a proposed facility and, if
7 necessary, mitigation measures to address those impacts.

8 5. Any change to the City’s zoning regulations, including its use classifications, must
9 first be recommended by the Planning Commission to the City Council, and then approved by the
10 City Council. Since the inception of Oakland’s zoning regulations, the City’s Planning
11 Commission has never made such a recommendation regarding a change in the classification of
12 crematoriums.

13 6. Petitioner sought recourse for the community by presenting the City with an
14 opportunity to affirm its existing laws – that crematoriums are an Extensive Impact Civic Activity.
15 The City instead ignored both the plain language and the legislative history of its planning code,
16 and to stand by its staff’s incorrect interpretation that was made without any public process or
17 approval of the City Council.

18 7. The City discarded its fundamental rules of procedure in favor of an incorrect and
19 arbitrary staff decision. This incorrect decision has denied the public its legal right to participate
20 and offer a voice in the siting of a specific polluting facility, threatens to disadvantage local
21 businesses in an area striving for economic transformation, and could also push the cumulative
22 impact of pollution in East Oakland past the tipping point. Where the City should have offered the
23 public notice, an opportunity to comment, and then required an extensive review of impacts and
24 mitigation proposals, the City instead betrayed the public with an arbitrary and capricious
25 determination. With no other legal recourse, Petitioner files this action.

26 **PARTIES**

27 8. Petitioner and Plaintiff COMMUNITIES FOR A BETTER ENVIRONMENT
28 (“CBE”) is a California non-profit environmental health and justice organization with offices in

1 Oakland and Huntington Park. CBE's mission is to achieve environmental health and justice for
2 communities of color and working-class communities. CBE strives to accomplish its mission by
3 organizing in traditionally disempowered communities, by facilitating public participation in
4 administrative decision-making processes, and by ensuring implementation of laws that protect
5 public participation, public health and the environment. For 35 years, CBE has advocated for
6 meaningful protection of California's environment. CBE is primarily concerned with protecting and
7 enhancing the environment and public health by reducing air and water pollution and toxics, and
8 equipping residents of California's urban areas that are most impacted by local pollution with the
9 tools to monitor and transform their immediate environment.

10 9. CBE has thousands of members throughout California. Many CBE members live,
11 work, recreate, and breathe the air in East Oakland and specifically in close proximity to the
12 proposed crematorium. CBE's members have an interest in their health and well-being, as well as
13 conservation, environmental, aesthetic, and economic interests in their environment. CBE's
14 members who live and work in East Oakland have a right to, and a beneficial interest in, the City's
15 performance of its duties, especially the guarantee of adequate review procedures for any facility
16 proposed in any neighborhood. These interests have been, and continue to be, threatened by the
17 City's arbitrary and capricious departure from its classification of crematoriums as Extensive
18 Impact Civic Activities, and its illegal issuance of a building permit to Stewart Enterprises under
19 the incorrect use classification, "General Manufacturing."

20 10. By this action, CBE seeks to protect the health, welfare, and economic interests of its
21 members and the general public and to enforce a public duty owed to them by the City.

22 11. Respondent and Defendant CITY OF OAKLAND is a municipal corporation duly
23 organized and existing under the laws of the State of California.

24 12. Respondent and Defendant THE PLANNING COMMISSION OF THE CITY OF
25 OAKLAND is the final decision-making body within the CITY OF OAKLAND regarding the
26 administrative determination sought by CBE concerning classification of crematoriums, which
27 Petitioner asserts was an abuse of discretion.

28 13. Real Party in Interest and Defendant STEWART ENTERPRISES, a Louisiana

1 Corporation, provides cremation services. Stewart Enterprises currently operates a crematorium in
2 Emeryville, California, and is the applicant and developer of the proposed crematorium in East
3 Oakland, which is the subject of this litigation. The proposed site is 9850 Kitty Lane, Oakland,
4 California.

5 14. CBE is informed, believes and thereupon alleges that Real Party in Interest and
6 Defendant SE COMBINED SERVICES OF CALIFORNIA, INC., is a California Corporation and
7 subsidiary of Defendant Stewart Enterprises, and duly qualified to transact business in California.

8 15. Petitioners do not know the true names or capacities of the persons or entities sued as
9 DOES 1 through 20, inclusive, and therefore sues these defendants and real parties by their
10 fictitious names. Petitioners will amend the Petition and Complaint to set forth the names and
11 capacities of the DOE parties along with any additional appropriate allegations when such
12 information is ascertained.

13 JURISDICTION AND VENUE

14 16. This Court has jurisdiction over this action pursuant to California Code of Civil
15 Procedure sections 1094.5 and 1085.

16 17. Venue is proper in this court pursuant to Code of Civil Procedure sections 393 and
17 394 because the City, Stewart Enterprises, and the proposed site for its crematorium that is the
18 subject of this litigation, are located and operate in Alameda County.

19 18. This action was timely filed within 90 days of the City filing its Notice of
20 Determination on September 12, 2013.

21 19. Petitioner does not have a plain, speedy, or adequate remedy at law because Petitioner
22 and its members will be irreparably harmed by the ensuing environmental, socio-economic and
23 psychological damage caused by the City's illegal permitting, and therefore imminent operation, of
24 Stewart Enterprises' proposed crematorium under an incorrect and arbitrary and capricious
25 classification.

26 STATEMENT OF FACTS

27 The Community and Environmental Setting

28 20. Stewart Enterprises' proposed crematorium is located in East Oakland, a community

1 that Public Health identifies as already bearing a disproportionate share of pollution. The proposed
2 crematorium site is in the same neighborhood as a senior living facility, four elementary schools, a
3 public park, an urban garden, a community center, many churches, and several residential
4 neighborhoods with populations comprised predominantly of people of color.

5 21. According to Public Health, asthma and other respiratory illness rates are already at
6 dangerously high levels in East Oakland, where crematoriums would be allowed without permit
7 conditions, public notice or environmental review. The people in Columbia Gardens, Sobrante
8 Park, Elmhurst and Brookfield Village must already live with pollution from industrial sources such
9 as metal foundries and mobile source magnets, such as Oakland International Airport, Interstate
10 880, and the diesel fueling stations and goods repackaging centers that attract hundreds of diesel
11 trucks. In providing information to the City about existing public health conditions, Public Health
12 repeatedly articulated its support for requiring all crematoriums to obtain a CUP prior to operation
13 in Oakland and finds that this CUP process is necessary to protect the East Oakland community's
14 health.

15 **Regulation of Crematoriums in Oakland**

16 22. Since it first adopted zoning laws in 1935, the City has never allowed the operation of
17 a crematorium as a matter of right, with no public notice or hearing, and no opportunity for
18 conditional permitting. In the City's initial regulations, cemeteries, columbariums, mausoleums and
19 crematoriums were all grouped together. They were excluded from certain areas, as were many
20 uses that could prove "obnoxious or offensive." Any proposed facility that dealt with the storage or
21 preparation of the human dead prior to burial had to have first received approval from the City, after
22 a recommendation and hearing by the City Planning Commission with the required public notice.

23 23. In 1965, the City updated its zoning laws to become the Oakland Planning Code
24 ("OPC"). The City created the use category "Extensive Impact Civic Activities." These activities
25 may occur anywhere in Oakland, but may also pose health, environmental, or other risks that may
26 generally prove obnoxious or offensive. The City requires a CUP process prior to approval of any
27 Extensive Impact Civic Activity permit.

28 24. In February 1988, the City transformed its 1965 Planning Code into the current OPC.

1 Among other changes, it transferred section 2322(b) to Oakland Planning Code section 17.10.240,
2 the regulation of Extensive Impact Civic activities. A contemporaneous internal staff guide
3 clarified that human cremation belonged in prior section 2322(b), and that section 2322(b) became
4 section 17.10.240, Extensive Impact Civic Activity. The City has since issued no other staff guides
5 or internal guidance memoranda regarding the classification of crematoriums.

6 25. On August 30, 2011, for the first time since 1935, the City approved the zoning of a
7 crematorium – Stewart Enterprises’ proposal for East Oakland. However, the City suddenly
8 departed from its long-standing regulation of crematoriums. Having classified crematoriums as
9 essentially Extensive Impact Civic Activities since the inception of Oakland’s zoning regulations,
10 the City unpredictably classified Stewart Enterprises’ proposal as General Manufacturing. In so
11 doing, the City allowed Stewart Enterprises to operate as a matter of right at its proposed site; it did
12 not require Stewart Enterprises to obtain a CUP, or any other environmental review, prior to
13 operation. General Manufacturing includes the manufacturing, compounding, processing,
14 assembling, packaging or treatment of products from extracted, raw, recycled or secondary
15 materials, for example, glass, wood, textile or paper manufacturing.

16 26. On May 10, 2012, the City issued Stewart Enterprises a ministerial building permit
17 based on the City’s arbitrary and capricious use classification of Stewart Enterprises’ proposed
18 crematorium in East Oakland.

19 27. On May 15, 2012, the City Council, prompted by the concern of Public Health and
20 the broader Oakland community over the lack of review of Stewart Enterprises’ proposal in East
21 Oakland, unanimously approved an Emergency Ordinance to require crematoriums to obtain a CUP
22 prior to operation in the City. Stewart Enterprises is currently in litigation with the City regarding
23 the validity and applicability of this Emergency Ordinance.

24 28. On March 20, 2013, CBE submitted its request to the Zoning Administrator to clarify
25 how the Planning Department classified crematoriums. On June 11, 2013, the Zoning
26 Administrator clarified the Planning Department’s position and responded to CBE that
27 crematoriums are best described as General Manufacturing activities. CBE appealed the Zoning
28 Administrator’s determination to the City Planning Commission, which denied the appeal on

1 September 11, 2013.

2 **Exhaustion of Administrative Remedies**

3 29. As detailed above and pursuant to OPC § 17.132.020, Petitioner has followed the
4 required procedure to challenge the City Zoning Administrator's Determination regarding the
5 classification of crematoriums.

6 30. Petitioner has exhausted its administrative remedies.

7
8 **FIRST CAUSE OF ACTION**
9 **(Violation of OPC § 17.10.090**
10 **CCP§ 1094.5, or in the alternative, CCP § 1085)**

11 31. Petitioners incorporate herein by reference the allegations contained in the foregoing
12 paragraphs.

13 32. Crematorium is a land use that falls within the category Extensive Impact Civic
14 Activity. The City's September 11, 2013 determination that crematoriums fall within the category
15 General Manufacturing directly contradicts the plain language and legislative history of the OPC.

16 33. The City relies on its conclusion that the cremation process is similar to metal, wood
17 or paper manufacturing where cadavers serve as raw materials to be processed. However, the
18 City's interpretation is unreasonable: the processing analogy entails the processing of raw materials
19 into goods to be sold. Although human bodies certainly go through a process during cremation,
20 there is no end good to be sold. Classification as a manufacturing activity further taints any social
21 or religious importance of the cremation process. In the face of the code's plain language, this
22 interpretation is arbitrary and capricious.

23 34. Moreover, where a use is not specifically listed, OPC § 17.10.090 requires
24 classification with uses that are most similar to the unlisted use. The City's 1935 Zoning Laws
25 established crematoriums, cemeteries, columbariums and mausoleums as a collective group of
26 similar uses, each evidently sharing a common social impact. By contrast, the OPC provides
27 starkly different examples of uses classified as General Manufacturing activities, such as glass
28 manufacturing, textile mills and wood manufacturing.

35. Similarly, OPC § 17.10.040 clarifies that, "accessory activities," are those that are

1 incidental to and therefore classified the same as their “principal activities.” Further, one definition
2 of a cemetery under the California Health and Safety Code § 7003(a)(3) is any combination of a
3 “crematorium and columbarium.” Therefore, both accessory activities, operating a crematorium or
4 operating a columbarium, are classified in the same manner as the principal activity, which is an
5 Extensive Impact Civic Activity. Indeed, Oakland’s existing crematoriums are attached to
6 cemeteries or columbariums. Further, crematoriums perform activities typically performed by
7 cemeteries, mausoleums, and columbariums.

8 36. The face of the Oakland Planning Code, therefore, establishes that crematoriums are
9 Extensive Civic Impact Activities. The OPC’s legislative history confirms that plain language. In
10 1935, the City first zoned and grouped crematoriums with similar use classifications: cemeteries,
11 mausoleums, and columbariums. The City’s own internal guidance manual details that these four
12 uses have always remained classified together, whether in the City’s 1935 Zoning Laws, its 1965
13 Planning Code update, or the current OPC. Today, that classification remains the same, Extensive
14 Impact Civic Activity.

15 37. Although the 1935 zoning laws did not yet include the use category Extensive Impact
16 Civic Activity, they provide practically equivalent and core requirements to ensure that no
17 community would host a facility treating dead human beings without public notice and without a
18 hearing by the City. In pertinent part, those regulations read: facilities “intended for
19 the...preparation of the human dead...prior to burial” must first be approved by “the City Manager
20 after a hearing and recommendation by the City Planning Commission,” with the appropriate notice
21 to the public. The City evidences a clear intent that crematoriums may not operate in Oakland as a
22 matter of right, but a developer of a crematorium must first seek “permission” from the City which
23 involves a public process. It is this matter of right element that distinguishes the proper
24 classification of crematoriums from the City’s improper and arbitrary classification that
25 ministerially, without any public notice or procedure, would allow issuance of a building permit to
26 a crematorium.

27 38. All evidence of OPC legislative history confirms the plain language – that
28 crematoriums are an Extensive Civic Impact Activity. The City’s September 11, 2013 decision

1 denying Petitioner's appeal seeking City affirmation that crematoriums are Extensive Civic Impact
2 Activities is therefore a prejudicial abuse of discretion.

3
4 **SECOND CAUSE OF ACTION**
5 **(Violation of OPC § 17.144**
6 **CCP§ 1094.5, or in the alternative, CCP § 1085)**

7 39. Petitioner incorporates herein by reference the allegations contained in the foregoing
8 paragraphs.

9 40. The OPC establishes a mandatory process for the City to change use classifications.
10 The City failed to follow that process when it changed crematoriums from an "Extensive Impact
11 Civic Activity" to "General Manufacturing." The OPC provides that the City Council shall not vote
12 to approve any changes to the use classifications without a recommendation and/or findings from
13 the City Planning Commission. The City Planning Commission never made any such
14 recommendation regarding crematoriums.¹ Rather, the City Planning Department made a
15 unilateral, unsupported, and wholly arbitrary and capricious determination regarding the
16 classification of crematoriums.

17 41. The City did not follow any procedures whatsoever to remove crematoriums from its
18 counterparts, cemeteries, mausoleums and columbariums, and effectively re-classify the use as
19 General Manufacturing.² By failing to follow the correct procedures to amend a use classification,
20 the City committed a prejudicial abuse of discretion and failed to proceed in the manner required by
21 law.

22 //

23 //

24 ¹ Further, the City Council never voted on a Planning Commission recommendation to change the
25 use classifications of crematoriums from Extensive Impact Civic Activity to General Manufacturing.

26 ² The first indication that the City was re-classifying crematoriums was when it issued the building
27 permit to Stewart Enterprises, on which it indicated the proposed crematorium was General
28 Manufacturing. Within five days of issuance of this permit, the City Council adopted an Emergency
Ordinance requiring all new or expanded crematoriums to secure CUPs. Stewart Enterprises sued
the City seeking a declaration that its permit had vested; seeking to void the ordinance; and seeking
damages. (Alameda Superior Court case number RG12646176.) That case is pending.

1 **THIRD CAUSE OF ACTION**
2 **(Violation of OPC § 17.10.030 and California Government Code §§ 65359, 65454 and 65860**
3 **CCP§ 1094.5, or in the alternative, CCP § 1085)**

4 42. Petitioners incorporate herein by reference the allegations contained in the foregoing
5 paragraphs.

6 43. OPC § 17.10.030 and California Government Code §§ 65359, 65454 and 65860
7 require that the City's use classifications conform with the City's General Plan.

8 44. Chapter Four of the General Plan establishes the "good neighbor" criteria for
9 businesses and residences to "peacefully co-exist" in mixed business and residential zones, such as
10 East Oakland. These criteria include the enforcement of City codes and the general shift of heavily
11 polluting industries away from residential areas to businesses with low impacts on the surrounding
12 community.

13 45. Classifying crematoriums as General Manufacturing activities would completely
14 thwart the City's General Plan by allowing one of the biggest cremation facilities on the West Coast
15 to pollute in a community already disproportionately impacted by pollution, without any
16 environmental review or public notice and comment. As detailed above, crematoriums emit several
17 toxic air pollutants that will only exacerbate the significant cumulative impact of pollution in East
18 Oakland. Classification of crematoriums as an Extensive Impact Civic Activity requires a CUP
19 process to adequately consider this cumulative impact, as well as other impacts such as that
20 associated with the high rate of violence juxtaposed with such a large stand-alone crematorium
21 facility. It is impossible to re-classify crematoriums as General Manufacturing, requiring no CUP
22 or public notice, and also conform with the "good neighbor" criteria of the City's General Plan.

23 46. The City's arbitrary and capricious determination regarding the classification of
24 crematoriums conflicts with its own General Plan, and constitutes a prejudicial abuse of discretion.

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27 //

28 //

1 **PRAYER FOR RELIEF**

2 WHEREFORE, CBE prays for judgment as set forth below:

3 A. For a writ of mandate or peremptory writ issued under the seal of this Court and directing the
4 City of Oakland to:

- 5 1. Refrain from granting any approvals for any future building, or other, permits for
6 crematoriums without first requiring the developer to obtain a Major Conditional Use
7 Permit;
- 8 2. Set aside its September 11, 2013 decision; and
- 9 3. Apply the proper use classification for crematoriums as an Extensive Civic Impact
10 Activity;

11 B. For entry of preliminary and/or permanent injunctive relief prohibiting the City of Oakland
12 from carrying out, implementing, or otherwise acting in furtherance of any zoning clearance
13 for crematoriums other than under the use classification of Extensive Impact Civic Activity;

14 C. For a declaratory judgment that the City of Oakland has never allowed crematoriums in
15 Oakland as a matter of right, and crematoriums are appropriately classified as Extensive
16 Impact Civic Activities under section 17.10.240 of the Oakland Planning Code, Title 17 of
17 the Municipal Code;

18 D. For a declaratory judgment stating that the City of Oakland violated its Planning Code, Title
19 17 of its Municipal Code, by providing any and all approvals, zoning clearances, or other
20 administrative actions for crematoriums under the incorrect use classification, General
21 Manufacturing;

22 E. For a declaratory judgment stating that the City of Oakland's approval of any zoning
23 clearance, building or any other related permit for crematoriums under the incorrect use
24 classification, General Manufacturing, is void *ab initio* or otherwise invalid and of no legal
25 effect;

26 F. For a declaratory judgment that the City of Oakland and the City of Oakland Planning
27 Commission's determination of the classification of crematoriums as General Manufacturing
28 is arbitrary and capricious, an abuse of discretion, and a violation of the law;

- 1 G. For Petitioners' fees and costs, including reasonable attorneys' fees and expert witness costs,
2 as authorized by CCP § 1021.5, and any other applicable provisions of law on its claims
3 regarding the City of Oakland's unlawful classification and issuance of zoning clearances
4 and/or building permits for crematoriums.
- 5 H. For such other legal and equitable relief as this Court deems appropriate and just.

6
7 Respectfully submitted,

8 
9 _____

9 DATED: December 10, 2013

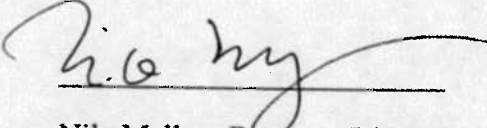
10 SHANA LAZEROW
11 ROGER LIN
12 COMMUNITIES FOR A BETTER ENVIRONMENT
13 1904 Franklin Street, Suite 600
14 Oakland, CA 94612
15 T: (510) 302-0430
16 F: (510) 302-0437
17 slazerow@cbeal.org; roger@cbeal.org

18 *Attorneys for Communities for a Better Environment*

1 **VERIFICATION**

2 I, NILE MALLOY, hereby declare:

3 I am the Northern California Program Director of Communities for a Better Environment, a non-
4 profit corporation with offices in Oakland, California and elsewhere in the State. The facts alleged
5 in the above Petition and Complaint for Injunctive and Declaratory Relief are true to my personal
6 knowledge and belief. I declare under penalty of perjury under the laws of the State of California
7 that the above is true and correct and that this verification is executed on this ___ day of ___ at
8 Oakland, California.

9 

10 Nile Malloy, Program Director
11 Communities for a Better Environment