SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

LOS ANGELES CONSERVANCY, a non-profit corporation

Petitioner,

vs.

CITY OF LOS ANGELES, *et al.*,

Respondents

AG-SCH 8159 SUNSET BOULEVARD OWNER L.P., et al.,

Real Parties in Interest

Case No.: BS166487

Order Granting Petition for Writ of Mandate as to Rejection of Preservation Alternatives and otherwise Denying Petitions for Writ of Mandate.

Dept. 86
Hearing: April 19-20, 2017

## Table of Contents

This order addresses numerous challenges to a large mixed use development ("project") that Real Party proposes to construct in the City of Los Angeles on Sunset Boulevard. The project as designed by architect Frank Gehry (Alternative 9) promises to be an iconic architectural addition to the City's landscape that will transform and revitalize the neighborhood by adding additional housing, open space, and commercial outlets. The project contemplates 249 new residential units (of which 30 are luxury condominiums, 26 are affordable housing units, and 12 are workforce housing units) and 65,000 feet of commercial space on a 2.56 acre parcel. The proposed project also requires demolition of a 1960 modernist bank building ("bank building") notwithstanding its historical significance.

Several parties opposed to the project have filed petitions for writ of mandate seeking a court order invalidating the City's approval of the project: Los Angeles Conservancy (LAC) (Case No. BS166487); JDR Crescent LLC and IGI Crescent LLC (collectively JDR Crescent) (Case No. BS166525); Fix the City, Inc. (Case No. BS166484) and Susan Manners as Trustee (Case No. 166528). As explained below, the Court finds merit in only one of the challenges. The Court interprets CEQA to require the City to make specific additional findings supporting its rejection of alternatives preserving the historic bank building and to support the findings with substantial evidence. On that issue alone, the Court remands the matter for further proceedings. The Court rejects all other challenges to the project.

# I. The City's Approval Complied with Local and State Laws

Petitioners argue the City's approval violated various laws relating to affordable housing, planning, zoning, street vacations and seismic activity. The Court's standard of review on these allegations is whether the City proceeded in accordance with law and whether its findings are supported by substantial evidence. (*Wollmer v. City of Berkeley* (2009) 179 Cal.App.4th 933, 939.)

### *A. The City's Approval Is Consistent with Land Use Laws*

#### 1. Petitioners Density Challenges as to "Off Menu" Items Are Timely

Petitioners Fix the City and JDR Crescent argue the City's approvals of density bonuses were unlawful. The City dismisses these arguments as barred by the statute of limitations, Govt. Code § 65009(c)(1) which requires service of a challenge within 90 days and LAMC § 12.22 A.25(g)(3)(i)(b) which provides the decision "of the City Planning Commission shall be final." Based on the Planning Commission's August 17, 2016 Letter of Determination, the City argues that Petitioners' challenges to "off-menu housing incentives" are untimely because they were filed after November 15, 2016. Petitioners rely on LAMC § 12.22.A.25.(g)(3)(ii) which provides, "For Housing Development Projects requesting the waiver or modification of any development standard(s) not included on the Menu of Incentives in Paragraph (f) above, and which include other discretionary applications . . . a. The applicable procedures set forth in Section 12.36 of this Code shall apply." Petitioners also rely on LAMC § 12.36.C.1(b) which provides, "[Notwithstanding any provision of this Code to the contrary, the following shall apply for projects requiring multiple approvals:] . . . The City Council shall decide all appeals of the City Planning Commission's decisions or recommendations as the initial decision-maker on projects requiring multiple approvals."

The Court agrees with Petitioners that the latter section controls here. LAMC 12.22 A.25(g)(3)(i) governs Housing Development Projects that include a request for an off menu incentive and "are not subject to other discretionary applications." On the other hand, LAMC 12.22 A.25(g)(3)(ii) governs Housing Development Projects that include a request for an off menu incentive as well as "other discretionary applications." In this case, the project included requests for two off menu incentives as well as a discretionary application for a Master Conditional Use

Permit for the sale of alcoholic beverages.[1] Thus, LAMC §§ 12.22 A.25(g)(3)(ii) and 12.36.C.1(b) permitted Petitioners to appeal the Planning Commission's entire decision, including its decision on off menu incentives, to the City Council. Accordingly, because the statute of limitations did not begin to run until the City Council's approval of the Project was final, Petitioners' claims are not time barred.

### 2. The City Has Discretion to Provide Off Menu Incentives

LAMC § 12.22.A.25(f)(4)(ii) includes an "on menu" incentive allowing a 3:1 FAR (floor area ratio) for Housing Development Projects if (among other things) 50% of the commercially zoned parcel is within 1500 feet of a transit stop. In this case, the project did not qualify for that incentive because it is 1560 feet from the nearest transit stop. Petitioners argue the City had no discretion to allow a density bonus that did not meet the terms of an item specified in the "Menu of Incentives" which provides, "Housing Development Projects that meet the qualifications of Paragraph (e) of this subdivision may request one or more of the following Incentives as applicable . . . ." (12.22.A.25(f).) The City points out that the language in LAMC 12.22.A.25(f)(4)(ii) is not exclusive and further the Density Bonus Law giving rise to that ordinance specifically empowers a city to approve "[o]ther regulatory incentives or concessions proposed by the developer." (§ 65915)k)(1), (k)(3).)

The Court agrees with the City that the ordinance is not reasonably interpreted as limiting the City's discretion to provide incentives to the items listed in the Menu. The plain language stating that projects "may request" an Incentive is directed to the developers of the projects and places no restrictions on the City's discretion to grant other incentives.

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[1] LAMC § 16.05.B.2 defines "Discretionary Approval" as "An approval initiated by a property owner or representative related to the use of land including, but not limited to, a: . . . (d) conditional use approval; . . . ."

### 3. The City Did Not Have to Change Zoning, Amend the General Plan or Engage in Any Other Legislative Act to Approve the Density Bonus

The City cites the State Density Bonus law, Govt. Code §§ 65915(j)(1) as authority for its discretion to award density bonuses without changing the zoning or amending the general plan. The Density Bonus Law was enacted in 1979 and requires local governments to provide density bonuses (from 5 percent to 35 percent) to projects incorporating low income or senior housing. Section 65915(j)(1) states, "The granting of a concession or incentive shall not require or be interpreted in and of itself to require a general plan amendment, local coastal plan amendment, zoning change, study or other discretionary approval." The Court agrees with the City that this provision controls and reflects the State's very strong policy in favor of increasing the supply of housing. The City therefore did not have to change zoning or amend the general plan in order to award density bonuses.

Petitioners argue that the City's density bonuses violated D limitations. LAMC § 12.32.G.4 defines "D Development Limitations" explaining that the necessary findings the Council must make to designate an area "D Development." The City argues that the mandatory nature of the Density Bonus Law necessarily overrides procedures for changing a D Development designation based on language in the implementing ordinance, LAMC § 12.22.A.25(c) ("Notwithstanding any provision of this Code to the contrary, the following provisions shall apply to the grant of a Density Bonus for a Housing Development Project. . .") and LAMC § 12.22.A.25(e)(1) ("In addition to the Density Bonus and parking options identified in Paragraphs (c) and (d) of this subdivision, a Housing Development Project that qualifies for a Density Bonus shall be granted the number of Incentives set forth in the table below.") The City also cites the mandatory nature of the Density Bonus Law which directs that cities "shall grant" the specified density bonuses (§ 65915(b)(1)) and *Latinos Unidos del Valle de Napa y Solano v. County of Napa* (2013) 217 Cal. App. 4th 1160, 1169 (which invalidated an ordinance conditioning a bonus

on the construction of more units than the number specified in the Density Bonus Law) as authority for the proposition that the provisions of the Density Bonus Law preempt any conflicting ordinance.

The Court notes that Section 65915(e)(1)mandates, "In no case may a city . . . apply any development standard that will have the effect of physically precluding the construction of a development meeting the criteria of subdivision (b) . . . ." This provision and the law cited by the City make application of the Density Bonus Law mandatory and preemptive. The Court therefore concludes the City could approve the project without taking any action with respect to the D Development zoning designation.

### 4. The City's Calculation of the Density Bonus Was Not an Abuse of Discretion

Fix the City argues the City improperly calculated the amount of the density bonus award to Petitioners because it failed to use the General Plan or Zoning as the baseline and because commercial square footage was improperly included in the calculus. It contends the City calculated residential density based on the C4-1D zone "ignoring the limitations in the Hollywood Community Plan" which limited density on the site to 1:1 FAR while parcels located in Height District 1 were allowed a 1:5 FAR. Fix the City fails to demonstrate that the City's bases for calculating FAR were an abuse of discretion. As the City points out, its determination that the EIR's designation of C4 was appropriate and allows for a wide range of mixed use projects. (Opp. p. 40.) Fix the City has similarly failed to demonstrate the City's determination that the 45-foot height limit for residentially zoned properties does not apply to this mixed use project. (*Id.*)

### 5. Petitioners Failed to Raise at the Administrative Level Their Argument that the Vesting Tentative Map Conflicts with a 1976 DWP Easement

Fix the City and JDR Crescent contend the Tentative Map is not consistent with the general and specific plans and argue the approval violates Gov. Code § 66474.61(g) by failing to evaluate whether the project conflicts with a 1976 DWP easement that was never disclosed in the approval process. (AR 65228.) The City objects that Petitioners waived this argument by failing to raise it during the administrative proceedings. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 536 ["The petitioner bears the burden of demonstrating that the issues raised in the judicial proceeding were first raised at the administrative level."].) In reply, Fix the City and JDR Crescent fail to cite evidence in the record showing that this issue was raised at the administrative level. Accordingly, the Court finds that Petitioners waived this argument.

In any event, the Court finds that the City's approval of the Tentative Map did not violate Gov. Code § 66474.61(g), which states that an agency must deny approval of a tentative map if "the design of the subdivision or the type of improvements will conflict with easements, acquired by the public at large, for access through or use of property within the proposed subdivision." The City points out and the Court agrees that the 1976 DWP easement was an exclusive easement "for the use of the department of water and power of the City of Los Angeles," not an easement acquired by the public at large for access through or use of the property. (Lake Decl., Exh. 3, p. 5, ¶ 5.)

### 6. The Project Does Not Violate the Hollywood Community Plan's Density Policies

Fix the City asserts the project violates Hollywood Community Plan Policies against increased density by subdivision, noting that increased density exacerbates traffic and compromises emergency response times. JDR Crescent points out that with a proposed FAR three times greater than would be permitted under the Hollywood Community Plan, the project is fundamentally inconsistent with the "down zoning" contemplated in the Plan. It is true that the

project site is zoned as "C4-1D," the 1D designating a maximum floor area ratio of 1:1 (the total floor area of all buildings may not exceed one times the buildable area of the lot). As discussed, however, because the project creates low income housing units, the State's Density Bonus Law permits such a "density increase over the otherwise maximum allowable residential density under the applicable zoning ordinance and/or specific plan . . . ." (L.A.M.C. § 12.22.A.25(b).) Furthermore, as stated in the EIR, the project is consistent with a number of other objectives in the Hollywood Community Plan including: "furthering the development of Hollywood as a major center of population, employment, and retail services, providing land uses at densities required to accommodate future growth in the area, and providing housing for a variety of income levels while preserving and enhancing the residential character of the community." (AR 565.) The project also supports the Plan's objectives of promoting economic well-being, improving transportation infrastructure, and creating public and private open spaces and recreational opportunities. (AR 565-567.)

### *B. The City Properly Converted Traffic Lanes to Pedestrian Use*

Fix the City and CDR argue that withdrawal of the right turn lane on Crescent Heights Boulevard was the vacation of a street under Streets & Highways Code § 8309 which defines "vacation" as "the complete or partial abandonment or termination of the public right to use a street, highway, or public service easement" subject to proceedings for petitions to vacate set forth in Streets & Highways Code § 8320 et seq.

The City argues that the issue of street vacation is not ripe because "the only Project approvals that are subject to this action are those that were appealed from the Planning Commission to the City Council" and that such appeals did not address the B permit which has not yet been issued. (p. 51.)

The Court agrees with the City that this issue is improperly raised at this juncture and that it is not evidence of any CEQA violation.

### *C. The City Properly Reconfigured City Property*

Fix the City argues the City's reconfiguration of a traffic island (9,345 square feet purchased by the city in the 1960s) into open space was a gift of land that violated City Charter § 385 (stating that "any real . . . property owned by the City that is no longer needed may . . . be sold under terms and conditions prescribed by ordinance") and the implementing procedures under Los Angeles Administrative Code §§ 7.21 et seq.

The City counters by arguing the relocation of the traffic island in order to expand the plaza does not require a sale of property or dedication of any easement because the property remains under the ownership and control of the City as it is improved and maintained by Real Party. (See AR 753 ["This improvement would not require the dedication of an easement or purchase of the traffic island property; rather, the existing travel lane and traffic island would remain under the ownership and control of the City, but would be improved and maintained as public space by the Project applicant."].) The Court agrees that, as structured, the reconfiguration of the traffic island does not violate the City Charter.

### *D. The City's Approvals Did Not Violate the Alquist-Priolo Act.*

The project is located within an official Alquist-Priolo Earthquake Fault Zone established by the California Geological Survey for the Hollywood fault. The Fault Zone "shows a trace of the Hollywood fault north west of the site." (AR 56754.) Fix the City complains the project violates Cal. Code Reg. tit. 14 § 3603(a) which states, "No structure for human occupancy . . . shall be permitted to be placed across the trace of an active fault" or within 50 feet of an active fault as such area is presumed to be underlain by active fault branches unless proven otherwise by a geologic report. It takes issue with the conclusion of the City's disregard of the 50 foot setback

citing a statement by the City engineer in a 2014 memorandum to City Planning that "[t]here are too many epistemic and aleatory uncertainties regarding the Hollywood fault to warrant disregarding the required setback." (AR 56755.)

The City argues Petitioners overstate the reach of the Alquist-Priolo Act pointing out that it only applies to structures built across the trace[2] of an active fault as opposed to structures in the vicinity of active faults. (Pub. Resources Code, § 2621.5.) According to the City, there is no 50 foot setback requirement because the project is not located within 50 feet of an active fault; the geologists concluded the nearest fault trace lies more than 100 feet northwest of the site. (AR14213, 14220, 14229-34.)

The City cites substantial evidence supporting its conclusion that no active faults underlie the project. (OB p. 57.) It also correctly points out Petitioners offer no contrary evidence. Petitioners argue the City abused its discretion by failing to investigate whether there are any off site faults that may impact the project. While the City argues that no off site investigation is necessary under the Alquist-Priolo Act, Petitioners argue there is "a presumption that a surface fault trace exists where an area has not been investigated" and that the City acknowledged this presumption. (Reply p. 6.) However, the record cited in support of this argument (AR56755 and AR 14159) does not support the allegation of presumption. These documents indicate that in lieu of requiring Real Party to examine the area 50 feet to the northwest of the project to ascertain whether there was an active fault, the City's Grading Division Chief was willing to compensate for that possibility by accepting a design modification (a reinforced foundation). (AR 14159, 14256-57 ["Alternately, according to the City geologist, in lieu of undertaking additional borings

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[2] Cal. Code Regs., tit. 14, § 3601(b) defines a "fault trace" as "that line formed by the intersection of a fault and the earth's surface, and is the representation of a fault as depicted on a map, including maps of earthquake fault zones."

or providing a 50-foot setback, an acceptable off-fault surface rupture mitigation measure is, within the 50-foot setback area, to design [a reinforced foundation]."].)

Petitioners also cite an article published by the California Geological Survey setting forth guidelines to "assist geologists who investigate faults relative to the hazard of surface fault rupture." (AR 27296.) The article recommends that fault investigations evaluate data "obtained both from the site and outside the site area" (AR 27296) and that fault investigation reports should include findings about the "[l]ocation and existence (or absence) of hazardous faults on or adjacent to the site . . . ." (AR 27298). In this case, Real Party's consultant, Golder Associates, did in fact perform boring and cone penetration tests inside and outside of the site boundary. (AR 14220.)

The Court finds no abuse of discretion in any alleged failure to conduct further off site investigation.

### *E. No Violation of AB 32*

Manners contends the project fails to meet the 19 percent reduction in greenhouse gases mandated under AB 32 citing *Center for Biological Diversity c. California Dept. Fish and Wildlife* (2016) 62 Cal.4th 204 (*Biological Diversity*) (holding that evidence of a project's decrease in greenhouse gases by 29% is not necessarily evidence of compliance with AB 32 which requires a 29% reduction statewide). In that case, the question was whether an EIR for a large residential development validly determined there was no significant impact caused by discharge of greenhouse gases. The court held the lead agency's reliance on AB 32 as a criterion of significance was legally permissible but the criterion was not properly applied. In this case, the City did not rely on AB 32 to determine the criterion of significance.

*Biological Diversity* is distinguishable because the project at issue in that case was estimated to increase annual emissions by 269,053 metric tons of $CO_2$ equivalent. In this case, the EIR estimates a decrease in annual emissions. Moreover, Manners offers no evidence countering

the City's conclusion that there is no non-speculative way to estimate the cumulative effects of this project on statewide GHG emissions. (AR 0084-85.) The Court finds no abuse of discretion relating to AB 32.

### *F. No Violation of Right to Appeal*

Manners argues that CEQA allows an appeal to an agency's elected decision making body citing Guidelines § 15025(b)(1) ("(b) When an EIR is certified by a non-elected decision-making body within a local lead agency, that certification may be appealed to the local lead agency's elected decision-making body, if one exists." Manners contends the City violated due process by delegating this appeal to a committee of five city council members ("PLUM"). In support of this argument, Manners cites LAMC § 17.06(A)(4) and Guidelines §§ 15090(2), (3). LAMC § 17.06(A)(4) provides that an "interested person adversely affected by the proposed subdivision may appeal any action of the Appeal Board with respect to the tentative map . . . to the City Council." (§ 17.06(A)(4).) "The City Council shall hear the appeal within 30 days after it is filed . . . ." (*Ibid.*) "At the time established for the hearing, the Council **or its Committee** shall hear the testimony of the subdivider, the appellant, the Advisory Agency and any witnesses on their behalf." (*Ibid.*, emphasis added.) Because the statute expressly states that a Committee may hear an interested party's appeal, the Court finds that the City Council did not violate Manners' due process by delegating the appeal to the PLUM committee.

Manners' citation to Guidelines § 15090 is also unavailing. Section 15090(2), (3) provides that prior to approving a project, the lead agency must certify that: "[t]he final EIR was presented to the decisionmaking body of the lead agency," "the decisionmaking body reviewed and considered the information contained in the final EIR prior to approving the project," and "[t]he final EIR reflects the lead agency's independent judgment and analysis." Nothing in Section

15090(2), (3) requires the City Council to hold appeal hearings or prohibits the City Council from delegating appeal hearings to a committee.

### *G. No Unlawful Bias*

Manners asserts that contributions to LACC tainted the approval process citing Ethics Omission reports showing that RPI's "lobbyist" expended "close to $94,676 on the [City Council] and the Planning Department" for the fourth quarter of 2015. (OB p. 10.) Manners cites what appear to be excerpts from Quarterly Lobbying Reports by the Ethics Commission showing payments by the entity Townscape Partners to Paul Hastings and Marathon Communications for lobbying services on the 8150 Sunset Boulevard Project. (See, e.g, <http://ethics.lacity.org/pdf/lobbying/QRSummaries/2015-Q4.pdf> at p. 14.) These reports show payments by clients *to lobbyists*. Manners fails to cite any evidence of payments made by Townscape Partners or any lobbyists directly to members of the City Council. The Court rejects Manners' argument that the mere act of lobbying City Council creates an unlawful bias on the part of the City Council.[3]

Manners also contends that the hearing officer, William Lamborn, had a conflict of interest because he "works for the City." (OB p. 8.) "To prevail on a claim of bias violating fair hearing requirements, [a plaintiff] must establish 'an unacceptable probability of actual bias on the part of those who have actual decisionmaking power over their claims.' [Citation.]" (*Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1236.) According to Manners, Lamborn had a conflict of interest because he conducted the hearing on whether the approve the Vesting Tentative

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[3] L.A.M.C. § 48.02 defines "lobbying activities" to include the following conduct when that conduct is related to a direct communication to influence municipal legislation: "(1) engaging in, either personally or through an agent, written or oral direct communication with a City official; (2) drafting ordinances, resolutions or regulations; (3) providing advice or recommending strategy to a client or others; (4) research, investigation and information gathering; (5) seeking to influence the position of a third party on municipal legislation or an issue related to municipal legislation by any means, including but not limited to engaging in community, public or press relations activities; and (6) attending or monitoring City meetings, hearings or other events.

Tract Map, issued a decision approving the Tentative Map on June 23, 2016 (AR 59204-59415), issued an Appeal Recommendation Report to the Planning Commission on July 28, 2016 (AR 60550-60782), and appeared and testified before the Planning Commission and PLUM. The Court finds that Lamborn's employment by the City and involvement in the appeals process is not evidence of any actual bias on Lamborn's part as a hearing officer. Manners' citation to *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1020 is inapposite. In that case, the Supreme Court held that a private attorney selected to be a temporary administrative hearing officer "has a pecuniary interest requiring disqualification when the government unilaterally selects and pays the officer on an ad hoc basis and the officer's income from future adjudicative work depends entirely on the government's goodwill." (*Id.* at 1024.) In this case, as Manners points out, Lamborn was a full-time employee of the City. As a result, he did not have the same pecuniary interest in deciding the matter a certain way so as to be selected for future adjudicative work.

### *H. Manners' Alleged Easement Provides No Basis for Relief*

As an adjacent property owner, Manners asserts that the elimination of the turning lane unlawfully takes away a private easement that she and other residents have historically enjoyed. Manners has failed to persuade the court that she and other residents have an enforceable easement interest or that the alleged violation of easement rights provides a basis for issuing a writ of mandate. Manners' remedy for alleged impingement of a valid easement is an action for damages rather than a petition for writ of mandate.

### *I. The City's Reconfiguration of the Right Hand Turn Lane Was Lawful under the Streets & Highways Code*

Fix the City argues that the Public Streets, Highways, and Service Easements Vacation Law (Streets & Highway Code Sections 8300 et seq.) requires cities to follow certain requirements, including notice and a public hearing, before a street is abandoned or partially abandoned or the

public's right to use a street is terminated. JDR Crescent contends that the City's approval of the project without street vacation procedures also violated LAMC 12.36 which requires all applications for approvals to be filed simultaneously. (RJN Exh. 11.) The City asserts this argument is premature because the Planning Commission is not the entity that will approve the proposed conversion of the right hand turn lane into a public plaza. The City's Department of Public Works is the entity that will issue a B Permit authorizing the work to proceed.

The Court agrees that this issue is not ripe because Department of Public Works has not yet acted. It is also not properly before this Court because the Planning Commission did not approve this aspect of the project.

The Court also agrees with the City that, as a matter of law, the vacation procedures do not apply to the situation at hand. In this case, the project does not terminate the public's right of access to the area, it merely transforms the nature of the access from vehicular to pedestrian.

# II. CEQA Challenges to Historical Resources

## *A. The City's Arguments Undermining the Historic Significance of the Bank Building Are Not Relevant to Infeasibility*

The City argues at considerable length that LAC overstates the historical significance of the bank building. The City also offers evidence the bank building's historic importance is diminished by remodels and by the availability of similar architectural examples. (RB 60-63.) These arguments are not relevant to the determination of infeasibility under Section 21081(a) because, in this case, the City conceded in its Findings that demolition will have a significant environmental effect. (AR 00133.) Under CEQA, the City's rejection of more protective alternatives has consequences. Having found a significant impact, the City must, under CEQA, withhold approval of demolition unless it properly finds substantial evidence the preservation

alternatives are unreasonable or infeasible and further concludes that the benefits of the approved project outweigh the significant environmental effect of demolition.

### *B. The City's Findings Rejecting the Preservation Alternatives as Infeasible Are Not Compliant with CEQA or Supported by Substantial Evidence*

#### 1. The City's Findings of Infeasibility

The City's Findings (AR 27793-95) conclude "none of the historic preservation alternatives, including Alternative 6, are feasible." (AR 27793.) After acknowledging the "Draft EIR determined that Alternative 6 met, or could partially meet, all of the objectives of the project," the City concluded that "under CEQA, 'the decision makers may reject as infeasible alternatives that were identified in the EIR as potentially feasible,'" citing *San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1, 18. Alluding to "numerous public comments raising concerns about the overall massing and design concept," and concerns the alternatives "would not enhance the quality of the neighborhood, would be visually unappealing, would obstruct views [and] would not be pedestrian-friendly," the City found the preservation alternatives "would concentrate development of the remaining project site and would create a large and flat monolithic design that would not allow for views through the project site, which were a primary concern from the public." (AR 27794.) The City also opined the preservation alternatives "would result in a disjointed design to sidewalks, project accessibility and would not be as visually appealing or pedestrian friendly" as Alternative 9.

The City further found that the preservation alternatives failed to achieve six of the developer's stated "project objectives" (noted in bold font below) referring to the Statement of

Project Objectives[4] in the DEIR identifying 15 "objectives the applicant seeks to achieve." (AR 264-65.)

> [1] **Redevelop and revitalize an aging and underutilized commercial site and surface parking lot with a more efficient and economically viable mix of residential and commercial uses.**
>
> [2] Provide housing to satisfy the varying needs and desires of all economic segments of the community, including very low income households, maximizing the opportunity for individual choices and contributing to Hollywood's housing stock.
>
> [3] Increase the number of affordable rental housing units in the westernmost area of Hollywood.
>
> [4] Capitalize on the site's location in Hollywood by concentrating new housing density and commercial uses, thereby supporting regional mobility goals to encourage development around activity centers, promote the use of public transportation and reduce vehicle trips and infrastructure costs.
>
> **[5] Build upon the existing vitality and diversity of uses in Hollywood by providing a vibrant urban living development along a major arterial and transit corridor.**
>
> [6] Create new living opportunities in close proximity to jobs, public transit, shops, restaurants and entertainment uses.
>
> **[7] Provide high quality commercial uses to serve residents of the westernmost area of Hollywood in a manner that contributes to a synergy of uses and enhances the character of the area.**
>
> [8] Bring convenient neighborhood-serving commercial uses within walking distance of numerous apartments and single-family residences in the westernmost area of Hollywood.
>
> **[9] Create a development that complements and improves the visual character of the westernmost area of Hollywood and promotes quality living spaces that effectively**

[4] Although the Guidelines § 15124(b) directs that an EIR should include a "statement of the objectives sought by the proposed project" and that the "statement of objectives should include the underlying purpose of the project," none of the DEIR's 15 stated objectives identifies which of the 15 states "the underlying purpose of the project."

**connect with the surrounding urban environment through high quality architectural design and detail.**

**[10] Enhance pedestrian activity and neighborhood commercial street life in the westernmost area of Hollywood.**

**[11] Provide an attractive retail face along street frontages.**

[12] Provide improvements that support and encourage the use of nearby public transit lines and promote the use of bicycles as well as walking.

[13] Improve the energy efficiency of on-site uses by creating a master planned development that meets the standards for Leadership in Energy and Environmental Design (LEED) certification.

[14] Provide housing that supports the economic future of the region in an area in which the necessary infrastructure is already in place.

[15] Maintain and enhance the economic vitality of the region by providing job opportunities that attract commercial and residential tenants.

(AR 27794-95.) The City explained it was approving Alternative 9 "because it addresses these concerns and achieves the above-listed Project Objectives" and because "Alternative 9 would not be feasible if it incorporated a preserved bank building." (AR 27795.)

Notwithstanding the "significant and unavoidable impact incurred from demolition of the Bank," the City concluded "Alternative 9 achieves a design that is significantly more accessible to the City in its provision of publicly accessible open space, affordable housing, green building and iconic architecture that will significantly transform Sunset Boulevard [making it a] destination City for residents and tourists alike." The City concurred with Gehry Partners' March 24, 2016 letter opining it was "not feasible to meet [Project Objectives] with a design that preserved the bank," quoting language from the letter:

> "It does not provide street front engagement along Sunset Boulevard, it turns its back to Havenhurst Drive, and it impedes pedestrian access to the project from Havenhurst and Sunset. The size and layout of the building limits the number of types of tenants that could occupy the space. We do not believe this building has the flexibility to adapt to a new

usage, which would severely limit the programming of that building . . . . The bank consumes a sizable portion of the available property, which if preserved, would leave insufficient space to design buildings with comparable function to the ones that we would have to abandon." (AR 57731.)

### 2. Analysis

There is no dispute, in this case, the FEIR identified demolition of the bank building as a "significant effect" on the environment. In its Findings, the City rejected preservation alternatives as "infeasible" under Pub. Res. Code Section 21081(a)(3), approving the project notwithstanding the significant environmental effect of demolition. It is also undisputed the City's findings of infeasibility contradicted the DEIR which identified preservation alternatives (Alternative 5 and Alternative 6) as potentially feasible. The question for this Court is whether, as a matter of law, the City's findings supporting its rejection of preservation alternatives complied with CEQA and whether the findings were supported by substantial evidence.

#### a) An Agency May Reject Protective Alternatives that Are Infeasible and May Reject Unreasonable Alternatives that Fail to Meet the Project's Basic Project Objectives/Fundamental Purpose

Several provisions in CEQA and in the Guidelines address the rejection of proposed alternatives as *infeasible*. Sections 21002 and 21002.1 articulate California's substantive public policies underlying CEQA specifying that an agency should not approve a development project causing environmental impacts where feasible alternatives would mitigate those impacts. An agency should not reject a more protective alternative unless the alternative is infeasible, considering relevant economic, social, or other *conditions* at hand:

> 21002. The Legislature finds and declares that it is the policy of the state that public agencies **should not approve projects as proposed if there are feasible alternatives** or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects, and that the procedures required by this division are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the **feasible alternatives** or feasible mitigation measures

which will avoid or substantially lessen such significant effects. The Legislature further finds and declares that in the event **specific economic, social, or other conditions make infeasible such project alternatives** or such mitigation measures, individual projects may be approved in spite of one or more significant effects thereof.

21002.1 In order to achieve the objectives set forth in Section 21002, the Legislature hereby finds and declares that the following policy shall apply to the use of environmental impact reports prepared pursuant to this division:

(a) The purpose of an environmental impact report is to identify the significant effects on the environment of a project, to **identify alternatives** to the project, and to indicate the manner in which those significant effects can be mitigated or avoided.

(b) Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so.

(c) If **economic, social, or other conditions make it infeasible to mitigate** one or more significant effects on the environment of a project, the project may nonetheless be carried out or approved at the discretion of a public agency if the project is otherwise permissible under applicable laws and regulations.

[(d) and (e) omitted.]

(Pub. Resources Code, §§ 21002 and 21002.1, emphasis added.) This Court regards the reference to "conditions" in these provisions as significant because "conditions" connotes existing circumstances external to the design characteristics of the proposed alternative. The Legislature's use of the word "conditions" in its statements of policy provides guidance as to the intended meaning of "considerations" in Section 21081(a)(3).

Consistent with the policies articulated in Sections 21002 and 21002.1, Section 21081 prohibits approvals of a projects causing environmental impacts over feasible and more protective alternative but uses slightly broader language. Section 21081(a)(3) specifies how a lead agency should determine the feasibility of proposed alternatives with reference to specific economic and social "considerations" rather than economic and social "conditions." It also expands the scope of permissible considerations to include "legal," "technological" and "other" considerations and identifies "employment opportunities" as an appropriate consideration:

21081. Pursuant to the policy stated in Sections 21002 and 21002.1, no public agency shall approve or carry out a project for which an environmental impact report has been certified which identifies one or more **significant effects** on the environment that would occur if the project is approved or carried out **unless both** of the following occur:

(a) The public agency makes one or more of the following findings with respect to each significant effect:

(1) Changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment.

(2) Those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency;

(3) Specific **economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportunities** for highly trained workers, **make infeasible the . . . alternatives** identified in the environmental impact report.

(b) With respect to significant effects which were subject to a finding under paragraph (3) of subdivision (a), the public agency finds that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment.

(Emphasis added.) The requirement under Section 21081 that, before rejecting an alternative the agency must make two findings (a finding of infeasibility under subd. (a)(3) *and* a policy determination that the benefits of the approved project override the persisting environmental effects), suggests the Legislature reserved policy considerations for the latter finding and that the determination of infeasibility is a prerequisite to the weighing process contemplated in subd. (b).

Consistent with Section 21081(a)(3), the discussion of adequate findings in Guidelines, § 15091(a)(3), suggests, as a possible finding of infeasibility, a determination that "(3) [s]pecific economic, legal, social, technological, or other *considerations* including the provision of employment opportunities for highly trained workers, make infeasible the . . . project alternatives identified in the final EIR." The factors identified in Guidelines, § 15126.6(f)(1), as "factors to be

taken into account when addressing the feasibility of alternatives" are consistent with the reference to *conditions* in Sections 21002 and 21002.1 because they all describe circumstances or conditions external to the design of the proposed alternative: "site suitability, economic viability, availability of infrastructure, general plan consistency, other plans or regulatory limitations, jurisdictional boundaries (projects with a regionally significant impact should consider the regional context), and whether the proponent can reasonably acquire, control or otherwise have access to the alternative site...." The nature of these factors further suggests that the lead agency's focus in assessing feasibility should be on macroeconomic conditions (such as a need for employment), wide-ranging social conditions, and existing government "plans" and policies rather than, for example, an alternative's aesthetics or other undesirable design characteristics.

### b) An Agency May Reject an Alternative as Unreasonable if It Fails to Meet the Project's Basic Objectives/Fundamental Underlying Purpose

Although in this case, the City rejected the preservation alternatives as "infeasible" because they failed to meet project objectives, CEQA and the Guidelines authorize rejection of an alternative that fails to meet objectives as unreasonable (rather than infeasible). The notion that a failure to meet objectives renders an alternative "infeasible" is not supported by any language in CEQA or the Guidelines. CEQA Section 21081 and the Guidelines (§§ 15091(a)(3) and 15126.6(f)) do not authorize a finding of "infeasibility" based on the alternative's failure to meet project objectives. The only discussion of objectives in connection with rejection of protective alternatives is in Guidelines § 15126.6(a) which requires an EIR to identify "***reasonable alternatives*** . . . which could feasibly attain most of the ***basic objectives*** of the project . . . ."

The Guidelines, § 15126.6(c), which identifies three alternative bases for excluding a proposed alternative from an EIR, distinguishes between infeasibility and a failure to meet basic project objectives:

(i) failure to meet ***most of the basic project objectives***,

(ii) ***infeasibility***, or

(iii) inability to avoid significant environmental impacts.

(Emphasis added.) The "rule of reason" in Guidelines § 15126.6(f) is consistent with this distinction. After stating that an EIR needs "to set forth only those alternatives necessary to permit a ***reasoned*** choice," it explains that the "EIR need examine in detail only the [alternatives] that . . . could ***feasibly*** attain most of the ***basic objectives*** of the project." (Emphasis added.)

These provisions in § 15126.6 strongly suggests that an EIR (and, presumably an approving agency) may reject alternatives that fail to meet ***basic*** project objectives because they are *unreasonable* (as opposed to *infeasible*) alternatives. The fact that Guidelines § 15126.6(f)(1) does not list "failure to meet basic objectives" as a "[factor] that may be taken into account when addressing the *feasibility* of alternatives" is consistent with the analytical distinction in 15126.6(c) between a failure to meet basic objectives and infeasibility.

It makes sense to distinguish between alternatives that are infeasible and alternatives that are not reasonable because CEQA defines "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time taking into account economic, environmental, social and technological factors." (Pub Resources Code, § 21081.1.) It therefore follows that "infeasible" under Section 21081(a)(3) means *incapable* of being accomplished within a reasonable period of time taking into account economic, environmental, social, technological and/or existing policy considerations. An alternative's inability to meet basic project objectives does not necessarily speak to its feasibility. If the underlying purpose is to build a shopping center, a proposed alternative to build an office building may be entirely feasible and profitable based on the nature of the site, the zoning, and similar considerations, but it is not a *reasonable* alternative for a developer whose basic objective is to build a shopping center.

The Supreme Court's analysis in *In re Bay-Delta* (2008) 43 Cal.4th 1143, 1165-66 recognizes the distinction between infeasibility and a failure to meet basic project goals, stating "an EIR need not study in detail an alternative that is infeasible or that the lead agency has reasonably determined cannot achieve the project's ***underlying fundamental purpose***." (*Id.* at 1165.) (Emphasis added.) The project under consideration in that case was a long term comprehensive plan for a consortium of federal and state agencies to collectively address pollution problems in the Bay-Delta region. One of the stated purposes was to reduce conflicts by providing a solution the various competing interests could support. The Supreme Court upheld the lead agency's decision not to include, in the EIR, a detailed study of an alternative that would have exacerbated the conflicts that the plan was designed to eliminate.

> "Although a lead agency may not give a project's purpose an artificially narrow definition, a lead agency may structure its EIR alternative analysis around a reasonable definition of ***underlying purpose*** and need not study alternatives that cannot achieve ***that basic goal***. For example, if the ***purpose*** of the project is to build an oceanfront resort hotel [(*Citizens of Goleta Valley v. Board of Supervisors of Santa Barbara County* (1990) 52 Cal.3d 553, 561)] or a waterfront aquarium (*Save San Francisco Bay Assn v. San Francisco Bay Conservation etc. Com.* (1992) 10 Cal.App.4th 908, 924-925), a lead agency need not consider inland locations. (See also *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal. App. 4th 704, 715 [lead agency need not consider lower density alternative that would defeat primary purpose of providing affordable housing].)" (Emphasis added.)

The Supreme Court's presumption that the relevant "purpose" is the *proponent's* purpose, whether the proponent is a government agency as in *In re Bay-Delta*, or a private developer building a resort hotel, an aquarium or a mixed use project on Sunset Boulevard, is instructive. The court's emphasis on evaluating the reasonableness of proposed alternatives in light of a project's "fundamental underlying purpose" is consistent with the Guidelines' reliance on "***basic*** project objectives" as the basis of comparison.

It is also consistent with Guidelines, Section 15124, which mandates that an EIR should identify "the objectives sought by the proposed project," including the project's "underlying purpose," without supplying unnecessary additional information:

> "A description of the project should contain the following information but ***should not supply extensive detail beyond that needed for evaluation and review of the environmental impact.***
>
> (a) [location and boundaries;]
>
> (b) A statement of ***the objectives sought by the proposed project*** [to] help the lead agency develop a reasonable range of alternatives in the EIR . . . . The statement of objectives should include the ***underlying purpose*** of the project.
>
> (c) A general description of the project's technical, economic, and environmental characteristics, considering the principal engineering proposals if any and supporting public service facilities. . . ." (Emphasis added.)

In other words, the project description, which should articulate the stated objectives and specify the underlying purpose, should be limited to the information necessary to evaluate the project's *impacts* on the environment mindful that CEQA defines "environment" as "the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." (§ 21060.5.) Based on this definition, the physical parameters of a project and a description of its intended uses should be sufficient to identify the potential impacts on air quality, noise, objects of historic value etc. According to Section 15124, the EIR "should not supply extensive detail beyond that."

In this case, the 15 objectives listed in the FEIR went far beyond what was required. Although the FEIR did not specify which one was the "fundamental underlying purpose" of the development, it listed 15 "objectives" that described various beneficial social byproducts of the project (e.g., revitalization, aesthetic appeal, increased jobs, increased affordable housing, promotion of public transportation etc.). The Court recognizes that identifying such benefits as

"objectives" may facilitate the political process of garnering public support and government approvals, such "objectives" do not speak to the potential environmental impacts and do not state the proponent's "basic project objectives" or its "fundamental underlying purpose." Such non-basic objectives therefore do not provide appropriate bases for rejection of more protective alternatives as unreasonable.

Notwithstanding the Supreme Court's analysis in *In re Bay-Delta* and the language in Guidelines Section 15126.6(c) recognizing a failure to meet the project's fundamental underlying purpose/basic objectives is a basis for rejecting *unreasonable* alternatives that is distinct from a finding of infeasibility, there is language in several cases (discussed below) suggesting that a failure to meet *any* project objective may support a finding of *infeasibility.* Because this Court cannot find any reported case actually holding that any inconsistency with any of a developer's stated objectives is, *ipso facto*, a ground for finding infeasibility, the Court regards this language as dicta that is inconsistent with the Guidelines and *In re Bay Delta, supra.*

For example, the decision in *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1505-06 *(Sierra Club)* has been cited for the proposition that a failure to meet project objectives supports a finding of infeasibility even though it nowhere states that proposition. The court's holding in *Sierra Club,* affirming rejection of an alternative that failed to meet the developer's objective of consolidating operations, is consistent with *In re Bay-Delta, supra,* and the rule of reason deeming alternatives that fail to meet *basic* objectives unreasonable. (Guidelines § 15126.6(f).) In *Sierra Club,* a large winemaker sought to improve efficiency by constructing a new 1,424,400-square-foot warehousing and storage facility in order to consolidate operations from six existing facilities ("a facility of [such] size and layout . . . to meet our fundamental business needs of operational efficiency and consolidation, which is the justification for this large and expensive project"). (*Ibid.*) Conservationists proposed an alternative design that cut the size of the proposed facility in half. The court found substantial evidence supporting the lead agency's

"ultimate decision [rejecting the alternative based on] economic *feasibility*" noting the half-size alternative "would not achieve the *objective* of consolidating the winery's operations." (*Sierra Club, supra,* 121 Cal.App.4th at pp. 1506, 1508.)

In *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437 (*Save Round Valley*) the court affirmed a finding of economic infeasibility, citing *Sierra Club* in a footnote discussing "*basic* objectives." Without citing Guidelines 15126.6(f), the court stated, "We do not suggest that an economic analysis is necessarily required in order to address the feasibility of the land exchange alternative. . . . If, for example, the County concludes the *basic objectives* of the project cannot be achieved regardless of economic feasibility, an analysis of economic viability may not be necessary." (*Id.*, at fn. 13, citing *Sierra Club*, emphasis added.)

Unfortunately, the court in *SPRAWLDEF v. San Francisco Bay Conservation and Development Commission* (2014) 226 Cal.App.4th 905, 918–19 (*SPRAWLDEF*) overstated the content of the *Save Round Valley* footnote. Instead of quoting the footnote's reference to "*basic* objectives," the court noted that an alternative (which was rejected based on economic and legal considerations) "fail[ed] to achieve *project goals*." (*Id.* at 922, emphasis added.) There is similar dicta in *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704 (affirming the city's rejection of a decreased density alternative as economically infeasible and legally infeasible under Govt. Code § 65589.5 and commenting that the alternative "would defeat the *project objective* of providing 'the least expensive single family housing for the vicinity'"). (Emphasis added).

Dicta in *City of Del Mar v. City of San Diego* (1982) 133 Cal.App.3d 401 (*Del Mar*) has added to the confusion. Although *Del Mar* did not reject alternatives based on a failure to meet any stated developer objectives, the court in *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 949 (*Rialto*) cited *Del Mar* for the proposition that "a lead agency may reject an alternative *as infeasible* because it cannot meet *project objectives.*"

(Emphasis added.) In *Rialto*, the developer's purpose (basic objective) was to construct a Walmart Supercenter and four commercial outparcels designed for restaurant and retail tenants. The City rejected a "reduced density alternative" that eliminated the four commercial outparcels. The court affirmed the lead agency's finding noting that "excluding the four outparcels . . . would not have satisfied the *project objective* of providing a mix of retail and restaurant tenants, thus providing residents with additional shopping and eating options." (*Id.* at 948, emphasis added.)

Although the cases cited above mention project *objectives* in the context of affirming rejection of proposed alternatives as *infeasible*, the facts adjudicated are consistent with Guidelines § 15126.6(f)'s directive that a lead agency need not consider an alternative that fails to meet "*basic objectives*" and with *In re Delta-Bay*'s rejection of an alternative that was inconsistent with the project's fundamental purpose. The Court finds no case holding or suggesting that a mere inconsistency with a non-basic project objective (an objective that fails to identify project elements having an impact on the environment) justifies rejection of a more protective alternative. Indeed, such a rule would turn CEQA's substantive mandate on its head by allowing private and public proponents to articulate objectives that no proposed alternative could match. For example, Real Party in this case could have articulated an objective of "constructing a mixed-use development designed by architect Frank Gehry" thereby rendering any proposed alternative not approved by Mr. Gehry infeasible. On the other hand, a failure to meet the *basic* objectives/fundamental purpose justifies the rejection of an alternative as unreasonable under the rule of reason articulated in Guidelines § 15126.6 (f): "The EIR need examine in detail only the [alternatives] that the lead agency determines could feasibly attain *most of the basic objectives* of the project."

As explained in greater detail below, the City's criteria for rejection of the more protective alternatives in this case are not consistent with CEQA and the Guidelines because the City relied on a failure to meet non-basic objectives and on considerations not embraced by the criteria for infeasibility identified in Section 21081(a)(3).

### c) The City Failed to Make Appropriate Findings Supporting Its Rejection of Protective Alternatives and Failed to Support Its Findings with Substantial Evidence

The Court agrees with the City that a lead agency examining infeasibility under Section 21081(a)(3) is not bound by the EIR's determination of potential feasibility and may reject the EIR's determinations in that regard. As explained in *California Native Plant* Society *v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 981:

> The issue of feasibility arises at two different junctures: (1) in the assessment of alternatives in the EIR and (2) during the agency's later consideration of whether to approve the project. [Citation.] But differing factors come into play at each stage. [Citation.] For the first phase – inclusion in the EIR – the standard is whether the alternative is potentially feasible. [Citation.] By contrast, the final decision on project approval – the decision-making body evaluates whether the alternatives are actually feasible. [Citation.] At that juncture, the decision-makers may reject as infeasible alternatives that were identified in the EIR as potentially feasible. [Citation.]

Nevertheless, a lead agency that rejects alternatives identified as potentially feasible in the EIR must do so in accordance with relevant provisions of CEQA including Section 21081(a)(3). In this case, the City based its rejection of the preservation alternatives on criteria not embraced by the language of Section 21081(a)(3) or the relevant Guidelines.

As the basis for its finding that alternatives 5 and 6 were infeasible, the City identified numerous project-specific characteristics of the alternatives that generally fall into three categories: (1) aesthetic considerations ("massive," "monolithic" and "visually unappealing" buildings that do not allow for views through the site); (2) pedestrian traffic considerations ("disjointed design to sidewalks" affecting project accessibility, a less "pedestrian friendly" layout that "turns its back" on Havenhurst); and (3) reduced profitability of commercial space (a layout that "limits the number and types of tenants" and lacks "flexibility" to adapt to new usage, and the presence of a sizable bank building leaving "insufficient space to design buildings with comparable function" to the buildings in Alternative 9).

In reviewing the City's findings, the first question for this Court is whether, as a matter of law, the findings articulate "considerations" rendering the alternatives infeasible under Section 21081(a)(3) or demonstrate a failure to meet the underlying purpose/basic project objectives that renders the alternatives unreasonable. If the City relied on proper criteria to find the alternatives were infeasible or unreasonable, the Court must then examine whether the findings are supported by substantial evidence, mindful that the Court may not disturb properly made findings that are supported by substantial evidence.

Addressing the first question requires the Court to interpret the language of Section 21081(a)(3). The City argues that "given the generality of the categories of 'social' or 'other' considerations,' the matters decisionmakers might take into account are broad and diverse." (Opp. p. 70.) While it is true that, aside from *Dusek v. Anaheim Redevelopment Agency* (1985) 173 Cal.App.3d 1029 (*Dusek*) (which is inapposite[5]), the cases cited by the City involve diverse bases for rejecting alternatives, it is also true that, in every case, the lead agency's finding of infeasibility identified a specific economic, legal, or social consideration or an existing governmental policy or plan that rendered implementation of the alternative impractical to construct.

For example, in *Del Mar*, *supra*, the court of appeal affirmed the agency's approval based on an existing government plan and specific social and economic considerations: "[i]n point of fact, San Diego considered and reasonably rejected the [alternatives] as infeasible in view of the social and economic realities of the region" noting that San Diego's existing growth management plan accommodated the "economic, environmental, social and technological factors" identified in CEQA's Section 21081. (133 Cal.App.3d at 417.) In *Sierra Club v. Gilroy City Council* (1990)

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[5] In *Dusek*, the agency approved the demolition of a mansion located on public property. Because the petitioners in *Dusek* did not challenge any finding that any alternative was infeasible it is inapposite and its dicta in the context of discussing overriding considerations is irrelevant.

222 Cal.App.3d 30, the court affirmed the agency's approvals citing economic infeasibility, and the city's dire need for additional housing (a social condition). Similarly, in *Foundation for San Francisco v. City and County of San Francisco* (2002) 106 Cal.App. 3d 893 the court affirmed an agency's rejection of alternatives based on legal considerations (a failure to meet building code requirements) and economic considerations (an additional $1.5 to $4 million in construction costs). (*Id.* at 913-14.) Thus, the cases cited by the City stand for the proposition that the courts have consistently identified economic, social, and legal considerations under Section 21081(a)(3) or existing policies ("plans" under Guidelines § 15126.6(f)(1)) as the bases for finding infeasibility. (See generally Remy et al., Guide to CEQA (2007 Ed.), p. 384 ("When making a finding that an environmentally superior alternative is infeasible, an agency may be entitled to rely on evidence that the alternative would . . . fail to implement planning policies already in place.")

The findings in the cited cases also appropriately focused on the characteristics or impact of the more protective alternatives as mandated under Section 21081. As noted above, CEQA defines "feasible" as "capable of being accomplished . . . ." The proper focus for determining whether a proposed alternative is "infeasible" is therefore whether the proposed alternative is *incapable* "of being accomplished . . . ." The salient question for infeasibility is the nuts, bolts and dollars inquiry whether a proposed alternative can be built on the site for a reasonable price (relative to potential profitability) and within a reasonable period of time, in view of existing governmental policies and relevant economic, legal, social and/or technological constraints.

However, in this case, the City focused on the comparative benefits or superior characteristics of the approved project rather than practical considerations affecting implementation of the alternatives. The superior qualities of the approved project are not relevant to the feasibility of a proposed alternative. Such benefits may be relevant to the agency's determination under Section 21081(b), which directs a lead agency to consider whether "specific overriding economic, legal, social, technological, or other *benefits* of the project outweigh the

significant effects on the environment," but they are not relevant to the threshold determination whether an alternative is infeasible or unreasonable.

The City also relied on non-basic objectives as a basis for rejecting the more protective alternatives. In this case, the EIR listed 15 multipart "objectives that the applicant seeks to achieve for the Project," most of which identify social benefits rather than aspects of the project that will impact the environment. (AR 265.) While there is nothing in the record suggesting the City identified the "underlying purpose" of the project or made any formal determination which of the stated objectives are the "basic project objectives," it is apparent that the only stated objectives potentially impacting the environment are objectives [1] and [3] to "[r]edevelop . . . [an] economically viable mix of residential and commercial uses" while providing additional low income housing units. To the extent the City based its rejection of more protective alternatives on objectives having no potential impact on the environment, it improperly relied on non-basic rather than basic objectives.

At the April 19, 2017 hearing in this matter, counsel for the Real Party argued the City's determination that six of the stated objectives were not met by the alternatives was effectively a determination those six objectives are "basic project objectives." However, aside from the description of the project as a "mix of residential and commercial uses" in the first stated objective, the six objectives identify various social benefits rather than elements of the project *that potentially impact the environment.* Because these potential social benefits do not state the project's fundamental underlying purpose or its "basic objectives," they are not appropriate grounds for rejection of more protective alternatives under CEQA or the Guidelines.

### *(1) Aesthetic Considerations Are Not Social and/or Policy Considerations Justifying a Finding of Infeasibility or Basic Plan Objectives Justifying a Finding Alternatives Are Unreasonable*

As noted above, feasibility under CEQA focuses on the practical question whether the alternative can be constructed for a reasonable profit and within a reasonable timeframe and in light of relevant "economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportunities...." (§ 21081(a)(3).) The unattractiveness of an alternative does not render it infeasible because an unattractive design does not prevent construction of the alternative in a timely and reasonably profitable manner. Section 21081(a)(3) accordingly makes no mention of aesthetic merit. As noted above, the Court interprets "social . . . or other considerations" in section 21081(a)(3) as encompassing external conditions and circumstances including existing governmental policies. The aesthetics of a proposed alternatives are not a "social or other consideration" contemplated under that provision. The Court finds no case (and the parties have cited no case) affirming a finding of infeasibility based on a proposed alternative's perceived lack of aesthetic value as a legitimate "social . . . or other condition" under Section 21081(a)(3).

The City's discussion of aesthetics as a basis for rejecting protective alternatives also improperly focuses on positive characteristics of the approved project rather than the feasibility of the more protective alternatives. The project's benefits are not relevant to the question whether *an alternative* is infeasible (not "capable of being accomplished in a successful manner within a reasonable period of time"). Indeed, case law strongly suggests that the project-specific design features of a proposed alternative are not a proper focus of inquiry under Section 21081(a)(3). The considerations accepted by the courts as appropriate bases for findings of infeasibility involve the overall economics of the project (its profitability), generalized social conditions or existing government plans or policies that make the proposed alternative impractical to construct. (See,

e.g., *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957 [upholding rejection of alternative based on legal and social considerations including rights of disabled persons and the City's policy of promoting disability access]; *Flanders Foundation v. City of Carmel-By-the-Sea* (2012) 202 Cal.App.4th 603 [upholding rejection of alternative based on a specific social considerations including the perpetuation of a financial drain on the City's resources]; see also, *Del Mar*, *Gilroy* and *Foundation* [discussed *infra*].)

The City's reliance on aesthetic considerations is troubling for an additional reason. As LAC points out, Pub. Resources Code, § 21099(d)(1) specifically states, "Aesthetic . . . impacts of a . . . mixed-use residential . . . project on an infill site within a transit priority area shall not be considered significant impacts on the environment." Because Alternatives 5 and 6 proposed residential mixed use projects under that provision, aesthetic concerns are not a viable basis for rejecting them.

Aesthetic considerations also fail to support a finding the alternatives are unreasonable. Such considerations are not "basic project objectives" because they do not, per se, have an impact on the physical environment. While the Court recognizes the City's reliance on aesthetic considerations was motivated by a desire to respond to community concerns, such considerations are not a valid basis for rejecting Alternatives 5 and 6 as unreasonable.

***(2) The City's Finding of Infeasibility Based on Aesthetic Concerns Is Not Supported by Substantial Evidence***

The City's finding of infeasibility based on aesthetic concerns is also not supported by substantial evidence or by evidence the City independently evaluated the issue. With respect to aesthetics, the City cites Frank Gehry's March 24, 2016 letter to Councilmembers explaining that using models, he "tried dozens of massing options for this project to arrive at the best solution" including options "using the bank building and without the bank building" and his conclusion

"having done [his] homework . . . [that he] really do[es] not believe that [he] can design a successful project while keeping the bank on the site." (AR40985; RB 69.)

It is, of course, perfectly reasonable for an architect to opine, in essence, that the distinctive but dated existing bank building does not fit with his modern, cutting edge design. However, the issue for determining feasibility is whether, on a practical basis, the alternative can be constructed, not whether it can be accomplished in an aesthetically pleasing manner. The architect's opinion is not substantial evidence of infeasibility under CEQA because it does not address the relevant considerations.

### *(3) Pedestrian Traffic Is Not a Social or Other Consideration Affecting Feasibility or a Basic Project Objective/Fundamental Purpose.*

The Court has similar difficulty finding that an alternative's supposedly compromised pedestrian traffic renders it infeasible under Section 21081(a)(3) and/or Guidelines § 15126.6(f)(1). As noted above, the determination of infeasibility requires a very practical inquiry into whether a more protective alternative can be constructed for a reasonable price and within a reasonable time frame. Pedestrian traffic issues do not, in and of themselves, prevent construction of Alternatives 5 and 6 for a reasonable price within a reasonable time frame. Pedestrian traffic *per se* is also not a cognizable social or other condition/consideration contemplated under Section 21081(a)(3).[6]

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[6] This is not to say that the promotion of free flowing pedestrian traffic could never be relevant to any social, economic or existing plans/policy considerations under Section 21081(a)(3). Conceivably, a lead agency could demonstrate that the economic impact from the compromised flow of pedestrian traffic so adversely impacts the developer's prospective commercial rental income that no prudent investor would proceed with the project. Alternatively, a lead agency could identify existing government plans or policies for pedestrian mobility and determine that the marginal impact on pedestrian mobility under the alternative design undermines that policy. Or, a lead agency could identify highly congested local automobile traffic as a social consideration that could be alleviated by a design providing pedestrian access to nearby shops and services.

Although enhanced pedestrian traffic is identified as one of the developer's project objectives, it is not an element of the project that potentially impacts the environment or a "fundamental underlying purpose" of the project under *In re Bay-Delta*, supra. Any supposed inconsistency between the pedestrian traffic aspects of the proposed alternatives and the objective of promoting pedestrian traffic is therefore not a legitimate basis for rejecting the alternative as unreasonable under Guidelines § 15126.6.

### *(4) The City's Findings re Pedestrian Traffic Are Not Supported by Substantial Evidence*

Moreover, the City's findings with respect to supposed diminution of pedestrian traffic in Alternatives 5 and 6 are not supported by substantial evidence. The City relies on Gehry Partners LLP's unsigned March 24, 2016 letter which expresses opinions, e.g., that the bank building "does not provide street-front engagement along Sunset Boulevard," "turns its back to Havenhurst Drive, impedes pedestrian access to the project from Havenhurst and Sunset," and has a "nonporous façade . . . at odds with the vision for a pedestrian-friendly development." (AR57731; RB 68.) These opinions are not supported by drawings identifying any impediments, estimates of the volume or timing of anticipated pedestrian flow on Sunset or the adjacent streets or analysis of how or the extent to which the bank building alternatives marginally impact such traffic. The evidence the bank building was designed for a "car culture with its ample parking lot, rear entrance, drive-up teller, and Zigzag folded plate concrete roof . . . created to draw drivers off the road and into the bank" does not speak to pedestrian traffic in the proposed alternatives. (AR2136; RB 68.)

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However, identifying that social consideration would not end the agency's obligations under CEQA. To support a finding that a less pedestrian friendly alternative is *infeasible*, the lead agency would need substantial evidence local residents' errand driving significantly exacerbates the traffic, substantial evidence such driving could be abated by a pedestrian friendly arrangement, and substantial evidence that the marginal difference between pedestrian traffic in the more protective alternatives and Alternative 9 is significant enough to vitiate the alternatives' positive impact on automobile traffic.

Evidence as to the superior design features of Alternative 9 (its "expanded 12-foot sidewalks," "garden areas," "publicly accessible internal pedestrian network") are not relevant to the question whether the alternatives are feasible under Section 21081(a)(3). (AR27854, 27824, 990; RB 69).

The City's findings also apparently rest on characteristics of the bank building in its current condition rather than rehabilitated as proposed in alternatives 5 and 6. The architect's March 24, 2016 letter makes no reference to Alternatives 5 and 6 and apparently comments on the bank building in its current condition. For example, the reference to the "nonporous façade" appears to be a comment about the bank in its present state because Alternatives 5 and 6 propose to replace "the exterior ground floor walls on the south and east elevations with new compatible windows, to improve transparency and views through the windows" and to replace existing false clerestory windows with "new compatible windows to allow natural light . . . and provide views through the new clerestory windows of the folded plate roof." (See, e.g., AR948, 951.)

The City's required showing of substantial evidence is also undermined by contrary evidence suggesting that Alternatives 5 and 6, in fact, promote pedestrian access. Both alternatives include design features that appear to facilitate pedestrian traffic: wider sidewalks, off-street parking, and a reconfiguration of a traffic island into landscaped public open space. (AR 966.) The EIR describes alternatives 5 and 6 as "consistent with the City's "*Walkability Checklist*" because they "would link pedestrians to a landscaped plaza, extend the pedestrian environment to the retail businesses and residential access points . . . and include numerous design features to enhance the neighborhood character and pedestrian environment." (AR 966.)

The Court therefore concludes that the City's pedestrian related findings are not consistent with CEQA and not supported by substantial evidence. There is also a dearth of evidence the City independently analyzed pedestrian traffic issues. While the City may rely on studies or data generated by Real Party, CEQA requires the City to independently analyze that information.

### *(5) Reduced Profitability of Commercial Space Is Potentially a Basis for Finding Infeasibility but the City's Findings Are Not Supported by Substantial Evidence*

Reduced profitability is an appropriate basis for rejecting Alternatives 5 and 6 as unreasonable because the project's basic objective/fundamental purpose is to construct an "economically viable" project. It is also an appropriate basis for finding infeasibility under Section 21081(a)(3) which identifies "economic . . . considerations" as appropriate considerations bearing on infeasibility. However, there is ample case law confirming that mere evidence of reduced profitability is not "substantial evidence" of economic infeasibility under Section 21081(a)(3). To render an alternative infeasible, the reduced profitability must be "sufficiently severe to render it impractical to proceed with the project." (*Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1181.) Ultimately, "the question is ... whether the marginal costs of the alternative as compared to the cost of the proposed project are so great that a reasonably prudent [person] would not proceed with the [altered project]." (*Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 600, 54 Cal.Rptr.3d 366 (*Woodside*).)

The City cites no evidence demonstrating that the preservation alternatives will so severely impact commercial rental income that no reasonably prudent person would proceed with the development. Instead, the City relies on an October 31, 2016 letter from Real Party's consultant, Paul Silvern of HR&A Associates Advisors, Inc. (HR&A). (AR40971-976.) Silvern's letter evaluates financial feasibility based on "two investment return metrics commonly used in the real estate industry" and measures them against a "minimum" developer profit margin of 12.5 % which, in HR&A's experience, "is a typical threshold for Los Angeles development projects (i.e., midpoint of a 10-15 percent range"). (AR 40971.) Based on these and other assumptions and estimates, Silvern concludes that the more protective alternatives will yield profits below the HR&'S designated "minimums" (a 5.1% return on cost versus a minimum of 5.7% and a 7.6%

developer profit margin ($20,754,135) versus a 12.5% minimum (described as the "midpoint of a 10-15% range"). Silvern's letter fails to address the pertinent question whether Alternatives 5 and 6 will compromise commercial rental income so severely that no reasonably prudent investor would proceed with such a project. The other evidence cited by the City, e.g., Mr. Gehry's opinion that other commercial uses will not work within the confines of the existing bank structure (AR27795; RB 69) is also insubstantial.

While there is no requirement for "any particular analysis or any particular kind of economic date," there must be "some context that allows for economic comparison." (*SPRAWLDEF* 226 Cal.App.4th at 918 citing *Woodside, supra,* 147 Cal.App.4th at pp. 600–601.) As the *SPRAWLDEF* court noted:

> The 'feasibility of ... alternatives must be evaluated within the context of the proposed project. "The fact that an alternative may be more expensive or less profitable is not sufficient to show that the alternative is financially infeasible. What is required is evidence that the *additional* costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project." ' [Citations.] Thus, when the cost of an alternative exceeds the cost of the proposed project, 'it is the magnitude of the difference that will determine the feasibility of this alternative.' " (*Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 883, 111 Cal.Rptr.3d 374.) Ultimately, "the question is ... whether the marginal costs of the alternative as compared to the cost of the proposed project are so great that a reasonably prudent [person] would not proceed with the [altered project]." (*Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 600, 54 Cal.Rptr.3d 366 (*Woodside* ).)

(*Id.* at 918–19; see also *Kings County* at 736 [reversing agency approval based on insufficient "quantitative, comparative analysis" for a reasoned decision].)

The Court is also unable to find substantial evidence the City undertook any independent analysis of economic feasibility notwithstanding the extensive case law underscoring the City's obligation to do so. The sparse record in this case is in stark contrast to the record in *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656 (*San Franciscans*). In that case, preservationists argued for restoration of a highly

dilapidated and outdated former department store, the Emporium Building. (*Id.* at 707.) To support its rejection of the full restoration alternatives in favor of partial restoration of certain historic aspects, the agency relied on studies and economic analyses prepared by two independent consulting firms. (*Id.* at 693) Both studies concluded that no prudent person would develop a project that fully restored the Emporium Building, pointing out that complete restoration would have a substantial social and economic impact, requiring the public to contribute an additional $59 to $82 million in public funds.

In contrast to *San Franciscans*, the showing of financial infeasibility in this case is vague and rests on opinions rather than facts. For example, the assertion that the protective alternatives limit the number of tenants and compromise "flexibility" is vague in meaning and not supported by evidence of any calculable or estimated financial impact. There is no evidence, for example, that the size or configuration of the commercial space in the alternatives is less attractive to potential tenants or that the alternatives will garner lower rents.

The rejection of a similarly unsubstantiated showing in *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336 (*PAC*) is instructive. In *PAC*, preservationists challenged the City Council's approval of demolition of a historic IBM plant to build a "big box" Lowe's warehouse store. The court of appeal concluded the agency's decision was not supported by substantial evidence noting that the agency's findings (based on Lowe's unsubstantiated opinions that the reduced size alternative would be "more expensive to build," "operationally infeasible," and would place Lowe's at a competitive disadvantage) were not sufficient because they were not supported by any analysis. (*Id.* at 1355-56.) The *PAC* court pointed out the record "contain[ed] no facts, independent analysis or 'meaningful detail' to support Lowe's claim that 'San Jose market demands of product selection/variety' and the need to 'stock the appropriate amount of inventory' rendered the reduced size store [infeasible]." (*Id.* at 1357, citing *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 736 (*Kings County*).)

The City in this case has similarly failed to demonstrate it fulfilled its obligation "to independently participate, review, analyze and discuss alternatives in good faith" and failed to explain the basis for its finding of infeasibility "in meaningful detail." (*PAC, supra,* 141 Cal.App.4th at 1357 [citing *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal. 3d 376, 405].)

# III. The Court Rejects All other CEQA Challenges

## *A. No CEQA Violation based on the EIR's Consideration of Fire and Emergency Services*

Petitioner Fix the City argues the EIR "fails to properly discuss a significant impact to LAFD emergency response services in and around the Project" noting the average response times are below appropriate standards. (OB p. 7-8.) Based on *City of Hayward v. Trustees of California State University* (2015) 242 Cal.App.4th 833 (*City of Hayward*), the City argues that impacts on fire and emergency services are not "environmental effects" covered under CEQA.

In *City of Hayward,* opponents of a proposed expansion of a university campus contended the EIR was inadequate because, among other things, it failed to address the "adverse effect on [the safety of] people and property" caused by the diminution in the condition of fire and emergency services (from adequate to inadequate). (*Id.* at 841-842.) The court of appeal rejected the argument concluding "the obligation to provide adequate fire and emergency medical services is the responsibility of the city" (citing Cal. Const. art. XIII, § 35, subd. (a)(2)) and "not an environmental impact that CEQA requires a project proponent to mitigate." (*Id.*) The court pointed out that the CEQA guidelines (§ 15382) defines "significant effect on the environment" as an "adverse change in any of the physical conditions within the area including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance." (*Id.* at 843.)

Consistent with *City of Hayward*, this Court finds that impacts on emergency response times are not "environmental impacts" covered under CEQA. The EIR's alleged failure to adequately analyze response times is therefore not a violation of CEQA.

Fix the City additionally argues that the EIR did not adequately disclose the project's impact and cumulative effect on emergency response services pointing out that the disclosures regarding response times were more extensive in *City of Hayward* than in the present case and that such disclosures are necessary to allow a determination whether the project will have a cumulative effect on emergency services. Petitioner, however, cites no authority for the proposition that a factor that does not qualify as an environmental impact under CEQA can somehow qualify as a cumulative environmental impact. The Court is therefore not persuaded by this argument.

The Court finds that the EIR appropriately analyzes the project's impact on fire protection in terms of whether the project will require the construction of a new fire station or expansion of existing facilities, which would result in a substantial adverse physical impact on the environment. (AR 666; CEQA Guidelines, Appendix G, part 14; *City of Hayward, supra*, 242 Cal.App.4th at 841-43.) The EIR concludes that "[t]he Project would not require the addition of a new fire station or the expansion, consolidation, or relocation of an existing fire station to maintain service" and that as a result "[i]mpacts would be less than significant." (AR 667.) Fix the City argues that this conclusion is in "direct conflict" with a statement from LAFD to the City Planning Department concerning the project. The Court disagrees. The LAFD statement merely projects that "[t]he development of this proposed project, *along with other approved and planned projects* in the immediate area, *may* result in the need for . . . (1) Increased staffing for existing facilities. (2) Additional fire protection facilities. (3) Relocation of present fire protection facilities." (AR 2991.) Petitioners contend that at current service levels, the stations nearest to the project site fail to meet the National Fire Protection Association ("NFPA") standard of responding to fires within 5:20, 90% of the time. (OB p. 8.) Yet, Petitioners fail to cite any evidence that failure to meet this

standard requires construction of additional fire protection facilities.[7] On the contrary, an e-mail from Fire Marshall Luke Milick dated September 19, 2013 merely states that the LAFD's "*goal* is to reach all fires within 5:20 90% of the time." (AR 2983.) Moreover, despite failing to meet the NFPA standard, the LAFD admitted in its statement that "[a]t present there are no immediate plans to increase Fire Department staffing or resources in those areas, which will serve the proposed project." (AR 2990.)

Accordingly the Court finds that the EIR adequately analyzes the project's impact on fire protection and emergency medical services.

### *B. The EIR Did Not Improperly Ignore the D Limitation Zoning Restriction*

Petitioners JDR Crescent and Fix the City argue that the City violated CEQA by ignoring a D limitation on zoning. They argue the limitation should restrict the project's floor area ratio to 1:1 and was not properly disclosed as a baseline condition. They further contend the EIR to the 1988 Hollywood Community Plan was designed to "down zone: property in the area to encourage small scale rather than large scale developments including a "permanent "D" Limitation" limiting FAR to 1:1. (OB p. 5.) According to petitioners, the City cannot disregard this mitigation measure without "a statement of reasons with substantial evidence."

The City points out the D limitation was fully disclosed, citing passages from the DEIR that describe it. (RB 94.) The City disputes Petitioners' characterization of the D limitation as a CEQA mitigation measure noting that the Hollywood Community Plan does not identify the environmental effects it would purport to mitigate or characterize it as a CEQA mitigation measure. (RB 95.)

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[7] Even if the Project did require the construction of new fire protection facilities, Petitioners fail to cite any evidence that construction of such facilities would have a substantial adverse physical impact on the environment.

The Court agrees with the City that its disclosure was adequate and finds there is no substantial evidence the D limitation was a CEQA mitigation measure imposing any obligations under CEQA to make additional findings in this case. Such findings were also unnecessary because the City's approval of increased density constituted a lawful waiver of the limitation pursuant to the State Density Bonus law.

Petitioners rely on the decision in *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, where the petitioners challenged the lead agency's deletion of a CEQA traffic mitigation measure adopted in a general plan. The court of appeal upheld the lead agency's deletion based on its articulation of a legitimate reason supported by substantial evidence. The court's conclusion that the lead agency essentially had to find the existing mitigation measure infeasible (make findings supported by substantial evidence) makes sense because deleting a mitigation measure leaves a specified environmental effect in place. As with any other finding of infeasibility, the lead agency's decision to approve a project notwithstanding that effect must be supported with findings and evidence.

By contrast, the "mitigation measure" Petitioners identify in the Hollywood Community Plan fails to identify the environmental effect it purports to mitigate. Without evidence of an environmental effect that will persist if the "mitigation measure" is waived or deleted, there is no reason for the City to make findings under CEQA.

### *C. The EIR Did Not Fail to Analyze Land Use Consistency*

JDR Crescent argues the project conflicts with several "fundamental and clear objectives of the Hollywood Community Plan" to "down zone" development in favor of small scale neighborhood oriented commercial projects that are consistent with infrastructure capacity and mitigate adverse effects of transportation, public services and infrastructure. (OB p. 8.) Guidelines § 15125 requires an EIR to "discuss any inconsistencies between the proposed

project and applicable general plans, specific plans and regional plans." As discussed, the Court finds that the project is exempt from the Hollywood Community Plan's FAR limitation because the project qualifies for a density bonus under the State Density Bonus Law. Petitioners fail to point out any other inconsistency between the project and the Hollywood Community Plan. Accordingly, the Court finds that the EIR did not fail to analyze land use consistency.

### *D. The FEIR Did Not Have to Be Recirculated*

Petitioners argue the FEIR should have been recirculated because the errata disclosed new information, i.e., that the traffic signal at Fountain Avenue and Havenhurst Drive is under the jurisdiction of the City of West Hollywood rather than the City of Los Angeles. Respondents counter this argument by pointing out the record (AR 3019, 3017 and 3146) fully disclosed the fact that West Hollywood had jurisdiction over the traffic light. The Court agrees that the draft EIR disclosed that "[n]o other feasible improvements to the intersection of Fountain Avenue/Havenhurst Drive have been identified. . . and should the City of West Hollywood determine that it does not wish to install a new traffic signal at this location, the project's impacts would remain significant and unavoidable." (AR 3019.) The fact that the traffic light was in West Hollywood was not "significant new information" requiring recirculation of the EIR pursuant to Guidelines § 15088.5.

### *E. Alleged Violation of ELDP Is Not a Basis for Invalidating the City's Approval*

Manners argues the project "fails" because its ELDP status is invalid. She contends the changes in the project reflected in Alternative 9 disqualify it from ELDP status because it no longer provides the jobs, reduced greenhouse gas emissions or improved transportation efficiency required for ELDP status under Section 21183(b). Because Alternative 9 is smaller than the certified project, Manners argues it will necessarily provide fewer permanent jobs. She also takes

issue with the City's contention it need not demonstrate a 10% reduction in transportation trips because Havenhurst is a "pass through" street that will reduce vehicle trips. (AR 56445-56.)

Manners provides no law supporting the proposition that a failure to meet the ELDP criteria is grounds for reversing approval of a project. Because the primary benefit of the ELDP is expedited processing, the remedy for any supposed failure to qualify for ELDP would be elimination of the expedited processing rather than rejection of project approval. The Court declines to issue a writ of mandate based on alleged failure to meet the ELDP criteria.

### *F. The EIR Did Not Have to Identify Alternative Sites*

Manners argues the City violated CEQA by not identifying alternative locations. (AR 30130 PC; 30234 PC.) (AR 62960 WEHO.) The applicable Guideline, § 15126.6(f)(2) states an EIR "must consider a reasonable range of alternatives to the project, or to the location of the project." The Court interprets this language, written in the disjunctive, as requiring an EIR to include a range of alternatives that may or may not include an alternative proposing a different location. The Court does not find that the Guideline is reasonably interpreted to always require an alternative that identifies a different location. Moreover, Manners has failed to identify any feasible alternative sites owned by Real Party or available to Real Party for purchase. Without evidence of an available alternative location that is suitable for the project, the notion that there is a feasible alternative location is "remote and speculative" and need not be addressed. (*Bowman v. City of Petaluna* (1986) 185 Cal.App.3d 1065, 108384; Guideline § 15126.6; see also, *Citizens of Goleta v. Bd. Supervisors* (1990) 52 Cal.3d 553, 566.)

### *G. The EIR Did Not Fail to Analyze Transportation and Circulation*

Fix the City and JDR Crescent argue the EIR did not adequately analyze the impacts of the intersection at Fountain/Havenhurst and other nearby intersections. Manners argues that the Traffic Impact Analysis Report underlying the EIR's transportation analysis is flawed.

### 1. The EIR Adequately Analyzed the Project's Impact on the Fountain/Havenhurst Intersection

The EIR includes a Traffic Impact Analysis Report ("TIA") performed by Hirsch/Green Transportation Consulting, Inc. ("Hirsch/Green"), which analyzed existing (2013) and future (2018) conditions at a total of 14 signalized intersections and one unsignalized intersection in the project vicinity. (AR 3027.) The Report concluded the project will generate a net increase of approximately 1,077 site-related trips per day, including a net increase of 216 trips during the PM peak hour. (AR 761, 3016.) Based on this level of net new trip generation, the Report found no significant impacts to any of the 14 signalized intersections, but concluded that "a significant impact could potentially occur at the unsignalized intersection of Fountain Avenue and Havenhurst Drive." (AR 3016.) Based on the Report, the EIR recommended installing a traffic signal at the Fountain/Havenhurst intersection, which would reduce the significant impact at that intersection to a less than significant level (Mitigation Measure TR-1). (AR 787-788.) The EIR acknowledged that because the Fountain/Havenhurst intersection is located in the City of West Hollywood, "should the City of West Hollywood determine that it does not wish to install a new traffic signal at this location, the project's potential impact would remain significant and unavoidable." (AR 788.) The EIR also found that "[n]o other feasible improvements to the intersection of Fountain Avenue/Havenhurst Drive have been identified at this time." (*Ibid.*)

When the FEIR was issued on May 13, 2016, the City believed that West Hollywood might approve the installation of the traffic signal. (Opp. p. 76.) In its June 21, 2016 letter to West Hollywood, however, the City acknowledged that West Hollywood had decided against approving the proposed traffic signal installation. (AR 58987.) In its appeal letter to the City Planning Commission, West Hollywood explained "the intersection is not capable of accommodating the addition of a left-turn lane and the equipment necessary to make this a feasible option" and installation of a traffic signal would result in cut-through traffic on Havenhurst. (AR 26030.) In

June 2016, the City issued an errata to the FEIR, adding language to consistently state throughout that because the Fountain/Havenhurst intersection is within West Hollywood, a decision by West Hollywood not to install the proposed traffic signal would result in significant and unavoidable impacts to that intersection. (AR 15309-10.) The City considered the project's impact on the Fountain/Havenhurst intersection in its Statement of Overriding Considerations, but concluded the project's benefits outweighed its significant unavoidable impacts. (AR 28372.)

JDR contends that by issuing an errata, the City violated CEQA Guidelines § 15088.5, which requires a lead agency to recirculate an EIR when "significant new information" is added to the EIR. The Court finds that the City did not violate this provision because the additional language added by the City, was already present in Section 4.J Transportation and Circulation of the DEIR. (See AR 788, 3019.)

JDR also argues that the City failed to fully explore available mitigation measures as required by Pub. Res. Code § 21002.1 because after the City realized that West Hollywood would not approve the installation of the traffic signal, the City made no efforts to identify other feasible mitigation measures. The City responds that it explored other options, but found that aside from installing a traffic signal, "[n]o other feasible improvements to the intersection of Fountain Avenue/Havenhurst Drive have been identified . . . ." (AR 788.) The record shows that the City reached out to its consultant concerning this very issue of alternative mitigation measures. (AR 26659-60.) Hirsch/Green responded that "limited rights-of-way on both sides of [Fountain and Havenhurst] generally restrict the ability to implement meaningful roadway widenings . . . ." (AR 26659.) As a result, mitigation measures are limited to (1) implementation of a Transportation Demand Management ("TDM") Program; (2) restriping the roadway within the existing rights-of-way to create additional lanes; or (3) installation of a traffic signal. (*Ibid.*) The proposed project includes the implementation of a TDM Program, which will aim to reduce the overall number of vehicle trips by encouraging cycling, carpooling, and ridesharing. (See AR 754, 26660.)

Hirsch/Green explored the possibility of restriping to create new left-turn lanes in both directions on Fountain Avenue, but determined that this measure would not reduce the project's potential impact to less-than-significant levels and could also create secondary impacts in the project vicinity due to the removal of on-street parking. (AR 26660.) Hirsch Green concluded that installation of a traffic signal was the "only feasible mitigation measure to reduce the Project's impact at the intersection . . . to less-than-significant levels." (*Ibid.*) Given that Petitioners have failed to identify any additional mitigation measures that the City should have considered, the Court finds that the City complied with its obligations under Pub. Res. Code § 21002 to explore available mitigation measures.

JDR's citation to *City of San Diego v. Board of Trustees of California State University* (2015) 61 Cal.4th 945 is distinguishable. In that case, petitioners challenged the California State University's ("CSU") EIR certification and approval of a campus expansion project. In the EIR, CSU found that the proposed project would contribute significantly to cumulative traffic congestion at several locations off-campus. (*Id.* at 951.) Citing to *City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, CSU determined that these impacts were significant and unavoidable because CSU could not guarantee that the State Legislature would appropriate funds for the identified mitigation measures. (*Id.* at 954.) The Supreme Court held that the *Marina* decision did not justify CSU's position that it could "contribute funds for off-campus environmental mitigation only through an appropriation designated for that specific purpose, i.e., an earmarked appropriation." (*Id.* at 959.) The court explained that "[i]n mitigating the effects of its projects, a public agency has access to all of its discretionary powers . . . includ[ing] such actions as adopting changes to proposed projects, imposing conditions on their approval, adopting plans or ordinances to control a broad class of projects, and choosing alternative projects." (*Ibid.*) The court also pointed out that "mitigation

costs "could appropriately be included in the project's budget and paid with the funds appropriated for the project." (*Id.* at 960.)

In this case, unlike in *City of San Diego,* the City is not the proponent of the project and is not making its recommended mitigation measures contingent on an appropriation from the Legislature. On the contrary, the City considered nine project alternatives and adopted numerous changes and conditions of approval to reduce the project's impact. The City specifically considered measures to mitigate the project's impact to the Fountain Avenue/Havenhurst Drive and determined that the only effective mitigation measure would be to install a traffic signal. Because West Hollywood has sole discretion over whether to authorize a signal at that intersection, the City properly concluded that the project's impact at that intersection is significant and unavoidable absent West Hollywood's approval. (See *City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, 367 [Some mitigation measures cannot be purchased, such as permits that another agency has the sole discretion to grant or refuse."].)

### 2. The EIR Adequately Analyzed the Project's Impact on Project Access

JDR argues that the EIR also fails to adequately analyze the project's impact on the intersections nearest to the project site. JDR cites the L.A. CEQA Thresholds Guide, which presents two sets of criteria to evaluate project impacts: the screening and significance criteria. "The screening criteria provide assistance in responding to Initial Study Checklist questions, and can help determine when further study is needed to decide whether a significant impact could potentially occur. ... The significance threshold identifies the level of impact over which mitigation (or a Statement of Overriding Considerations, if mitigation is not feasible) is required." (CEQA Thresholds Guide p. 3) The CEQA Thresholds Guide provides criteria for analyzing a project's impact on various aspects of transportation including a project's impact on "Project

Access," which relates to "the provision of access to and from the project site." (*Id.* at p. L.5-1.) The Thresholds Guide defines the "Significance Threshold" for project access as follows:

> A project would normally have a significant project access impact if the intersection(s) nearest the primary site access is/are projected to operate at LOS E or F during the a.m. or p.m. peak hour, under cumulative plus project conditions.

(Thresholds Guide p. L.5-2; AR 776-777.) With respect to this Significance Threshold, the EIR found that "The Project operational characteristics, expected minimum driveway capacities, and the projected peak hour driveway traffic volumes of the Project would provide adequate capacity to accommodate the maximum vehicular demands" and that as a result "the Project would result in less than significant impact with regard to access." (AR 777.) JDR argues that the EIR failed to adequately analyze impacts on nearby intersections because Table 4.J of the EIR shows that eleven of the fifteen intersections near the project site are projected to operate at an LOS E or F during peak hours. (AR 767-769.) Petitioners conclude that based on this data the "only reasonable conclusion" is that the project poses a significant impact to access. However, the Project Access Threshold is a criteria used to determine a project's impact on access to the site, not a project's impact on nearby intersections.[8] The Project Access Threshold identifies conditions under which a project "would normally have a significant project access impact." (Thresholds Guide p. L.5-2.) In this case, based on Hirsch/Green's Traffic Impact Analysis Report, the EIR concluded that the three driveways leading to the project provide adequate capacity to accommodate entering and exiting traffic and provide sufficient on-site vehicle queuing space "such that no significant vehicular queuing or disruption of either pedestrian or vehicular traffic

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[8] Thresholds TR-2A and TR-2B analyzed the Project's impact on nearby intersections and determined that the Project "would result in nominal incremental changes in the CMA or vehicular delays at most of the study intersections during the A.M. and P.M. peak hours, with the exception of the unsignalized Fountain Avenue/Havenhurst Drive intersection." (AR 766.)

flows on the Project Site-adjacent streets would occur." (AR 778.) Accordingly, the Court finds that the City properly analyzed the project's impact on project access.

### 3. The Traffic Impact Analysis Report Properly Calculated Project Traffic Generation

Manners argues in summary fashion that "the traffic impact study is full of assumptions and not valid" based on the fact that the TIA utilized certain adjustment factors in calculating project traffic generation. The TIA estimated the net amount of traffic that would be generated by the proposed project by calculating the number of trips generated by each residential, retail, and commercial component of the existing site and proposed project site. (AR 3034-3035.) The TIA adjusted its project traffic generation estimate by taking into account existing trips on the roads near the Project site, which may make an interim stop at the Project site. (AR 3037.) For example, using LADOT's recommended pass-by trip reduction factors, the TIA assumed that the retail components of the existing site experienced a 50 percent pass-by trip reduction and that the retail and supermarket uses of the proposed project would experience a 40 percent pass-by reduction. (AR 3037.) The TIA adjusted its estimates for *both* the existing site as well as the proposed project site. (AR 3037-3038, 27152.) The Court finds that the TIA properly relied on these adjustment factors in calculating the net amount of traffic generated by the project.

## IV. Conclusion

Aside from concerns with the City's articulated findings addressing the rejection of preservation alternatives (and substantial evidence supporting such findings) addressed above, the Court rejects all challenges to the City's approvals of the project.

The Court grants LAC's (and the joining parties') petition for writ of mandate as to the City's findings rejecting the non-demolition alternatives (only) and otherwise denies all petitions. The Court remands for further proceedings consistent with this decision.

Dated: APR 2 5 2017

AMY D. HOGUE
JUDGE OF THE SUPERIOR COURT