

APR 30 2015

Modified

StopTheMilleniumHollywood.com, et al. v.
City of Los Angeles, et al.
BS 144606

Tentative Decision on Petition for
Mandamus: granted in part

Sherril R. Carter, Executive Officer/Clerk
By Annette Fajardo Deputy
Annette Fajardo

Petitioners StopTheMillenniumHollywood.com, Communities United for Reasonable Development, Beachwood Canyon Neighborhood Association, and George Abrahams seek a writ of administrative mandamus setting aside the actions of Respondent City of Los Angeles (“City”) in approving a large, mixed-use development in Hollywood (“Project”), its supporting Environmental Impact Report (“EIR”), and its land-use entitlements.¹

The court has read and considered the moving papers, opposition, and reply, and renders the following tentative decision.

A. Statement of the Case

Petitioners StopTheMillenniumHollywood.com (“STMH”), Communities United for Reasonable Development (“CURD”), Beachwood Canyon Neighborhood Association (“BCNA”), and George Abrahams (“Abrahams”) commenced the instant proceeding on August 28, 2013 alleging claims for mandamus, declaratory relief, and injunction.

On September 5, 2014, Petitioners filed a First Amended Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief (“FAP”), which is the operative pleading. The FAP alleges in pertinent part as follows.

1. Petitioners and Real Party-in-Interest

Petitioner StopTheMillenniumHollywood.com (“STMH”) is an unincorporated association comprised of community organizations and individuals who participated in the administrative proceedings before the City. FAP, ¶7. Petitioner CURD is another unincorporated association of community organizations and individuals who jointly filed land use appeals during the administrative hearing process before the City Planning Commission and the City Council. *Id.*, ¶8. Petitioner BCNA is a corporation representing property owners and residents living in the areas near Beachwood Canyon in or immediately adjacent to Hollywood and the site of the Project. *Id.*, ¶9. BCNA is the parent organization of STMH and CURD. *Id.* Petitioner Abrahams is a director of BCNA. *Id.*, ¶10.

Real Party-in-Interest Millennium Hollywood, LLC (“Millennium”) is the business entity seeking to construct the Project.

2. Procedural Summary

A Draft EIR for the Project was released on October 25, 2012 and circulated for 45 days. FAP ¶25. A joint public hearing on the Project was held before a Deputy Advisory Agency and Hearing Officer (sometimes “DAA”) on February 19, 2013. *Id.*, ¶26. On February 22, 2013, the DAA approved the vesting tentative tract map (“VTTM”) for the Project. *Id.*, ¶27. The DAA also adopted a Statement of Overriding Considerations at the hearing. *Id.* On March 4, BCNA, represented by Abrahams, appealed the VTTM and Final EIR (“FEIR”) approvals as to the City

¹The court has separately ruled on the parties’ several motions to augment the Administrative Record.

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Planning Commission ("Planning Commission"). *Id.*, ¶28. The hearing on BCNA's appeal of the VTTM and FEIR, as well as consideration of the entitlements and development agreement took place on March 28, 2013. *Id.*, ¶30. On April 27, 2013, the Planning Commission issued a determination approving the entitlements and EIR, and recommending a zone change and a height district ordinance change. *Id.*, ¶35. The same day the Planning Commission issued another determination letter denying BCNA's appeal of the DAA determinations. *Id.*, ¶36.

On May 7, 2013, CURD filed an appeal of the Planning Commission's approval of a zone change, height district change and associated actions. *Id.*, ¶37. CURD also appealed the Planning Commission's decision from its appeal of the VTTM approval. *Id.*, ¶38.

On May 24, 2013, the City issued a notice of land use appeal public hearing before the City Council's Planning and Land Use Management Committee ("PLUM"). *Id.*, ¶43. The hearing was initially set for June 4, 2013. *Id.* CURD was among the organizations whose appeal was to be heard at this hearing. *Id.*, ¶44. At the scheduled PLUM hearing on June 4, it was announced that the matter was being postponed June 18, 2013 at Millennium's request. *Id.*, ¶44. It was also announced that the matter would be heard by the full City Council on June 19, 2013. *Id.*

At the June 18, 2013 PLUM hearing, it was announced that the City Council hearing scheduled for the following day was postponed to July 24, 2013. *Id.*, ¶ 53. PLUM also voted to (1) approve the Project, subject modified conditions, (2) deny all appeals, and (3) adopt the Final EIR and "Statement of Overriding Considerations." *Id.*, ¶56.

Prior to the July 24, 2013 City Council hearing, PLUM released a "Recommendation Report" relating the actions that it had taken on June 18, 2013. *Id.*, ¶62. Petitioners allege that this report misrepresented the June 18, 2013 actions. *Id.* Specifically, the report referred to a different ordinance than the one discussed at the hearing. *Id.* PLUM essentially set their initial proposed ordinance aside and adopted a new one instead. *Id.*, ¶64.

The City Council's hearing was held on July 24, 2013. ¶ 71. The day before the hearing, Millennium submitted a last-minute 311-page report attacking Petitioners' arguments. *Id.*, ¶68. Petitioners were deprived of an opportunity to rebut Millennium's evidence. *Id.* At the conclusion of the City Council's hearing, the councilmembers voted unanimously to approve the Project. *Id.*, ¶85.

3. The Causes of Action

The FAP's first three causes of action are for violation of CEQA. The First Cause of Action alleges that the City violated CEQA and the CEQA Guidelines by abusing its discretion in: (1) failing to provide an accurate, stable and finite project description; (2) failing to address comments raising significant environmental issue in good faith, with reasoned responses; (3) failing to adequately disclose, analyze, mitigate or avoid the Project's significant impacts on the environment, including emergency service response times, seismic risks and traffic impacts; (4) failing to re-circulate the Draft EIR when significant new (seismic) information was added late or was requested to be added even after FEIR certification; (5) failing to adequately disclose, analyze, mitigate or avoid the Project's land use impacts associated with each Los Angeles Municipal Code ("LAMC") provision overridden in favor of development regulations and/or land use equivalency programs; and (6) failing to adequately analyze the impact of the invalidation of the 2012 Hollywood Community Plan Update. *Id.*, ¶123. Petitioners further allege that the City abused its discretion by concluding that certain impacts would be less than significant without substantial evidence in support thereof. *Id.*, ¶128.

The Second Cause of Action alleges that in disregarding the concerns of Caltrans, a responsible agency under CEQA, the City violated Pub. Res. Code sections 21080.4(a) and 21092.4, and Guidelines section 15096(b)(2). *Id.*, ¶144.

The Third Cause of Action alleges that by failing to notify and consult with the California Geologic Survey (“CGS”), a responsible agency under CEQA, the City violated Pub. Res. Code section 21153 and Guidelines section 15086(a)(1). *Id.*, ¶151. Millennium and the City “colluded to suppress critical information regarding seismic hazards at the Millennium Project Site, including information indicating that traces of the active Hollywood Earthquake Fault bisect the property, and further including suppression from the EIR of the California Department of Conservation, California Geological Survey’s 2010 Fault Activity Map, which indicates the presence of the active Hollywood Earthquake Fault running directly through the Millennium Property.” *Id.*, ¶153.

The Fourth Cause of Action is for violation of due process rights and deprivation of a fair hearing under the United States Constitution, the California Constitution, and CCP section 1094.5(b). Petitioners allege that the City’s failure to attach the precise versions of the Millennium Hollywood Development Regulations and Millennium Hollywood Land Use Equivalency Program (“LUEP”) deprived them of the ability to know from the four corners of the letters of determination precisely what the Planning Commission decided. *Id.*, ¶158. When confronted with this deficiency, the City refused to cure the defect, making it impossible for Petitioners to track changes made by the City during the City Council hearing process because Petitioners could not verify what the operative versions of these zoning documents were. *Id.* The City Council’s failure to develop and publish procedural rules to assure fair and consistent hearings violates Govt. Code section 65804. *Id.*

The Fifth Cause of Action is for declaratory and injunctive relief based on deprivation of fair hearings in land use appeals. Petitioners allege that the City is presently engaged in a pattern of violating Govt. Code section 65804. *Id.*, ¶174.

The Sixth Cause of Action is for violation of City Charter (sometimes “Charter”) section 562 and LAMC section 12.27(D). Petitioners generally allege that the City has granted variances without making the legally mandated findings under the Charter and LAMC. *Id.*, ¶¶ 177-78.

The Seventh Cause of Action is for violation of Charter section 562, LAMC sections 12.04 and 12.32, as well for an unconstitutional impairment of the City’s police powers. Petitioners allege that the City is attempting to elevate development regulations into the position of a municipal ordinance, per LAMC section 12.04 and 12.32, in irreconcilable conflict with Charter section 562. *Id.*, ¶181. In doing so, the City is attempting to override stricter LAMC provisions. *Id.*, ¶182. The LUEP and development regulations are a grant of carte blanche authority which is *ultra vires* and *void ab initio* because they amount to the City’s unconstitutional surrender of its police power to regulate land use. *Id.*, ¶ 183.

Finally, the Eighth Cause of Action is for violation of an existing peremptory writ of mandate issued in La Mirada Avenue Neighborhood Association of Hollywood v. City of Los Angeles, et al., (“La Mirada”) BS138369 invalidating the Hollywood Community Plan Update (“HCPU”). *Id.*, ¶¶ 191-98. Per the writ, the City rescinded the HCPU and decertified its EIR. *Id.*, ¶201. Accordingly, the FEIR’s reliance on the invalidated HCPU warrants the FEIR’s invalidation. *Id.*, ¶203-04.

4. Relief Sought

On the First, Second, Third and Eighth Causes of Action, Petitioners seek: (1) a peremptory writ of mandamus directing the City and City Council to vacate and set aside the actions approving the FEIR, Project approvals, and all land use entitlements; (2) an injunction enjoining the City from granting any authority, permits, certificate of occupancy, or entitlements as part of the Project pursuant to the City's prior actions; and (3) an injunction enjoining Millennium from undertaking construction on the Project. Id., p. 62.

On the Fourth Cause of Action, Petitioners seek a declaration that their due process and fair hearing rights were violated. Id. They request mandamus directing the City to (1) vacate and set aside its actions in approving the FEIR, Project approvals, and entitlements, and (2) provide new and fair hearings that comply in all respects with due process of law. Id.

On the Fifth Cause of Action, Petitioners seek a judicial declaration that the City violated Govt. Code section 65804, as well as mandamus directing the City to develop proper fair hearing policies and procedures during land use appeals. Id., pp. 62-63.

Finally, on the Sixth, Seventh and Eighth Causes of Action, Petitioners seek a writ of mandamus directing the City vacate and set aside its actions approving the Project's land use entitlements. Id., p. 63. They further seek to have the City enjoined from granting any authority, permits, certificate of occupancy, or entitlements pursuant to the City's prior land use entitlement approvals. Id. Petitioners also seek to have Millenium enjoined from undertaking construction on the Project pursuant to the approved land use entitlements. Id.

B. Standard of Review

A party may seek to set aside an agency decision for failure to comply with CEQA by petitioning for either a writ of administrative mandamus (CCP §1094.5) or of traditional mandamus. CCP §1085.

CEQA review of quasi-adjudicatory agency actions in which a hearing is required, evidence taken, and the agency determines factual issues are governed by administrative mandamus under CCP section 1094.5, in which the court determines whether the agency's decision is supported by substantial evidence. Pub. Res. Code §21168. Examples of such actions include issuance of use permits (Neighborhood Action Group v. County of Calaveras, (1984) 156 Cal.App.3d 1176, 1186), planned use development permits (City of Fairfield v. Superior Court, (1975) 14 Cal.3d 768, 773), and zoning variances. Topanga Assn. For a Scenic Community v. County of Los Angeles, (1974) 11 Cal.3d 506, 517.

CEQA review of quasi-legislative agency actions is governed by traditional mandamus per CCP section 1085, in which the court determines whether the agency prejudicially abused its discretion by not proceeding in a manner required by law or by making a decision not supported by substantial evidence. Pub.Res. Code §21168.5. Examples of such actions include adoption of a general plan or rezoning property. O'Loane v. O'Rourke, (1965) 231 Cal.App.2d 774, 784-85 (general plan); San Diego Building Contractors Assn. v. City Council, (1974) 13 Cal.3d 205, 212-13).

There is no practical difference between the standards of review applied under traditional or administrative mandamus in CEQA cases. Friends of the Old Trees v. Dept. Of Forestry & Fire Protection, (1997) 52 Cal.App.4th 1383, 1389. Public entities abuse their discretion if their actions or decisions do not substantially comply with the requirements of CEQA. Sierra Club v. West Side Irrigation District, (2005) 128 Cal.App.4th 690, 698. Whether an agency abused its discretion requires "scrutiny of the alleged defect" depending on whether the claim is

predominately “improper procedure or dispute over the facts.” Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova, (“Vineyard”) (2007) 40 Cal.4th 412, 435. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence. Western States Petroleum Assn. v. Superior Court, (1995) 9 Cal.4th 559, 568.

Petitioners’ first, second, and third causes of action alleges violation of CEQA in failing to proceed in the manner required by law, and to some extent the first cause of action challenges the sufficiency of the FEIR. Where an EIR fails to provide certain required information and/or was misleading is failing “to proceed in a manner required by CEQA” and an issue of law. Vineyard, *supra*, 40 Cal.4th at 435. Such issues require “a critical consideration, in a factual context, of legal principles and their underlying values.” Harustak v. Wilkins, (2000) 84 Cal.App.4th 208, 212. However, the omission of information in an EIR is not presumed prejudicial, and will rise to the level of a failure to proceed in the manner required by law only if the analysis is clearly inadequate or unsupported. Citizens for a Sustainable Treasure Island v. City and County of San Francisco, (“Treasure Island”) (2014) 227 Cal.App.4th 1036, 1046-47.

Whether an agency abused its discretion in an EIR’s findings must be answered with reference to the existence of substantial evidence in the administrative record. “Substantial evidence,” is defined as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.” Guidelines² §15384(a). The substantial evidence standard requires deference to the agency’s factual and environmental conclusions based on conflicting evidence, but not to issues of law. Laurel Heights Improvement Assn. v. Regents of University of California, (“Laurel Heights”) (1988) 47 Cal.3d 376, 393, 409. Argument, speculation, and unsubstantiated opinion or narrative will not suffice. Guidelines §15384(a), (b). Whether substantial evidence exists is a question of law. See California School Employees Association v. DMV, (1988) 203 Cal.App.3d 634, 644.

The challenges to violation of the LAMC and City Charter (sixth and seventh causes of action) are traditional mandamus claims. The City is entitled to great deference in interpreting its own ordinances, and the court evaluates as an issue of law whether development regulations are an unlawful delegation of police power. See County Mobilehome Positive Action Committee, Inc. v. County of San Diego, (1998) 62 Cal.App.4th 727, 733. Petitioners have the burden of showing that the agency decision is unreasonable or invalid as a matter of law. City of Arcadia v. State Water Resources Control Board, (2006) 135 Cal.App.4th 1392, 1409. The court must uphold the agency’s action unless it is “arbitrary and capricious, lacking in evidentiary support, or made without due regard for the petitioner’s rights.” Citizens for Improved Sorrento Access, Inc. v. City of San Diego, (2004) 118 Cal.App.4th 808, 814; Sequoia Union High School District v. Aurora Charter High School, (2003) 112 Cal.App.4th 185, 195.

²As an aid to carrying out the statute, the State Resources Agency has issued regulations called “Guidelines for the California Environmental Quality Act” (“Guidelines”), contained in Code of Regulations, Title 14, Division 6, Chapter 3, beginning at section 15000.

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For the constitutional challenges based on due process and fair hearing (fourth and fifth causes of action), the court independently reviews the proceedings to decide whether a party's rights were compromised. Sinaiko v. Superior Court, (2004) 122 Cal.App.4th 1133, 1140.

Finally, the challenge for a violation of the La Mirada judgment (eighth cause of action) is a traditional mandamus claim for abuse of discretion based on a failure to proceed in the manner required by law and/or based on a lack of substantial evidence. The underlying judgment is interpreted as an issue of law. Dow v. Lassen Irrigation Co., (2013) 216 Cal.App.4th 766, 780-81.

C. Statutory Framework

1. California Environmental Quality Act (CEQA)

The purpose of CEQA, (Pub. Res. Code §21000 *et seq.*) is to maintain a quality environment for the people of California both now and in the future. Pub. Res. Code § 21000(a). “[T]he overriding purpose of CEQA is to ensure that agencies regulating activities that may affect the quality of the environment give primary consideration to preventing environmental damage.” Save Our Peninsula Committee v. Monterey County Board of Supervisors, (2001) 87 Cal.App.4th 99, 117. CEQA must be interpreted “so as to afford the fullest, broadest protection to the environment within reasonable scope of the statutory language.” Friends of Mammoth v. Board of Supervisors, (1972) 8 Cal.3d 247, 259.

The Legislature chose to accomplish its environmental goals through public environmental review processes designed to assist agencies in identifying and disclosing both environmental effects and feasible alternatives and mitigations. Pub. Res. Code §21002. Public agencies must regulate both public and private projects so that “major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian.” Pub. Res. Code §21000(g).

Under CEQA, a “project” is defined as any activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment (1) undertaken directly by any public agency, (2) supported through contracts, grants, subsidies, loans or other public assistance, or (3) involving the issuance of a lease, permit, license, certificate, or other entitlement for use by a public agency. Pub. Res. Code §21065. The word “may” in this context means a reasonable possibility. Citizen Action to Serve All Students v. Thornley, (1990) 222 Cal.App.3d 748, 753. “Environment” means 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. Guidelines §21060.5.

The “project” is the whole of the action, not simply its constituent parts, which has the potential for resulting in either direct or reasonably foreseeable indirect physical change in the environment. Guidelines §15378. An indirect physical change must be considered if that change is a reasonably foreseeable impact which may be caused by the project. On the other hand, a change that is “speculative or unlikely to occur is not reasonably foreseeable.” Guidelines §15064(d)(3). The term “project” may include several discretionary approvals by government agencies; it does not mean each separate government approval. Guidelines §15378(c).

An EIR must be prepared for a project if the agency concludes that “there is substantial evidence, in light of the whole record... that the project may have a significant effect on the environment.” Pub. Res. Code §21080(d). The EIR is the “heart” of CEQA, providing agencies with in-depth review of projects with potentially significant environmental effects. Laurel

Heights, supra, 6 Cal.4th at 1123. An EIR describes the project and its environmental setting, identifies the potential environmental impacts of the project, and identifies and analyzes mitigation measures and alternatives that may reduce significant environmental impacts. Id. Using the EIR's objective analysis, agencies "shall mitigate or avoid the significant effects on the environment... whenever it is feasible to do so. Pub. Res. Code §21002.1. The EIR serves to "demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its actions." No Oil, Inc. v. City of Los Angeles, (1974) 13 Cal.3d 68, 86. It is not required to be perfect, merely that it be a good faith effort at full disclosure. Kings County Farm Bureau v. City of Hanford, (1990) 221 Cal.App.3d 692, 711-12. A reviewing court passes only on its sufficiency as an informational document and not the correctness of its environmental conclusions. Laurel Heights, supra, 47 Cal.3d at 392.

All EIRs must cover the same general content. Guidelines §§ 15120-32. An EIR should be prepared with a sufficient degree of analysis to provide decision-makers with information which enables them to make a decision which intelligently takes account of environmental consequences. The environmental effects need not be exhaustively reviewed, but the EIR's sufficiency is viewed in the light of what is reasonably feasible. Guidelines §15151. The level of specificity of an EIR is determined by the nature of the project and the "rule of reason." Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners, (1993) 18 Cal.App.4th 729, 741-42. The degree of specificity "will correspond to the degree of specificity involved in the underlying activity which is described in the EIR." Guidelines §15146. The ultimate decision whether to approve a project is a nullity if based upon an EIR that does not provide decision-makers, and the public, with the information about the project required by CEQA. Santiago County Water District v. County of Orange, (1981) 118 Cal.App.3d 818, 829.

2. Alquist-Priolo Earthquake Fault Zoning Act

The Alquist-Priolo Earthquake Fault Zoning Act ("Alquist-Priolo"), (Pub. Res. Code §2621 *et seq.*), was enacted to prohibit the construction of buildings for human occupancy across the trace of active faults. California Oak Found. v. Regents of Univ. of California, (2010) 188 Cal.App.4th 227, 247; Better Alternatives for Neighborhoods v. Heyman, (1989) 212 Cal.App.3d 663, 670. Alquist-Priolo's purpose is in part to "provide policies and criteria to assist cities, counties, and state agencies in the exercise of their responsibility to prohibit the location of developments and structures for human occupancy across the trace of active faults." Pub. Res. Code § 2621.5. It is also meant to "provide the citizens of the state with increased safety and to minimize the loss of life during and immediately following earthquakes by facilitating seismic retrofitting to strengthen buildings, including historical buildings, against ground shaking." Id.

Among other things, Alquist-Priolo requires the State Geologist to publish maps delineating appropriately wide earthquake fault zones, as well active and well-defined fault traces. Pub. Res. Code §2622(a). The State Geologist must "continually review new geologic and seismic data and... revise the earthquake fault zones or delineate additional earthquake fault zones when warranted by new information." Id., §2622(c). Prior to publication, the State Geologist revised maps must be submitted to the State Mining and Geology Board for review and comment. See id.; 14 CCR §3602(a).

3. LAMC and City Charter Provisions

a. Adoption of Land Use Ordinances

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Govt. Code section 65804(a) requires all city and county zoning agencies (including charter cities) to “develop and publish procedural rules for conduct of their hearings so that all interested parties shall have advance knowledge of procedures to be followed.” Zoning agencies are required to create and preserve a record of their hearings, which must be made available (at a cost). Govt. Code §65804(b).

City Charter section 558 governs the adoption, amendment, and repeal of ordinances, orders and resolutions by the City Council which concern, among other things, land-use zones or districts, zoning or land-use regulations. City Charter §558(a).

LAMC section 12.32 governs the City’s adoption of land use ordinances in accordance with Govt. Code section 65804 and City Charter section 558. The City Council, Planning Commission, or Director of Planning may initiate consideration of a proposed land use ordinance, the first two by a simple majority vote. LAMC §12.32(A). An owner of property may also apply for a land use ordinance for matters governed by subdivisions F through S. LAMC §12.32(B).

The Planning Commission is authorized to make an initial recommendation regarding the approval or disapproval of a proposed land use ordinance, which will then considered by the City Council. LAMC §12.32(C)(1). The City is required to provide at least 24 days’ advance notice of the time, place and the public hearing on the proposed land use ordinance. LAMC §12.32(c)(4). Notice must either be in the form of publication, or in the form of mailings to owners within 500 feet of the affected property. Id. The applicant, if any, must also post notice in a conspicuous place at the affected property. Id.

Where the proposed land use ordinance concerns an amendment to zoning regulations, the Planning Commission is not required to comply with these strict notice requirements, nor must the matter be set for public hearing. *See* LAMC §12.32(E). Similarly, where the proposed land use ordinance involves a change in zone or height district, the Planning Commission may, without additional notice or hearing, recommend minor increases in affected areas or boundaries, provided that it determines that doing so is required by public necessity, convenience, general welfare or good zoning practice. LAMC §12.32(F)(1).

The Planning Commission hearing must be recorded or summarized. LAMC §12.32(C)(5)(a). If proceedings are recorded, the must be transcribed with copies made available to interested parties in exchange for a fee. Id. A copy of the transcript must be furnished to the Planning Commission and placed on file. Id. Additionally, after the hearing’s conclusion, the Planning Commission’s Director must submit a report setting forth his or her conclusions and recommendations, and the reasoning for them. LAMC §12.32(c)(5)(b).

Following the Planning Commission’s decision to recommend approval or disapproval of a proposed land use ordinance, the City Council may approve or disapprove the ordinance. LAMC §12.32(c)(7). The City Council’s decision must occur within 90 days of the recommendation. Id. If the proposed ordinance is approved by the City Council, it must make findings that its action is consistent with the General Plan and is in conformity with public necessity, convenience, general welfare and good zoning practice. Id.

The applicant may appeal the Planning Commission’s recommendation to disapprove a proposed land use ordinance by filing an appeal with the City Clerk within 20 days of the decision. LAMC § 12.32(D)(1). If no appeal is filed, the Planning Commission’s recommendation will be considered final. Id. At any time prior to the City Council’s decision on the appeal, the Planning Department must submit any pertinent supplemental information that the City Council or its PLUM requests. LAMC §12.32(D)(2).

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b. Q Qualified Classification

LAMC section 12.32(G) provides a series of possible special zoning classifications, one of which is a "Q Qualified" classification. *See* LAMC §12.32(G)(2). Ordinarily, rezoning a property allows the occupant to maintain it for any use permitted by-right therein. *See, e.g.,* LAMC 12.14 (listing uses allowed by right in "C2" commercial zones). A Q Qualified classification allows the City Council to rezone a property to restrict its use from the full range of uses in that zone. *See* LAMC §12.32(G)(2)(a). The classification can also be used to impose certain standards (or conditions) on the intended redevelopment. *Id.* The express purpose of such classifications is to (1) protect a neighborhood's best interests and assure compatible development therein, (2) secure appropriate development in harmony with the objectives of the applicable General Plan, or (3) prevent or mitigate the potential environmental impact of a zone change. LAMC §12.32(G)(2)(a)(1)-(3).

Q Qualified classifications may be either permanent or temporary. *See* LAMC §12.32(G)(2)(a). If made on a temporary basis, the classification lasts for up to six years. *See* LAMC §12.32(G)(2)(b)(1), (f). Once a certificate of occupancy is issued for a development, the temporary Q Qualified classification becomes permanent. LAMC §12.32(G)(2)(e). Until that point, the six-year time limit can be extended if there is "substantial physical development" of the property for the classification's permitted uses. LAMC §12.32(G)(2)(f). Otherwise, the classification becomes null and void if the time limit expires. *Id.*

c. Variance Procedure

City Charter section 562 sets forth the minimum standards and procedures for the granting a zoning variance. All initial determinations on variances are made by the Zoning Administrator ("ZA"). Charter §562(a). ZA determinations are appealable to the appropriate Area Planning Commission, and then the City Planning Commission or City Council (as prescribed by ordinance). Charter §562(b). Even if an ordinance requires that the appeal be made to the City Planning Commission, the decision is nevertheless subject to the City Council's discretionary review pursuant to City Charter section 245. *Id.* In any event, variances may not be granted without the following findings being made:

- (1) that the strict application of the provisions of the zoning ordinance would result in practical difficulties or unnecessary hardships inconsistent with the general purposes and intent of the zoning regulations;
- (2) that there are special circumstances applicable to the subject property such as size, shape, topography, location or surroundings that do not apply generally to other property in the same zone and vicinity;
- (3) that the variance is necessary for the preservation and enjoyment of a substantial property right or use generally possessed by other property in the same zone and vicinity but which, because of the special circumstances and practical difficulties or unnecessary hardships, is denied to the property in question;

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- (4) that the granting of the variance will not be materially detrimental to the public welfare, or injurious to the property or improvements in the same zone or vicinity in which the property is located; and
- (5) that the granting of the variance will not adversely affect any element of the General Plan. Charter §562(c).

LAMC section 12.27 generally implements City Charter section 562, and governs the adoption of ordinances. Consistent with Charter section 562(c), LAMC section 12.27(D) requires that the ZA make the same five findings in writing. The ZA's decision to approve or deny a variance is appealable to the appropriate Area Planning Commission, and then in turn to the City Council directly. See LAMC §12.27(G)-(O).

D. The Requests for Judicial Notice

Petitioners ask the court to judicially notice 13 documents (Exs. A-M). Exhibits B-M consist of LAMC and Charter provisions (Exs. B, I, J, K), court records from La Mirada, BS 138369 and South Central Farmers v. City of Los Angeles, BS117561 (Exs. E-G, L), a City Council action (Ex. H), and a State Attorney General opinion (Ex. M). These requests are unopposed and are granted. Ev. Code §452(b), (c), (d).

Exhibit A is a City printout from the City's Ethics Commission website showing payments made by Millenium to various entities. The joint Opposition argues that Exhibit A is not part of the Administrative Record, it is immaterial that Petitioners seek to add it via judicial notice rather than a motion to augment, and it should not be judicially noticed because it is irrelevant. The Opposition explains that the payments were made by Millenium to its lawyers, engineers and consultants working on this Project; they were not made to City officials. The payments were disclosed only because the City's broadly worded lobbying ordinance requires payments for providing advice or strategy to a client be disclosed as "lobbying activities." Opp. at 6-7. Petitioners respond that the payments are not offered under CEQA, but rather to show due process violations. Reply at 1.

Exhibit A is an official act subject to judicial notice. Ev. Code §452(c). It also is relevant to Petitioners' due process claim. The request is granted.

Exhibit C is a map released by CGS on November 6, 2014 depicting the location of Alquist-Priolo Earthquake Zones and Seismic Hazard Zones within the Hollywood Quadrangle. Exhibit D is a Supplement to a Fault Investigation Report issued by CGS on November 5, 2014 to support its adoption of Exhibit C. CGS prepared Exhibits C and D to assist cities and counties in planning development. After the State adopts a map that delineates an Earthquake Fault Zone, the affected cities and counties regulated development within the Zone, including requiring the preparation of a geologic report discussing any hazard of surface fault rupture. Pub. Res. Code §2623(a).

The joint Opposition argues that the City did not have Exhibits C and D when it approved the Project, and they are irrelevant. In any event, the City treated the Project site as if it was within a Fault Zone. The mitigation conditions imposed on Millenium require it to conduct the same investigation and geologic report that would be required by placement in the Earthquake Fault Zone. Opp. at 8.

Petitioners contend that the City may have treated the Project Site as within an Earthquake Fault Zone, but that fact is insufficient for purposes of public information. The City

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knew that CGS was studying the area, yet never changed the statements in the DEIR that the Project site was not in an Alquist-Priolo zone. The public should have been informed of this fact, and CGS's subsequent action reinforces that conclusion. Reply at 3.

Exhibits C and D did not exist at the time of approval, and they corroborate Petitioners' position. Nonetheless, they are inadmissible to challenge the City's approval of the FEIR and the Project entitlements. To the extent that Petitioners' CEQA challenge is quasi-legislative, extra-record evidence is completely inadmissible for the determination of whether the decision is supported by substantial evidence or the agency proceeded in the manner required by law. Western States Petroleum Assn. v. Superior Court, ((95) 9 Cal.4th 559, 573, 574-76. To the extent the challenge is quasi-adjudicative, the admission of extra-record evidence is governed by CCP section 1094.5(e). Petitioners do not discuss the requirements for the admission of extra-record evidence. The requests are denied.

In a "Second Supplemental Request for Judicial Notice" filed on April 14, 2015, Petitioners ask the court to judicially notice excerpts from an EIR dated November 2010 for the NBC/Universal Evolution Plan and the City Council's action approving and certifying the Plan (Ex. N). Petitioners argue that the excerpts are relevant to whether the Millennium FEIR adequately addressed cumulative impacts. Mot. at 2. While this may be true, Petitioners make no showing that the evidence was presented to the City before approval of the Project, or that the evidence meets the test for extra-record evidence. Petitioners also provide no reason why they waited to file the request with their reply, or give any indication that the evidence is properly responsive to a new issue raised by the Opposition. The City and Millennium have had no opportunity to object to the request, and it is denied.

The City and Real Party ask the court to judicially notice five documents (Exs A-E), including LAMC provisions (Exs. A, B, D), a Charter provision (Ex. E), and a court filing in La Mirada (Ex.C). The unopposed requests are granted. Ev. Code §452(b), (d).

E. Statement of Facts

1. The Project

The instant proceeding concerns a proposed 4.4 acre mix-use redevelopment project, spanning on two lots on the east and west sides of Vine Street south of Yucca in Hollywood ("Project"). AR 4211, 4215. The site is accessible from the Hollywood Freeway (US-101), with freeway on and off-ramps approximately one block north at Franklin and Vine, and Franklin and Argyle, respectively. AR 4217. In concept, the Project will include a mix of residential units, offices, a hotel, a health club, and retail spaces totally a developed floor area of approximately 1, 166,970 square feet, yielding a floor area ratio ("FAR") -- the total square footage of a building divided by the total square feet of the building's lot -- of 6:1. AR 4233.

2. Millennium's Initial Application

On August 18, 2008, Real Party Millennium filed a Master Land Use Permit Application with the City's Planning Department ("City Planning"). AR 21309-11. The Project was described as a mixed-use development consisting of approximately 492 residential units, a 200-unit luxury hotel, 100,000 feet of office space, an approximately 34,000 square foot sports club and spa, more than 11,000 square feet of commercial uses and approximately 34,000 square feet of food and beverage uses. AR 21321. The historic Capital Records Tower and Gogerty Building are located within the Project Site, and would be preserved as office and music recording buildings. Id. Thereafter, the City's Department of Building & Safety ("LADBS")

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informed Millennium's attorney that the Project's enclosed balconies would render the building in excess of the maximum 6:1 FAR allowable under the City's General Plan, thus requiring a variance. AR 68250.

Millennium took time to review its plans and no further substantive progress occurred until 2011. See AR 68255-56.

3. The NOP and Caltrans' Concern

Millennium submitted another Master Land Use Permit Application with the City's Planning Department in April 2011. AR 10987-90. As part of its application, Millennium proposed (1) custom "Development Regulations" for the Project that would be incorporated in the Project approvals and contain standards for the Project's development that would prevail over zoning or land use regulations in the LAMC (AR 845-904, 853), and (2) a "Land Use Equivalency Program" ("LUEP") that would provide flexibility to Millennium to adjust the type and density of land uses for the Project, allowing Millennium to request and obtain a transfer of land uses before development of any Project phase so long as it stayed within the FAR and trip cap of 1498 new peak hour vehicle trips per day set forth in the EIR (AR 13789-90). AR 10987-90.

As the lead agency, the City issued a CEQA Notice of Preparation and Public Scoping Meeting for an EIR ("NOP") on April 28, 2011. AR 6225-31. The City's project description was for a maximum 1,166,970 square foot of floor space (6:1 FAR), preserving and maintaining the existing Capitol Records and Gogerty Building, a mix of residential, hotel, office, restaurant, health and fitness club, and retail uses, using the LUEP to provide development flexibility for future demands of the market and economy by allowing adjustment between land uses from several development scenarios, and Development Standards as embodied in a Development Agreement. AR 6226.

The Project would require entitlements of (1) a Development Agreement, (2) Vesting Tentative Tract Map ("VTTM") for the mixed use development, (3) zone change from C4 to C2, (4) height district change, (5) conditional use permit ("CUP") for alcohol and live entertainment, (6) Vesting CUP for hotel, (7) variance for sports club parking and for restaurants with outdoor eating areas above ground floor, (8) demolition and grading permits, (9) haul route approval, and (10) design review and approval to permit FAR above 4.5:1. AR 6227.

An Initial Study, also prepared on April 28, 2011, noted that the Project would develop a mix of land uses, including residential, luxury hotel, office, restaurant, health and fitness club, and retail. AR 30569. The LUEP would define a framework for permitted land uses and square footages which could be exchanged so long as the 1,166,970 square footage and 6:1 FAR were not exceeded and no additional environmental impacts occurred. *Id.* The Initial Study noted, *inter alia*, that the Project Site was not within a State-designated Alquist-Priolo Zone or other designated fault zone. However, a portion of the western portion of the Site is adjacent to the boundary of a City fault rupture study zone. The City zoning map (ZIMAS) shows the closest fault with a potential for rupture is the Santa Monica/Hollywood Fault which is 0.4 miles away. AR 30577. The Initial Study concluded that an EIR was required because the Project may have a significant environmental effect. AR 30570. The (now defunct) City of Los Angeles Community Redevelopment Agency ("CRA-LA"), South Coast Air Quality Management District ("SCAQMD") and Los Angeles Regional Water Quality Control Board ("LARWQCB") were designated as the "Responsible Agencies" under CEQA. AR 30569.

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After the public scoping meeting was held, the California Department of Transportation (“Caltrans”) expressed concern in a May 18, 2011 letter over the Project’s traffic impact on the 101 Freeway. AR 31506. Caltrans had a specific concern about the possibility of vehicle queuing at the 101 Freeway on-ramps and off-ramps nearest to the Project. *Id.* Caltrans recommended that the City prepare a traffic study to determine whether the Project-related traffic, plus the cumulative traffic, would cause such issues. *Id.* Caltrans reminded the City that as a responsible agency under CEQA, it had the authority to determine the required freeway analysis for the Project and was responsible for off-setting Project vehicle trip generations that worsen the 101 Freeway. AR 31507. Caltrans noted that even the County’s Congestion Management Plan (“CMP”) standards provide that Caltrans should be consulted for the analysis of State facilities. AR 31507. Caltrans stated that trip generation, trip distribution, choice of travel mode, and assignments of trips to the 101 Freeway should be analyzed for all on/off ramps within five miles of the Project site, preferably using the Caltrans Traffic Impact Study Guide (“TISG”). AR 31506-07.

4. The DEIR

In October 2012, the City prepared a Draft Environmental Impact Report (“DEIR”). *See generally* AR 4082-5331. Per the DEIR, the Project was anticipated to encompass 492 residential units, 200 hotel units, 300 square feet of office, retail, restaurant, and fitness center/sports club space. AR 4234. The DEIR listed Caltrans as a responsible agency for its review of traffic impacts upon state highways and enforcement of any highway mitigation measures. AR 4260.

In analyzing potential traffic impacts, the DEIR applied the County’s standard CMP methodology which requires that an EIR analyze traffic conditions at all CMP monitoring arterial intersections where the project would add 50 or more trips during the weekday peak hours, and at all mainline freeway monitoring locations where the project would add 150 or more trips during weekday peak hours. AR 4955, 4975. The DEIR analyzed 37 arterial intersections, including those directly adjacent to nearby 101 freeway ramps. AR 4927. The DEIR also studied cumulative traffic impacts applying both a 1% annual ambient growth factor for the Hollywood area and a list of 58 related projects. *See* AR 4317-20, 4980. The DEIR concluded that the Project would result in a less-than-significant impact in terms of trip generation, including trips using freeway segments. AR 4975.

The DEIR addressed the Project Site’s subsurface geology, including seismic and fault rupture issues. AR 4589-602. The DEIR noted that the Project was not located within a designated Alquist-Priolo Earthquake Fault Zone. AR 4591. However, the Project’s eastern portion was adjacent to the boundary of a fault rupture study zone included as part of the Safety Element of the City’s 1996 General Plan. *Id.* The DEIR also noted that, according to CGS and ZIMAS, the closest earthquake fault with the potential for fault rupture was the Santa Monica Hollywood Fault (the “Hollywood Fault”), which was approximately 0.4 miles away. *Id.* The DEIR further included a Preliminary Geotechnical Study that analyzed subsurface borings performed on the property (*see* AR 8211-59), and seismic-geology mitigation measures, including a mitigation measure requiring substantial additional subsurface testing and monitoring prior to issuance of building or grading permits. AR 4136-37.

The DEIR addressed the Project’s impact on fire protection services. AR 4804-24. The DEIR stated that response time relates directly to distance, and the preferred response time of the Los Angeles Fire Department (“LAFD”) is to arrive at the scene of a call-out for all emergencies

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within five minutes 90% of the time. AR 4800. The DEIR acknowledged that a City Controller audit of LAFD in May 2012 concluded that there has been an increase in response times for medical first responders, but not the time standard for fires and non-medical incidents. The DFEIR stated that the Controller's audit was presented for informational purposes only, and relied on LAFD-supplied response times. AR 4800.

The DEIR noted that CEQA Guidelines, Appendix G, provides that a project could have a significant environmental impact if new government facilities are necessary in order to maintain acceptable response times for fire protection and the construction of the new facilities could cause significant environmental impacts. AR 4804. The City's CEQA Thresholds Guide also provides that, if a project requires the addition of a new fire station or expanded facility to maintain service, the determination of whether the new construction could cause a significant environmental impact will be determined through a case-by-case evaluation. AR 4804-05. The DEIR noted that the Project Site is only 0.7 miles from a LAFD fire station housing a truck company and 0.8 miles from a fire station housing an engine company. AR 4807. Both the truck and engine companies are within the 1.5 mile maximum response distance required by Fire Code section 57.09.06 and applicable response times. Average response times for those two stations are less than five minutes, and the environmental impact was deemed less than significant. AR 4808.

The DEIR was circulated for 45 days, with a public hearing being held on February 19, 2013. See AR 21084-85.

5. Millennium's Fault Investigation Report

Pursuant to LAMC section 17.05(U), Millennium prepared and the City approved a preliminary soils report. AR 29810-11; Opp. RJN Ex.A.

Because a 2010 CGS map showed the Hollywood Fault as active, and it "appears to exist in the vicinity of the subject site," the City required a fault investigation report pursuant to Los Angeles Building Code section 1803.5.11. See AR 29813.

A Fault Investigation Report dated November 30, 2012 ("Fault Report") was prepared by Millennium's consultant, Langan Engineering. AR 29864-79 (without exhibits). The Fault Report stated that the Hollywood fault is active and has the potential for rupture. According to CGS and the City's ZIMAS mapping system, the Hollywood fault is located approximately 0.4 miles from the Project Site. AR 29870. The Fault Report explained that, although the Project Site is not located in a current State or City-mandated fault investigation zone, the City required a fault investigation anyway since the Project Site is within 500 feet of the Hollywood fault trace as mapped by CGS. AR 29867. The Fault Report concluded that "active faulting is not present within the limits of our investigation within the Site..." AR 29875.

6. Caltrans' DEIR Comment Letter

In a December 10, 2012 letter, Caltrans expressed a series of "major concerns" with the DEIR's traffic analysis, referencing its May 18, 2011 letter in response to the NOP. AR 31785-88. Caltrans' primary concern was that the City's June 2012 Traffic Impact Study ("Traffic Study") for the DEIR did not follow the procedures outlined in the TISG, and did not analyze impacts to the state highway system. AR 31785. Specifically, the Traffic Study only applied the CMP criteria and failed to provide adequate information for direct traffic impacts to the 101 Freeway's mainline segments and ramps. AR 31786. Additionally, the DEIR and Traffic Study omitted a cumulative traffic analysis for the 101 Freeway which would consider the impact of 58

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related projects, the proposed NBC-Universal project, and anticipated growth from the Hollywood Community Plan. *Id.*

Caltrans also took issue with the DEIR's conclusion that the Project (without mitigation) would not generate significant trip generation impacts at CMP locations and on 101 Freeway segments. Caltrans asserted that this conclusion was "not based on any credible analysis that could be found anywhere in the DEIR." To the contrary, Caltrans opined that the Project would *significantly impact* the state highway system. *Id.* The Traffic Study's projected trip generation figures appeared to be "unreasonably low," and Caltrans requested that the City verify them. AR 31786-87. Particularly questionable was the Traffic Study's high number of trip-reduction credits. AR 31867.

The Traffic Study also did not include a series of nearby 101 Freeway on-ramps and off-ramps (e.g., the Vine Street off-ramp), the inclusion of which was necessary to show projected queuing and upstream buildup, which is a safety issue. *Id.* In order prevent queuing and backup, City intersections adjacent to the Project needed to be able to adequately absorb increased off-ramp volumes at the same time as serving local circulation. *See id.* A Highway Capacity Manual ("HCM") weaving analysis also needed to be performed. *Id.*

In sum, Caltrans was "concerned that the project impacts may result in unsafe conditions due to additional traffic congestion, unsafe queuing, and difficult maneuvering" for the 101 Freeway, where the Level of Service (sometimes "LOS") is "F". AR 31867, 31786. If the City did not address these concerns, Caltrans refused to "recognize the [Traffic Study] and DEIR as adequately identifying and mitigating the project's impact to the State highway facilities." AR 31867.

7. The FEIR

The FEIR was published on February 8, 2013. The FEIR included over 500 pages of responses to comments. *See* AR 151-661.³

In response to Caltrans' comments, the City stated that it consulted Caltrans and considered its concerns. AR 181. The City disputed Caltrans' concern that it did not analyze the Project's impact on the state highway system. *Id.* The DEIR's Traffic Study analyzed "key freeway ramps" using the City's own "level of service" methodology, and of freeway mainline segments using the County's CMP-recommended methodology. *Id.* Caltrans' TSIG was consulted, but it did not provide thresholds of significance which CMP, a state-mandated program, did. *Id.* The City neither confirmed nor denied Caltrans' status as a CEQA responsible agency. *See id.*

As for freeway segment analyses, the City asserted that the Traffic Study concluded that Project impacts to the 101 Freeway would be less than significant so no further analysis was necessary. AR 181. Support for that conclusion was provided by the recently certified EIR for the Hollywood Community Plan Update ("HCPU"). *Id.*

The City added that it performed a supplemental traffic study using methodologies developed by the Southern California Association of Governments ("SCAG"). *Id.* The supplemental traffic analysis verified the City's initial conclusions that the Project will not result in the addition of 150 trips or more to any freeway segment, and therefore traffic impacts on the freeway system will be less than significant. *Id.*

³ The City received only a few seismic comments that generally did not address the FEIR's sufficiency or methodology. AR 23892, 23995, 24019. *But see* AR 23924.

With respect to Caltrans' criticism of the Traffic Study's failure to include a cumulative traffic analysis for the 101 Freeway -- including from the 58-related projects in the DFEIR, the NBC-Universal project, and Hollywood Community Plan growth -- the City did not directly address the proposed NBC-Universal project. *See id.* However, the City referred to its extensive transit system in the Project's vicinity, stating that the Project would provide "in-fill uses" that would reduce regional trip demand. *Id.* The City's reliance on transit solutions was also consistent with the City's traffic study guidelines and the HCPU's objectives. *Id.*

As for the on-ramp/off-ramp issues, the City responded that its own procedures were selected as the most appropriate for use in the Traffic Study, and the ramps chosen were where impacts were expected to be the most significant and substantial. AR 183. The ramps listed by Caltrans were not expected to be a capacity restraint issue. Instead, the signalized intersections and mainline 101 Freeway sections present the capacity restraints, and the queues from those constraints determine the ramp conditions. AR 184. The queuing issue will depend on under-signaling at the intersections. *Id.*

The City's trip generation estimates -- 19,486 trips per day with 1064/1888 trips during the AM/PM peak hours -- were based on well-accepted guidelines. AR 184. Additionally, it is a common practice to reduce trips for transit trips, pass-by trips, and internal trips associated with mixed-use projects. *Id.*

The City stood by its use of the critical movement analysis ("CMA") methodology for congestion modeling as per the City's Department of Transportation ("LADOT") manual instead of Caltrans' preferred HCM methodology. AR 186. The CMA is a planning methodology, whereas HCM is an operations methodology. *Id.* The HCM also assumes *constant signal timing*, which is problematic given that the City employs instantaneous, computer-controlled signaling, the timing of which varies depending on traffic. *Id.*

8. Caltrans' Supplemental Comment Letter

On February 13, 2013, Caltrans submitted a supplemental comment letter after reviewing the FEIR. AR 22840-44. Caltrans stood by its assertion that the City's use of the CMP methodology did not adequately study impacts to the freeway system. AR 22840. According to Caltrans, the City's Traffic Study analysis improperly focused on the Project's impact on the local CMP, rather than impacts to the existing state highway system, particularly for safety issues. AR 22840-41. The Traffic Study also did not provide sufficient traffic analysis for the reader to review its assumptions, analysis, and conclusions. AR 22841.

Caltrans asserted that the CMP does not capture the same data for analysis that the HCM does. AR 22841. For example, the CMP does not analyze off-ramps or freeway impacts with fewer than 150 trip assignments, even where the existing LOS is F. *Id.* It also uses a "flawed percentage ratio to determine the significance of impacts," and incorrectly analyzes cumulative traffic impacts. *Id.* Caltrans again faulted the City for failing to undertake a queuing analysis. *Id.*

After receiving no response from the City, Caltrans sent a fourth letter dated May 7, 2013 to then-Councilmember Eric Garcetti. *See* AR 11853-54. In the May 7 letter, Caltrans generally repeated its grievances about why it felt the FEIR was inadequate. *See id.*

9. The Initial Hearing on the Vesting Tentative Tract Map and FEIR

Under the Subdivision Map Act, Millenium processed a VTTM for a 41-lot subdivision of the property. On February 19, 2013, 11 days after the FEIR's release, an initial hearing was

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held by the City's Deputy Advisory Agency on the proposed VTTM and the FEIR. AR 21084-85. Although the parties do not cite to the decision, the DAA apparently approved the Project's VTTM and supporting FEIR.

10. The Planning Commission Hearing

On March 28, 2013, the Planning Commission heard the appeals from the Deputy Advisory Agency's approval of the VTTM and FEIR. AR 2. At the outset of the hearing, Deputy City Attorney Adrienne Khorasanee (the "City Attorney") announced that due to a financial conflict of interest by one of its commissioners, the Planning Commission was disqualified from considering approval of the Development Agreement for the Project. AR 74812. As a result, Millenium decided to withdraw the Development Agreement, which was removed from the agenda. AR 74812. The City Attorney advised the Planning Commission that it could nevertheless consider the other items concerning the Project. Id.

The Project opponents were given 30 minutes to speak at the Planning Commission hearing. *See* AR 74882. Petitioners' attorney, Daniel Wright, Esq., spoke on behalf of Mr. and Mrs. Jim Geoghan, who represented the neighborhood associations appealing the initial determination. *See* AR 74883-95. Mr. Wright argued that the commissioner's conflict of interest meant that the entire Planning Commission should be disqualified from the matter and that the hearing should be terminated. AR 74885-86. Mr. Wright also made a due process objection based on his belief that the exhibits he filed were neither accepted nor considered. AR 74886. Commissioner Perlman responded that the Planning Commission had received the exhibits, which were in the record, as was Mr. Wright's last minute two-page letter. AR 74886-87.

After the appellants spoke, several prepared statements were read by City representatives. *See* AR 74918-19. Next was a 90 minute public comment period, with time split evenly between supporters and opponents. *See* AR 74927.

At the conclusion of the hearing, the commissioners voted to deny the appeals from the approval of the VTTM and FEIR. AR 21149. Thereafter, the commissioners voted to adopt the Planning Commission staff's recommended actions, including approval of various CUPs, variances, and changes to the Development Regulations. *See* AR 4-7, 21149, 75168-72. The Planning Commission also voted to recommend that the City Council (1) adopt an ordinance authorizing the execution of a Development Agreement; (2) adopt a zone change and height district change; and (3) certify the FEIR and Statement of Overriding Considerations. Id.

11. The PLUM Hearing

On June 18, 2013, the matter was heard before the City Council's Planning and Land Use Management Committee ("PLUM"). AR 29-33, 75300-79. Petitioners' attorney, Robert Silverstein, Esq., spoke on behalf of appellant CURD. *See* AR 75178. He requested at least ten minutes to make his objections. AR 75177-78. The Chairperson responded; "Well, why don't you start, and let's see how far you get?" AR 75178. Mr. Silverstein offered a letter with 27 exhibits for PLUM's consideration. *See* AR 75178. In addition to arguing about the dangers posed by the Hollywood Fault (AR 75178-90,) Mr. Silverstein argued that the Planning

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Commissioner's disqualifying conflict of interest should have resulted in the withdrawal of all items concerning the Project. AR 75190-92.⁴

After a presentation by Millennium, the PLUM gave 20 minutes of general public comment to each side. AR 75224. Anne Geoghan, a member of CURD, was one of the speakers during this period. AR 75251-52. At the conclusion of the hearing, the PLUM voted to take all actions recommended by the staff report. See AR 29-33, 75295-97. The changes to the Development Regulations and Q conditions requested by Millennium and the Planning Department were adopted by reference. AR 31. Therefore, the PLUM implicitly denied the appeal. See *id.*

12. The State Geologist's Letter

On July 20, 2013, State Geologist John Parrish sent Councilmember Wesson a letter indicating that CGS was commencing a study of the Hollywood Fault, pursuant to Alquist-Priolo for possible zoning as "Active." AR 19063-64. The State Geologist mentioned the Project, which he stated may fall within an Earthquake Zone. *Id.* He advised that the study's outcome would provide the City with new information for its consideration of current and future developments along the Hollywood Fault, and indicated that the investigation and resultant maps were scheduled for completion by late 2013 or early 2014. *Id.*⁵

13. The City Council Hearing

The City Council's hearing for the Project took place on July 24, 2013. AR 105, 113-16. The day before the hearing, Millennium submitted a 311-page letter and supporting evidence responding to CURD's arguments and evidence on appeal. AR 19086-393.⁶

Mr. Silverstein again represented CURD and other Project appellants. See AR 75331. At the outset of the hearing, the Chairman gave ten minutes for each of the two appellants, ten minutes for the applicant, and ten minutes each for all supporters and opponents. AR 75301. Mr. Silverstein requested more time to make his case, but the Chairman refused to give him the other appellant's ten minutes. AR 75330-31.

Mr. Silverstein objected to Millennium's last-minute letter as an attempt to sneak in new studies and data, and a violation of due process. AR 75332-33. He addressed the letter written by the State Geologist on the Hollywood Fault issue, and argued that the Project Site is within an earthquake fault zone. AR 75336.

⁴ Prior to the PLUM hearing, Millennium sent a May 31, 2013 letter requesting a series of changes to the Q Conditions for approval and to the Development Regulations. See AR 18466-70. The City's Planning Department also made a recommended modification to Q Condition No. 2 and corrections to the Development Regulations. See AR 19038-42. These requested changes were not addressed by Mr. Silverstein at the PLUM hearing. See AR 75178-92.

⁵ Petitioners attempt to present the results of this study showing that the Project is in fact within the Hollywood fault zone (RJN Exs C, D), but the court has denied this request.

⁶ In a letter to the City Council dated the day of the hearing, LADBS noted the State Geologist's July 23, 2013 letter stating that investigation may show that the Project lies within an Earthquake Zone, and responded that LADBS already treats the Project Site as if it is located in an Earthquake Zone. It was for this reason that Millennium was required to prepare the Fault Report. AR 13791-92.

A typed amending motion was announced as circulated by the City Clerk, which was unanimously approved by the City Council. AR 75301, 75378-79. The City Council then denied all appeals and approved the Project in full. AR 125, 133-37. Thus, the City Council: (1) certified the FEIR; (2) adopted the Statement of Overriding Considerations; and (3) granted a series of land use entitlements, including a vesting CUP for a hotel within 500 feet of a residential zone, a master CUP to sell an dispense alcohol for on and off-site consumption and live entertainment, zone variances for outdoor eating above the ground floor and to permit reduced parking for a sports club facility, reduced on-site parking, and the VTTM. See AR 11643 (Council Amending Motion), 125-50, (City Council Action).

The Project's vested land use entitlements include Ordinance No. 182636 (the "Ordinance"), which effectuates for the Project property a zone change from a C4 zone with a 3:1 FAR and no height limitation to a C2 zone with height limitation and 6:1 FAR. AR 11644-95. The Ordinance also includes the Development Regulations, (AR 18574-635) and the LUEP (AR 13789-90), which define and restrict the Project's mix of uses, design, height, scale, and massing, and any future change in the mix of uses. AR 13789, 18586. The Ordinance further contains a Mitigation Monitoring and Reporting Plan ("MMRP"), which contains all of the mitigation measures listed in the EIR. These entitlements and conditions thereto were recorded with the County Recorder's Office. See AR 11656.

14. Invalidation of the Hollywood Community Plan Update

On February 11, 2014, the Honorable Ann J. Jones rendered judgment in La Mirada, LASC Case No. BS 138580. See Pet. Pet. RJN Ex. F. Pursuant to the court's judgment, a peremptory writ of mandate was issued invalidating and setting aside the HPCU and the EIR certified for the HCPU. Id., p. 1. The La Mirada judgment also set aside and vacated the related approvals issued in furtherance of the HCPU. Id., pp. 1-2. The judgment stated that its provisions were not intended to order the City to rescind "those adjudicatory approvals not challenged which the City may have made under the HCPU after its adoption by the City." Id., p. 2.

The City accepted the La Mirada judgment without appeal, and it is now final. The original 1988 Hollywood Community Plan ("HCP") became operative again after the City rescinded the HCPU. See AR 24045.

F. Analysis

Petitioners argue that the City violated CEQA by (1) refusing Caltrans' direction as a responsible agency to study impacts to the 101 Freeway, (2) failing to notify and consult with CGS as an agency with jurisdiction, (3) failing to provide a fixed and stable Project description, (4) failing to advise the public of seismic issues, (5) failing to properly analyze traffic impacts, (6) failing to properly analyze fire/safety service impacts and (7) relying on the HCPU which was later set aside by the La Mirada judgment. In their non-CEQA claims, Petitioners argue that (1) the La Mirada judgment requires rescission of all HCPU-related approvals such as the Project, (2) the City's approval of the Development Regulations and elevation of them over all other LAMC provisions was illegal, and (3) the City Council's unfair hearings violated due process.

1. The City Was Required to Follow Caltrans' Preferred Traffic Study Methodology

Caltrans contended that the City's traffic figures for the Project of 20,000 vehicle trips and 1064/1888 peak period AM/PM vehicle trips – which Caltrans described as low and not based on credible analysis (AR 11859) -- required a Traffic Impact Study using Caltrans' TISG. Concerned about queuing and upstream freeway buildup, Caltrans wanted a study of 101 Freeway on/off ramps near the Project. Caltrans also wanted a weaving analysis pursuant to its Highway Capacity Manual ("HCM"). Caltrans further stated that the FEIR omitted a cumulative traffic analysis for the 101 Freeway which included the NBC-Universal project, which was necessary whether or not the City was correct about only 150 additional trips generated. Thus, Caltrans concluded that the FEIR did not adequately analyze the Project's impact to the state highway system. Mot. at 6-8.

In response to Caltrans, the City relied on the traffic analysis required by the CMP, which is the standard methodology for traffic studies in the County, and analyzed key freeway ramps as well as freeway mainline segments, finding a less than significant traffic impact. A supplemental traffic study using SCAG methodologies confirmed this conclusion. The City did not expect the ramps listed by Caltrans to be a capacity restraint issue. The City contended that Caltrans' allegation about its low trip estimates was unwarranted as the estimates were based on well-accepted guidelines. Finally, the City preferred its congestion modeling to Caltrans' HCM methodology which is inapplicable to planning issues.

Thus, there was a clear dispute between the City and Caltrans over the adequacy of the FEIR's Traffic Study analysis for impacts to the 101 Freeway.

The lead agency under CEQA is the agency that carries out a project or has primary authority for approving a project. Pub. Res. Code 121067; Guidelines §15051. Where the project is local, such as land use decisions, the agency that has general governmental power over a project is almost always the lead agency. See Guidelines §15051(a).

If the lead agency determines that an EIR is required, it must send notice to each responsible agency. Pub. Res. Code §21080.4(a). A "responsible agency" means an agency which has some discretionary responsibility for carrying out or approving a project. Pub. Res. Code §21069; Guidelines §15381. Upon receipt of the notice, each responsible agency "shall specify to the lead agency the scope and content of the environmental information that is germane to the statutory responsibilities of that responsible agency...and which, pursuant to the requirements of this division, shall be included in the environmental impact report." Pub. Res. Code §21080.4(a); Guidelines §15082(b) (responsible agency shall provide detail about the scope and content of environmental information that "must be included in the draft EIR").

The lead agency shall include the responsible agency's information in the EIR. Guidelines §15096(b)(2). The lead agency may begin work on the draft EIR without waiting for responses, but the draft "may need to be revised or expanded to conform to" the responsible agency responses. Guidelines §15082(a)(4). See Save San Francisco Bay Association v. San Francisco Bay Conservation and Development Commission, (1992) 10 Cal.App.4th 908 (city as lead agency complied with its duty to produce comprehensive document which responsible agency could rely upon in its discretionary approval).

A responsible agency complies with CEQA by reaching its own conclusions on whether and how to approve the project. Guidelines §15096(a). The responsible agency consults with the lead agency and comments on draft EIRs for projects which the responsible agency would later be asked to approve. Guidelines §15096(b), (d). If the responsible agency deems the lead agency's final EIR to be inadequate for use by the responsible agency, it must either sue, be

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deemed to have waived objection, prepare a subsequent EIR if permissible, or assume the lead agency role. Guidelines §15096(e).

The City is the lead agency for the Project. If Caltrans is a responsible agency, then the City was required to include in the FEIR the information required by Caltrans. The joint Opposition argues otherwise, contending that Pub. Res. Code section 21080.4(a) and Guidelines section 15096(b)(2) provide only that the lead agency shall include “this information” in the EIR, and “this information” means the comments of responsible agencies. According to the Opposition, the City was not required to follow Caltrans’ direction as a responsible agency if it included the comments in the FEIR. Opp. at 11.

This position is incorrect. As Petitioners argue (Reply at 7), Pub. Res. Code section 21080.4(a)’s plain language requires that the responsible agency “specify” to the lead agency the “scope and content of the environmental information” within the responsible agency’s purview, and that is the information which “shall be included” in the EIR. There is no reason for the statute to use the word “specify” if a lead agency could ignore it. This conclusion is underscored by the remedies available to the responsible agency should the lead agency fails to follow the responsible agency’s direction, which include a lawsuit, preparation of a subsequent EIR if permissible, or assumption of the lead agency role. Guidelines §15096(e). There would be no need for the responsible agency to have this list of remedies – particularly the remedy of taking over as lead agency -- if it only had a right to comment on a draft EIR. Thus, a lead agency fails to follow a responsible agency’s direction at its own peril. See Remy, Thomas, Moose, & Manley, Guide to CEQA: California Environmental Quality Act, (11th ed. 2007) p. 45 (“[L]ead agencies *must* include in their EIRs information related to the environmental impacts that are anticipated by responsible agencies and trustee agencies as to matters within their expertise or jurisdiction.”).⁷

The issue becomes whether Caltrans is a responsible agency under CEQA whose direction the City was required to follow for analysis of the Project’s impact on the state freeway system. Petitioners argue that Caltrans is a responsible agency for the Project, pointing out that the City identified Caltrans as a responsible agency in the draft EIR. Mot. at 6. Specifically, the DEIR stated that Caltrans had authority to review traffic impacts on the 101 Freeway and enforce any Project mitigation measures. AR 4260.

The Opposition admits that the City treated Caltrans as a responsible agency, but contends that treatment does not make it so. The Opposition argues that the definition of a “responsible agency” requires that the agency have some discretionary responsibility for carrying out or approving a project, and Caltrans has no approval authority over the Project. See Pub. Res. Code §21069; Guidelines §15381. Even if Caltrans has a role in implementing mitigation measures for the Project, that does not make it a responsible agency. See Rominger v. County of Colusa, (2014) 229 Cal.App.4th 690, 700-01 (county’s environmental review did not bar it from contending that the project was exempt from CEQA because court decides whether agency required with procedure required by law). Opp. at 11-12.

⁷ The Opposition cites to Citizens for East Shore Parks v. State Lands Commission, (2011) 202 Cal.App. 4th 549, 567-68. Opp. at 11. That case holds only that a lead agency may rely on a responsible agency’s failure to provide comments after receiving notice to mean that the responsible agency had no comments to make. It does not hold that a lead agency may ignore a responsible agency’s direction.

Contrary to Petitioners' position (Pet. Reply for Supp. Mot. To Augment, pp. 5-7), the City is not judicially estopped from contending that Caltrans is not a responsible agency simply because it said so in the DEIR, or in a September 9, 2013 email from Deputy City Attorney Siegmund Shyu providing Petitioners with notice of the responsible agencies so that Petitioners could notify them about their lawsuit. *See* Pub. Res. Code §21167.6.5(b), (c). Judicial estoppel is an equitable doctrine that prevents "the use of intentional self-contradiction as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." The primary purpose of the doctrine is not to protect the litigants, but to protect the integrity of the judiciary. Thomas v. Gordon, (2000) 85 Cal.App.4th 113 (citations omitted). The focus is on whether a party has taken totally inconsistent positions in judicial proceedings where the prior position was successfully asserted, and the inconsistency is not the result of ignorance, fraud or mistake. Aguilar v. Lerner, (2004) 32 Cal.4th 974, 986-97. The doctrine should apply when: (1) the same party has taken two positions; (2) the positions were taken in judicial or *quasi*-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud or mistake. International Engine Parts, Inc. v. Feddersen & Co. (1998) 64 Cal.App.4th 345, 350-351. The City was not "successful" in asserting that Caltrans is a responsible agency in the DFEIR or other documents, and judicial estoppel does not apply.⁸

Moreover, Caltrans does not become a responsible agency simply because it will enforce mitigation measures created by the City. *See* Lexington Hills Assn. v. State, (1988) 200 Cal.App.3d 415, 433 (issuance by Caltrans of "encroachment permits" was not integral to timber harvesting project, merely occurred during performance of mitigation measure, and Caltrans did not have authority or duty to approve project under CEQA). *Compare* Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo, (1985) 172 Cal.App.3d 151, 174-75 (Caltrans was responsible agency because it must issue encroachment permit for construction of the project, and permit was discretionary because Caltrans can control the location and manner of encroachment).

However, there is more to Caltrans' involvement than mere enforcement of mitigations. Caltrans contended that it is a responsible agency for the Project, and the City agreed with that contention in the DFEIR through the outset of this lawsuit. This is not an issue of judicial estoppel or admission, but rather that the City agreed upon a legal framework which included Caltrans as a responsible agency for purposes of CEQA. The City cannot now deny Caltrans the role of responsible agency after extensive colloquy between the two agencies in which Caltrans played that very role. At some point in the CEQA process, the City becomes bound by the CEQA framework it adopts. *See* Genry v. City of Murrieta, (1995) 36 Cal.App.4th 1359, 1404-05 (city never considered whether to prepare supplemental EIR and consequently was bound by election to prepare only mitigated negative declaration). To conclude otherwise would impermissibly enable the City to manipulate the Project's design so as to avoid allocating discretionary decisions to Caltrans and its demands for freeway and on/off ramp traffic study.

⁸ Nor does the City Attorney's September 9 email that Caltrans is a responsible agency constitute a judicial admission. Judicial admissions apply to facts, not conclusions of law. Stroud v. Tunzi, (2008) 160 Cal.App.4th 377, 384.

Apart from the fact that the City is bound by the CEQA framework it adopted, Caltrans is a responsible agency because it does perform a discretionary function for the Project. Both the DEIR and the Project Conditions of Approval state that Caltrans and LADOT will jointly design and approve the mitigations measures for the intersection at Argyle/Franklin Avenue and the northbound onramp to the 101 Freeway. AR 4194-95, 11685; *see* AR 22879. This design feature makes Caltrans an agency with discretionary authority for approval of an integral part of the Project (design of an onramp mitigation measure), not just the implementation of mitigation measures. Caltrans is a responsible agency for the Project.^{9 10}

The Opposition contends that the City, as lead agency, was entitled to consider and reject criticism by Caltrans so long as its reasons are supported by substantial evidence. North Coast Rivers Alliance v. Marin Municipal Water District, (2013) 216 Cal.App.4th 614, 627, 642 (lead agency could reject other agency recommendations so long as lead agency decision was supported by substantial evidence). According to the Opposition, the City considered and fully responded to Caltrans' comments, including the preparation of a second traffic impact analysis using SCAG's traffic model. This second study is substantial evidence supporting the FEIR's conclusions. Unlike the City's threshold of 150 peak-hour trips in one direction, the SCAG analysis used a more conservative threshold of 150 trips during peak hours in both directions and it still found no significant impact on freeway segments. *Opp.* at 9-10.

The Opposition defends the City's use of CMP rather than the HCM level of service methodology preferred by Caltrans, which measures level of service based on travel speed and duration of congestion. AR 56127. The CMP chose a LOS methodology called Intersection Capacity Utilization ("ICU") due to the need for a consistent means of measuring congestion across the County. ICU has been determined to be consistent with HCM for this purpose, and CMP does not preclude the use of different methodologies for a purpose outside the CMP. AR 56127-28. The City did not use Caltrans' TISG because it does not include thresholds of significance, and the absence of significance thresholds is an appropriate basis to evaluate environmental impacts. *See Sierra Club v. City of Orange*, (2008) 163 Cal.App.4th 523, 541 (level of service standard used in EIR). *Opp.* at 10. The City also studied system constraints for freeway ramps by studying the immediately adjacent intersections to numerous 101 Freeway on/off ramps. The City used LADOT methodology for this purpose, and there is no evidence that this methodology was inaccurate. *Id.*

The City's choice of methodology did not comply with the substance of what Caltrans required, and the City was not free to ignore it. Even the CMP expressly states that Caltrans must be consulted to identify specific locations on the freeway system for analysis. AR 11863. The City relied on the CMP for thresholds of significance, but Caltrans told the City that the congested conditions of the 101 Freeway meant that even trips below the arbitrary CMP threshold of 150 could be significant and should be analyzed using its TISG. AR 11864. The CMP also states that at a minimum the geographic area examined in the traffic study must

⁹ Petitioners also argue that Caltrans has authority for enforcing a stormwater runoff management permit that protects water quality in Ballona Creek (AR 4284), but this enforcement authority does not make Caltrans a responsible agency for traffic impacts on the Project. *See Reply* at 2.

¹⁰ The Opposition does not argue the scope of Caltrans' authority as responsible agency, and the court need not decide whether the traffic study sought by Caltrans is outside the scope of its discretionary authority.

include mainline freeway monitoring locations where the project will add 150 or more trips, in either direction, during peak hours; it does not say that a 150 trip threshold is always sufficient. The City was not free to reject Caltrans' instruction about thresholds. See AR 56281. See Mejia v. City of Los Angeles, (2005) 130 Cal.App.4th 322, 342 ("A threshold of significance is not conclusive...and does not relieve a public agency of the duty to consider the evidence...."); Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners, ("Berkeley Keep Jets") (2001) 91 Cal.App.4th 1344, 1380-82 (agency insufficiently considered site-specific characteristics of noise from airport in favor of standard for threshold of significance). The CMP also states that it chose ICU over HCM solely out of need for a consistent means of measuring congestion across the County. AR 56127-28. This justification – the need for a consistent measure of traffic on County streets -- is irrelevant to the evaluation of freeway traffic congestion and safety. Under these circumstances, there was no reason for the City to cling to the County's CMP to conduct its traffic analysis. The City wrongly used the CMP and its 150 trip threshold in the face of Caltrans' criticism and direction to the contrary.

Caltrans also wanted the City to use its HCM methodology to address safety issues, including queuing on off-ramps between Vermont and Highland where vehicles could back up into intersections, as well as performing a weaving analysis. Caltrans further wanted a cumulative analysis of the 101 Freeway traffic impacts from the Project, the 58 related projects in the DFEIR, and the NBC-Universal project. A freeway has three types of segments: (1) a merge/diverge segment, whether a stream of traffic combines or divides, (2) a weave segment, in which traffic streams travelling in the same direction cross paths, and (3) a basic freeway segment. AR 73441. Caltrans' HCM addresses safety issues with respect to all three types of segments (AR 22841, 11290), whereas the CMP addresses only traffic congestion. AR 56114 (CMP tracks and analyzes regional transit performance), 31503 (CMP evaluates "demand-to-capacity" for freeway impacts). The CMP has only one monitoring station between downtown and Coldwater Canyon (AR 56210) which is incapable of evaluating queuing and weaving. The City did not perform the requested analyses, merely finding that the 101 Freeway was exempt because the CMP's 150 trip threshold had not been met.¹¹

The FEIR fails to analyze traffic impacts to the 101 Freeway as Caltrans directed in its role as responsible agency. As Petitioners contend (Reply at 3-4), the City's disagreement with Caltrans is a failure to proceed in the manner required by law. The City was not entitled to disagree with Caltrans, perform a study more limited than sought by Caltrans, and then rely on substantial evidence of what it did. Rather, the City was obligated to provide the information and analysis which Caltrans specified as a responsible agency should be performed. Compliance with the requirements of CEQA is "scrupulously enforced." Citizens of Goleta Valley v. Board of Supervisors, (1990) 52 Cal.3d 553, 564.

2. The FEIR's Assessment of Traffic Impacts Was Inadequate

Apart from its failure to follow Caltrans' direction for methodology and 101 Freeway impacts analysis, the City did not adequately analysis traffic impacts. As stated *ante*, the City relied on the CMP to conclude that the Project would not generate more than 150 additional trips

¹¹ Finally, the Opposition contends that Caltrans waived its objections to the FEIR when it failed to file suit under Guidelines §15096(e). Opp. at 12. True, but Petitioners did not waive their right to assert the City's failure. See Citizens for Open Government v. City of Lodik, (2006) 144 Cal.App.4th 865, 875.

per day for the 101 Freeway, and this was not a significant traffic impact. AR 182. The FEIR also concluded that the freeway ramps, including the meters and weave sections on the ramps, are not the limiting factor for the roadway in the Hollywood area. AR 184.

The FEIR's mere conclusion that the ramps -- and the weaving sections on the ramps -- are not a limiting factor in Hollywood is not substantial evidence. Caltrans pointed out that ramp queuing can lead to safety issues and "without a queuing analysis neither Caltrans nor the City can determine whether traffic from the off-ramps will back up, creating an unsafe condition. AR 22843. Similarly, without a weaving analysis for both the northbound and southbound mainline segments between the nearby on/off ramps the difficulty of drivers in maneuvering could not be assessed. AR 22844. The City's only response was that its standard CMA analysis did not require these analyses. AR 186. This response did not meet CEQA's requirement of a good faith reasoned analysis in response to comment. See Berkely Keep Jets, *supra*, 91 Cal.App.4th at 1367; Guidelines §15151. The omission of a freeway weaving and queuing analysis was an abuse of discretion.

When Caltrans contended that the 101 Freeway's mainline segments should be analyzed, the City responded that its CMP analysis showed a less than significant 150 Freeway trips per day, and no further analysis was necessary. AR 181-82, 31791. As discussed *ante*, the use of a threshold of 150 daily trips failed to recognize Caltrans' concern that the greater the congestion, the lower the threshold of traffic needed to create an impact. AR 22848. According to Caltrans' TISG, fewer than 50 trips may have a significant impact on a freeway which operates at LOS E or F, and a full traffic study or some lesser analysis is required in that situation. AR 55811. See AR 22848. The 101 Freeway operates at level of service F during peak hours and the City's 150 trip threshold does not take into account this congested LOS. The additional traffic volume of 150 vehicles on the freeway is particularly important in light of weaving, queuing, and diverging movements, issues which Petitioners' consultant said can be addressed by Caltrans' HCM and not CMP. AR 11290. The City did not have substantial evidence to support its mainline freeway segment analysis.

The FEIR also did not perform an analysis of the Project's cumulative traffic impact with other projects on the ramps and mainline. Caltrans noted that the 58 projects identified in the FEIR will also add peak hour trips to the 101 Freeway, and a cumulative impact analysis was required. AR 22848. The City's sole response for not doing so was that the direct impact on the Freeway of the Project's 150 trips per day was not significant. AR 181-82. But, as Petitioners point out (Mot. at 24), this response misses the point of a cumulative impacts analysis which is to evaluate the cumulative impact of projects whose incremental impact is small. Environmental damage often occurs incrementally from a variety of small sources, and the assessment of a project's cumulative impact on the environment is a critical feature of the EIR. Los Angeles Unified School District v. City of Los Angeles, (1997) 58 Cal.App.4th 1019, 1025. Understated cumulative impacts analysis impedes meaningful public discussion and skews the decision-maker's perspective. Citizens to Preserve the Ojai v. County of Ventura, (1994) 27 Cal.App.4th 713, 729-35.

The Opposition argues that the FEIR did perform a cumulative impacts analysis because the Guidelines expressly permit a cumulative impacts discussion through a list of projects producing related impacts or a summary of projections from an adopted general plan or planning document. The Opposition contends (Opp. at 12-13) that the City conservatively did both, using a 1% growth factor (AR 2732) and discussing 58 related projects within 1.5 mile radius. AR 2733-39.

There are several problems with the Opposition's argument. First, the FEIR did not conservatively wear a belt and suspenders as the Opposition implies. The Guidelines provide that as part of the cumulative impacts analysis the EIR may provide a list of "past, present, and future project producing related or cumulative impacts," or "a summary of projections contained in an adopted general plan or related planning document...." Guidelines §15130(b)(1). The FEIR listed 58 related existing projects for cumulative impacts analysis, and then used a growth factor of 1% to cover future unknown projects. AR 4980. Thus, the two did not overlap. Second, the 1% growth figure is not a projection in an adopted general plan or planning document; LADOT created it out of whole cloth. *See id.* This is not permissible under Guidelines section 15130(b)(1).¹² Third, the FEIR did not use the projections for a reasonable discussion of cumulative traffic impacts. *See* Guidelines §15130(b)(5).

The FEIR also did not include the NBC-Universal project in its list of related projects, even though Caltrans expressly noted that the NBC-Universal project itself will add traffic to the 101 Freeway. AR 22848. The City's sole response was that the CMP did not show more than 150 trips generated by the Project, which was below the threshold of significance. AR 181-82. This *non-sequitur* is woefully inadequate to constitute a good faith reasoned response to comment. *See Berkely Keep Jets, supra*, 91 Cal.App.4th at 1367.

The Opposition now argues that the FEIR was not required to include NBC-Universal as it is located 3.5 miles away from the Project, outside the 1.5 mile radius designated by the City. AR 2733. Opp. at 13.

Other projects must be included in an EIR's cumulative impacts analysis if it is "reasonable and practical" to do so. San Franciscans for Reasonable Growth v. City and County of San Francisco, (1984) 151 Cal.App.3d 61, 77. The agency may draw a geographical line for its cumulative impacts analysis if it provides a reasonable explanation for doing so. *See* Guidelines §15130(b)(3). The City provided no justification for its arbitrary 1.5 mile radius that excludes a major project from cumulative impact analysis. There appears to be no legitimate reason why the large NBC-Universal project should not have been included in a cumulative impacts analysis.¹³ Exclusion of the NBC-Universal project solely because it is 3.5 miles away is unreasonable where it apparently is quite large and lies directly downstream from the Millennium Project with few on/off ramps in between.

The FEIR did not have substantial evidence to support its cumulative impacts analysis. The FEIR's traffic impacts analysis was inadequate and an abuse of discretion.

3. The City Was Not Required to Notify and Consult with CGS Prior to Circulating the DEIR

The lead agency "shall consult with, and obtain comments from, each responsible agency, trustee agency, any public agency that has jurisdiction by law with respect to the project...." Pub. Res. Code §21153(a).

Petitioners argue that CGS is a commenting agency under CEQA. Despite knowing that there was a real prospect that the Hollywood Fault crossed Project Site, the City did not notify

¹² The DFEIR stated that the summary of projections was validated by the HCPU, but the HCPU was invalidated in La Mirada and cannot be relied upon. *See* AR 2732.

¹³ Petitioners are, of course, correct in arguing that the mitigations proposed in the FEIR to alleviate traffic congestion are no substitute for analysis of the traffic impacts from the Project. *See* AR 182. Mot. at 26.

the Department of Conservation or its CGS as either a responsible agency or an agency that has jurisdiction over the Project. The State Geologist is required to delineate active earthquake fault zones, which are identified on maps. Pub. Res. Code §§ 2621.5(b), 2622. The CGS's 2010 Fault Activity map showed the Hollywood Fault across the Project site. AR 49493. The City knew seven months before the DEIR was circulated that a Hollywood Fault trace mapped by the CGS might cross the Project Site. AR 68319. When a State Geologist found out that the City Council was considering the Project, he called to express concern and wrote to explain that CGS was mapping the Hollywood Fault and its maps and reports would be completed by year-end 2013 or early 2014. AR 68408, 11885. Yet, CGS was not named as a responsible agency. Mot. at 9.

CGS is not a responsible agency because it has no discretionary authority to approve or carry out the Project. See Guidelines §15831. Nor is it a trustee agency over natural resources held in trust for the People. See Guidelines §15386. Although Petitioners principally contend that CGS is an agency with jurisdiction by law for the Project, CGS in fact has no jurisdiction over the Project. CGS has no permitting or approval authority for the Project. Instead, CGS has jurisdiction over a fact that is relevant to the Project – the investigation and mapping of earthquake zones. But jurisdiction over a relevant fact does not make CGS an agency which must be notified under CEQA. To hold otherwise would, as the Opposition points out, give CGS jurisdiction over every project in the State. Opp. at 21.

Nor do Petitioners point to any specific prejudice from the City's failure to notify CGS. The agency's environmental decision must be set aside only if the manner in which the agency failed to follow the law is prejudicial. Sierra Club v. State Board of Forestry, (1994) 7 Cal.4th 1215, 1236. While the failure to give notice to a responsible or trustee agency is presumed to be prejudicial, if a department appears at the hearing and voices no concerns there would be no prejudice. Fall River Wild Trout Foundation v. County of Shasta, (1999) 70 Cal.App.4th 482, 492. In this case, CGS did not appear at the City Council hearing, but its State Geologist did explain that CGS' forthcoming determination of the Hollywood Fault could bear on the Project. It is not clear what more CGS would have said.

The City was not required to give notice to CGS.

4. The Ambiguity of the FEIR's Project Description

a. Governing Law

The EIR must describe the project, including (a) a map of the project's precise location and boundaries, (b) a statement of objections sought by the proposed project (c) a general description of its technical, economic, and environmental characteristics, (d) a statement of the intended uses of the EIR. Guidelines §15124.

Only the four listed items are mandatory. California Oak Foundation v. Regents of the University of California, ("California Oak") (2010) 188 Cal.App.4th 227, 269-70. The project description should not "supply extensive detail beyond that needed for evaluation and review of the [project's] environmental impact." Guidelines 15124; California Oak, *supra*, 188 Cal.App.4th at 269-70. The critical inquiry is whether the EIR's project description "contains sufficient detail to permit reasonable and meaningful environmental review...." California Oak, *supra*, at 272. CEQA also does not require the project description to properly assess environmental impacts -- only generally to describe the project's own environmental characteristics. See Dray Creek Citizens v. County of Tulare, ("Dray Creek") (1999) 70 Cal.App. 4th 20, 28 ("general" means only the main features and not details or particulars).

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An accurate, stable, and consistent project description is the *sine qua non* of an informative and legally sufficient EIR.” County of Inyo v. City of Los Angeles, (1977) 71 Cal.App.3d 185, 193. A shifting project description may confuse the public and agency decision-makers, vitiating the EIR’s usefulness as a vehicle for intelligent public participation. County of Inyo, supra, 71 Cal.App.3d at 197. The description should be sufficiently detailed to provide a foundation for a complete analysis of environmental impacts. Id. at 192-3. The description should include all project components. See Santiago County Water District v. County of Orange, (1981) 118 Cal.App.3d 818, 829-30 (EIR for mining operation should have included extension of waterlines to serve the mine). It must apprise the parties of the true scope of the project. See San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus, (1994) 27 Cal.App.4th 713, 731-32 (EIR’s project description failed to include sewer expansion which the EIR acknowledged would be required as part of the development); San Joaquin Raptor Rescue Center v. County of Merced, (2007) 149 Cal.App.4th 645, 672-83 (EIR’s project description of a mining expansion project was inadequate because it inconsistently stated that no increase in mine production was being sought, yet also stated that the real party would be permitted to increase production).

An “EIR cannot be faulted for not providing detail that, due to the nature of the project, simply does not now exist.. Nor have the courts required resolution of all hypothetical details prior to approval of an EIR.” Citizens for a Sustainable Treasure Island v. City and County of San Francisco, (“Treasure Island”) (2014) 227 Cal.App.4th 1036, 1054.

In Treasure Island, the court rejected claims that the EIR for the redevelopment of a former Naval base in the San Francisco Bay lacked sufficient detail about the project and should have been a program EIR, not a project-level EIR. 227 Cal.App.4th at 1043. The project description was for a mixed-use community with up to 8,000 residential units, 140,000 square feet of commercial and retail space, 100,000 square feet of office space, 500 hotel rooms, 300 acres of parks, playground and open space, and a school. The construction and build out would be phased over a 20-year period. Id. at 1044. The court noted that the level of detail required for an EIR is driven by the nature of the project and what is reasonably feasible; an EIR on a construction project will necessarily be more detailed in the specifics of the project than adoption of a local general plan. Id. at 1051 (citing Guidelines §15146).

The court held that the project description was accurate and stable, and not merely a “conceptual land use map” as argued by the petitioners. The EIR made an extensive effort to provide meaningful information about the project while providing flexibility to deal with changing conditions affecting final design over a 20 year period. Id. at 1053. The project provided for new zoning that identified permitted uses and development standards within each district and also a set of binding design standards that included both fixed elements, such as street layouts, and conceptual elements, such as shapes of new buildings or specific landscape designs. Id. The court noted that many project features necessarily would be subject to future revision and quite likely would be the subjects of supplemental environmental review before the final project design was implemented. Id. at 1054. The petitioners claimed that “because the EIR does not anticipate every permutation or analyze every possibility, the project description is misleading, inaccurate and vague.” Id. The court rejected this claim, finding that the basic characteristics of the project remained, accurate, stable, and finite throughout the EIR process.

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Id. at 1055. As an informational document, the project description provided sufficient information for the public and reviewing agencies to evaluate the project's environmental impacts and also provided the required "main features" of the project. Id.

b. The Project Description

The City's FEIR is modeled after the EIR in Treasure Island. The Project Description states that the Project is for a mix of land uses, including "some combination" of residential units, hotel rooms, offices, restaurants, a health and fitness club, and retail. AR 4082. The DEIR describes a LUEP that would provide flexibility to Millennium to adjust the type and density of land uses for the Project, allowing Millennium to request and obtain a transfer of land uses before development of any Project phase so long as it stays within the FAR and trip cap of 1498 new peak hour vehicle trips per day stated in the EIR (AR 13789-90). AR 10987-90.

The DEIR provides for Development Regulations for the Project that are incorporated in the Project approvals with contain standards for the Project's development that would prevail over zoning or land use regulations in the LAMC. AR 845-904, 853. The Development Regulations require that final Project design meet mandatory standards for building heights (AR 859), towers (AR 879), density (FAR) (AR 858), building massing (AR 861), grade level (AR 875), storefronts (AR 877), yards (AR 873), open space (AR 884-86), street walls (871), passageways (AR 887-89), landscaping (AR 892-94), lighting (AR 895-96), parking (AR 897-98), bicycle parking (AR 899-900), and signage (AR 901). Conceptual design drawings depict maximum allowed development envelopes. AR 863-70.

The DEIR identifies three potential development scenarios: the Concept Plan, a Commercial Scenario, and a Residential Scenario. The Concept Plan represents one possible scenario in which Millennium would build approximately 492 residential units (700,000 square feet of floor area), 200 luxury hotel rooms (167,870 square feet), 215,000 square feet of office space (including the existing 114,303 square-foot Capitol Records), 34,000 square feet of food and beverage use, 35,100 square feet of fitness center/sports club, and 15,000 square feet of retail. AR 4106.

The Commercial Scenario describes the most environmental impactful development scenario possible for those resource areas where commercial uses dictate the severity of impacts: air quality, greenhouse gases, noise, water demand, wastewater flow, energy demand, police and fire services, and traffic. AR 4237. The Residential Scenario describes the most impactful development scenario possible for those resource areas where residential uses dictate the severity of impacts: population and housing, schools, parks, libraries, parking, and solid waste generation. AR 4238-39. The DEIR uses these two scenarios in determining the maximum environmental impacts in each area. The total amount of specific development – residential, hotel, office, retail/food and beverage, and fitness center/sports club -- may increase or decrease as long as long as the maximum impacts in each issue area are not exceeded and the total 6:1 FAR is not exceeded. AR 4239-41. *See also* Opp. at 26-27.

c. Merits

Petitioners contend that the Project Description is neither stable nor finite because the actual mix of features for the Project Site is unknown, precluding an accurate identification and analysis of all environmental impacts from the Project actually built. Mot. at 10-11. Petitioners

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describe the Project as an “amorphous envelope” of development parameters limited by a set of maximum environmental impacts. Nothing in CEQA permits the substitution of an impacts envelope for an actual project description, and a Project that does not provide an actual project but only “illustrative scenarios” pushes the flexibility permitted by CEQA for project descriptions beyond reasonable. Reply at 11-12.

The court agrees. An EIR should be prepared with sufficient information for the public and decision-makers to make an intelligent decision taking into account environmental consequences. The EIR’s sufficiency depends on what is reasonably feasible. Guidelines §15151. The level of specificity of an EIR is determined by the nature of the project and the “rule of reason.” Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners, (1993) 18 Cal.App.4th 729, 741-42. That degree of specificity “will correspond to the degree of specificity involved in the underlying activity which is described in the EIR.” Guidelines §15146. The ultimate decision whether to approve a project is a nullity if based upon an EIR that does not provide decision-makers, and the public, with the information about the project required by CEQA. Santiago County Water District v. County of Orange, (“Santiago County Water”) (1981) 118 Cal.App.3d 818, 829.

The degree of specificity required in an EIR will correspond to the degree of specificity in the underlying project. Guidelines §15146. A construction project will necessarily have a more detailed EIR than that for a general plan or zoning ordinance because the effects of a construction project can be predicted with greater accuracy. Guidelines §15146(a). The use of new zoning that identifies permitted uses and also a set of binding design standards that includes both fixed elements and conceptual elements, such as shapes of new buildings or specific landscape designs, is permissible where necessary. Treasure Island. But an EIR serves both an informative and substantive purpose, and a developer must present an accurate and stable picture of the project so that the public and decision-makers can decide whether its environmental consequences are outweighed by its public benefits. City of Santee v. County of San Diego, (1989) 214 Cal.App.3d 1438, 1454.

The FEIR provides a blurred view of the Project, not the definite and stable view required under CEQA. The LUEP, Development Regulations, and Q Condition No. 1 collectively approve an envelope of potential residential, commercial, retail, and office projects which will not have more than a maximum design mass and height and that will create no more than maximum levels of air pollution and traffic impacts. CEQA requires the project description to describe the project’s characteristics so that its environmental impacts may be assessed. Dray Creek, *supra*, 70 Cal.App. 4th at 28. Analyzing a set of environmental impact limits instead of analyzing the environmental impacts for a defined project is not consistent with CEQA, which demands that “the defined project and not some different project must be the EIR’s bona fide subject.” Burbank-Glendale-Pasadena Airport Authority v. Hensler, (1991) 233 Cal.App.3d 577, 592.

There are times when a project description setting forth only a project’s physical parameters and setting out maximum permissible environmental impacts can be reasonable – most particularly where other conditions make specificity impossible. Thus, in Treasure Island, the developer had plans to build over a 20-year period a large-scale development on an island. The island was contaminated by hazardous material which required cleanup, and the developer

could not be sure when the island would be available for development. The Treasure Island court expressly cited Guidelines section 15146 for the proposition that the specificity required depends on the underlying project, and concluded that the existing conditions and long-term nature of the project prevented disclosure of detail that does not now exist. 227 Cal.App.4th at 1054. The court permitted an EIR based on new zoning that identified permitted uses and development standards that included both fixed elements, such as street layouts, and conceptual elements, such as shapes of new buildings or specific landscape designs. The court described the EIR as making an extensive effort to provide meaningful information about the project while providing flexibility. The court further noted that many of the project's features would be likely subjects of supplemental review before a final design was implemented. Id.

These circumstances have no application to Millennium's Project. There is no 20-year build out of a site containing hazardous substances or other external variables that makes the nature and timing of development unknown and unknowable. Nor is there any planned supplemental environmental review for the Project. Where a construction project is not limited by external conditions that create great uncertainty, there is no reason for a project developer not to be specific about project details. The public and decision-makers should know whether the project will contain any housing, any retail, any commercial, any restaurant, any health club, and if so, how much. They should also know whether it will have multiple tall buildings and the building footprint, all for purposes of environmental analysis. *See* Guidelines §15146(a).

The Millennium FEIR does not rely on an external condition -- such as a hazardous cleanup or a long-term development plan with many unknown variables outside Millennium's control -- to provide an ambiguous Project Description. Nor does the FEIR justify the ambiguity by anticipating further environmental review upon final Project design. Instead, the Opposition's sole excuse for not providing a clear and unambiguous Project Description are the "changing conditions and unforeseen events" that could possibly impact the Project. *Opp.* at 25. While CEQA does not require a project to be defined down to the last detail, Millennium's uncertainty about market conditions or the timing of its build-out is an insufficient ground for the ambiguous and blurred Project Description. The public and decision-makers for the Project are entitled to know what the Project will look like after Millennium makes that decision so that the Project's description can form the foundation of the environmental analysis. The EIR's project description must provide sufficient information about the project for the public and reviewing agencies to evaluate the project's environmental impacts. Treasure Island, *supra*, 227 Cal.App.4th at 1055. An EIR that does not provide decision-makers, and the public, with adequate information about the project fails as an informational document. Santiago County Water, *supra*, 118 Cal.App.3d at 829

Additionally, the Project essentially defers a portion of the environmental impacts analysis. The environmental assessment of the defined project must be performed at the earliest possible stage, and certainly in the EIR. *See Sundstrom v. County of Mendicino*, (1988) 202 Cal.App.3d 296, 306-08. As Petitioners argue, when a project faces uncertainty over several specific project alternatives, the EIR typically evaluates the environmental impacts of each specific project alternative. Deferred environmental evaluation generally is permitted only for mitigation measures, and even there only where obtaining more detailed useful information on the topic is meaningfully impossible at the time of the EIR, and the information is not of

overriding importance to determining whether to proceed with the project. Riverwatch v County of San Diego, (1999) 76 Cal.App.4th 1428, 1448 (deferral of precise detail of mitigation measure dependent on yet-to-be performed Caltrans study did not undermine EIR's conclusion that the impact could be mitigated).

Although the FEIR limits the Project to a maximum environmental impact in each issue area, it does not explain how it will be determined that the maximum impacts will not be exceeded when the Project is finally designed and built. The LUEP permits Millennium to obtain a transfer or change of uses within the Project, and the Planning Director may approve that request if the submission reasonably demonstrates that the change is consistent with the trip cap and does not exceed the maximum environmental impacts identified in the EIR. AR 13789. But how will the Planning Director make that determination for changing the Project and using what criteria?¹⁴ Since no additional CEQA review will be required to ensure that a change sought by Millennium is within maximum environmental issue limits, and no public input will be permitted, the FEIR essentially defers the environmental assessment of the Project and substantively fails to ensure that the finally designed Project will not be approved without all necessary mitigations of environmental harm.

Petitioners admit that a LUEP may be acceptable where it permits a developer to choose among specifically defined scenarios, each of which is fully analyzed in the EIR, the Millennium LUEP makes this impossible. Petitioners give an example of the FEIR's reliance on a reduction in traffic because some residents will enjoy Project facilities internally and defer making a trip outside (AR 4939-41, 3263-64), but there is no assurance that the facilities will be constructed in a manner that would result in the anticipated internal trip captures. *See* AR 31600. Petitioners provide a second example that the driveway locations are merely hypothetical since the Development Regulations permit "parking, open space, and related development" to be located anywhere within the Project Site. AR 858. As a consequence, traffic analysis of driveway locations and their impact is impossible. Mot. at 12.

The Opposition tries to rebut Petitioners' argument that the driveway locations are merely hypothetical, noting that the FEIR provides that the driveways specifically will be located along Ivar and Vine and placed pursuant to LADOT standards. AR 2724-25. The Opposition argues that the traffic study contains the specificity to assess traffic impacts of these locations. Opp. at 27. This fact does not undermine Petitioners' point that the driveway locations are subject to change.¹⁵

The CEQA process is intended to provide the fullest information reasonably available on which the decision-makers and the public can rely in determining whether to start a project.

¹⁴ Although Petitioners raised this issue (Mot. at 11, n.6), the Opposition does not address it.

¹⁵ The Opposition also contends that Petitioners are mistaken about internal trip captures. The FEIR addresses trip capture and "pass-by" trip reductions based on the most traffic-intensive development scenario, meaning that fewer trips will be permitted than otherwise. The FEIR translates use-specific trip generation into general trip generation rates based on any use. Regardless of the final design, these general rates will apply to ensure the total trips remain below the cap. Opp. at 27-28. Petitioners do not reply to this confusing point.

Natural Resources Defense Council v. City of Los Angeles, (2002) 103 Cal .App.4th 268, 271. An EIR furnishes both the road map and the environmental price tag for the project so that the decision maker and the public both know how much they and the environment will have to give up in order to take that journey. *Id.* By approving an EIR with an ambiguous Project description which defers some portion of the environmental analysis, the City failed to act in accordance with law. CEQA's informational and substantive requirements have been violated and the EIR and the entitlements it purports to support must therefore be vacated.

d. The Q Condition

Petitioners argue that the Project's Q Condition of Approval No. 1 provides Millennium even more latitude to redesign and reconfigure the development than yielded by the ambiguous Project Description.

Q Condition No. 1 provides:

“The use of the subject property shall be limited to those uses permitted in the Land Use Equivalency Program, attached as Exhibit D or as permitted in the C2 Zone as defined in Section 12.16.A of the LAMC.” AR 11651 (Emphasis added.)

Petitioners argue that, on its face, Q Condition No. 1 permits Millennium to choose from any of the long list of land uses expressly permitted in the C2 zone. None of these uses or their environmental impacts were disclosed and analyzed in the FEIR, and none had appropriate mitigation imposed. Petitioners specifically objected to this Q Condition on the grounds that Q Conditions are supposed to restrict uses on a project beyond those required by a particular zoning law and were created to address the situation where a developer obtains a zoning change and then switch plans to build a project also authorized by that zone. Yet, Q Condition No. 1 expands Millennium's right to develop for uses that have not been disclosed. AR 11168-69. Mot.at 13.

The Opposition explains that the Project's central entitlement is the Ordinance, which rezoned the property from C4 to C2 commercial – a zone change that was necessary for the health club -- and imposed the Development Regulations. The Project is governed by the Development Regulations and the LUEP, both of which are incorporated into the Ordinance. The Q Conditions, which are zoning provisions enacted through the Ordinance, were added to restrict Millennium's use of the property within the C2 zone. *See* LAMC §12.32.G(2)(a). Opp. at 29.

The Opposition acknowledges the plain language of Q Condition No. 1, but argues that the City's intent in imposing Q Condition No. 1 was not to permit any use listed in the C2 zone. Instead, the LUEP defines the uses which Millennium is permitted to develop, if otherwise permitted on the C2 zone. Those uses must stay within the identified environmental maximum impacts and the Development Standards and Millennium's compliance will be verified and enforced by City Planning. Q Condition No. 1 must be read as a whole with the LUEP use restrictions and environmental impact caps (the LUEP is incorporated into Condition No. 1), and the requirements of the Development Regulations. Opp. at 29-31. Under familiar principles of statutory construction, Q Condition No. 1 must be interpreted with the LUEP and the

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Development Regulations to “impose use and development limitations on the Project.” Opp. at 32.

The construction of ordinances is subject to the same standards applied to the judicial review of statutory enactments. Department of Health Services of County of Los Angeles v. Civil Service Commission, (1993) 17 Cal.App.4th 487, 494. In construing a legislative enactment, a court must ascertain the intent of the legislative body which enacted it so as to effectuate the purpose of the law. Brown v. Kelly Broadcasting Co., (1989) 48 Cal.3d 711, 724; Orange County Employees Assn. v. County of Orange, (“Orange County”) (1991) 234 Cal.App.3d 833, 841. The court first looks to the language of the statute, attempting to give effect to the usual, ordinary import of the language. Brown v. Kelly Broadcasting Co., (1989) 48 Cal 3d 711, 724. Significance, if possible, is attributed to every word, phrase, sentence and part of an act in pursuance of the legislative purpose. Orange County, supra, 234 Cal.App.3d at 841. The various parts of a statute must be harmonized by considering each particular clause or section in the context of the statutory framework as a whole. Lungren v. Deukmejian, (1988) 45 Cal.3d 727, 735. If a statute is ambiguous, the construction given it by the agency charged with its enforcement is entitled to consideration if such construction has a reasonable basis. Ontario Community Foundations, Inc. v. State Bd. of Equalization, (1984) 35 Cal.3d 811, 816.

In effect, the Opposition contends that the language of Q Condition No. 1 should be interpreted to limit the uses of the property to those uses permitted by the LUEP **and** by C2 zone. If a use is not permitted by both, Millennium may not put the property to that use. The problem with the Opposition’s interpretation is that it runs contrary to the plain meaning of the word “or” in Q Condition No. 1, which in context means “either A or B”. There is no ambiguity on which the court can rely to justify the City’s interpretation.

Even if *arguendo* Condition No. 1, the LUEP, and the Development Standards collectively constitute a statutory scheme which should be collectively harmonized, that harmonization is easily done. Q Condition No. 1 addresses property use. The Development Standards concern building design, and do not address the use to which the property is placed. The LUEP contains use limitations, but Condition No. 1 places those use limitations in the alternative with uses in the C2 zone. Thus, the three elements are easily harmonized.

Petitioners objected to the language of Q Condition No. 1, and the City ignored their objection. The court cannot rewrite the Q Condition No. 1 now. It means what it says, and it provides Millennium greater latitude to redesign and reconfigure the Project in areas that have not been subjected to environmental analysis. This is a failure to act in accordance with the requirements of law.

5. Seismic Review

a. Petitioners’ Argument

Petitioners acknowledge that the FEIR adequately analyzed seismic issues, and argue that the City failed to disclose pertinent environmental information, failing to meet CEQA’s mandate that the public be equally informed as the agency. *See Laurel Heights, supra*, 47 Cal.3d at 404. Mot. at 14; Reply at 18.

Petitioners point out that the Hollywood Fault is considered active, and therefore a potential hazard for catastrophic rupture. Petitioners’ consulting geologists identified, and the 2010 CGS Map showed, the Hollywood Fault crossing through both sides of the Project Site.

AR 11542-43; RL 33497-98. Although the City's ZIMAS mapping did not show the Hollywood Fault as crossing the Project Site, LADBS staff noted that a City geologist met with Millennium and discussed the fact that the Fault potentially crossed the property. AR 68257. In recommending a Fault Report, the City geologist stated that the Hollywood Fault "appears to exist in the vicinity of the subject site." AR 65566-68.

The City's Initial Study noted the potential of a significant impact from rupture of a known earthquake fault, and stated that the EIR will provide additional analysis. AR 680-81. A November 2011 report was prepared as a technical appendix to the EIR (AR 29824), but was never included in the FEIR. The report claimed that the Project Site is not located in a Fault Rupture Study Area ("FRSA"), and site-specific fault studies were not performed or required. AR 29829. But Petitioners contend that Exhibit 4 to the November 2011 report shows the Project's eastern portion crossing through the red footprint of the FRSA. Wright Decl., Ex.1.

Petitioners note that in March 2012 LADBS acknowledged the need for a limited fault investigation based on a CGS Hollywood Fault trace map. AR 29988. LADBS and Millennium representatives agreed that this limited investigation would include only the Project's western portion, not the eastern portion identified in Exhibit 4, and would be deferred until the buildings were designed. RL 6677-78.

The Planning Department reviewed a proposed DEIR which did not have the November 2011 report, and instead included a May 2012 report prepared by Millennium's expert. The May 2012 report was identical to the November 2011 report except that Figure 4 now showed the entire Project Site outside the FRSA boundary and a bolded sentence was deleted. AR 1385. Petitioners conclude that the May 2012 report was deliberately rigged to avoid disclosure of the Project Site within the FRSA. Mot. at 18.

The May 2012 report was attached as a technical appendix to the DFEIR which was released by City Planning staff on October 25, 2012 without waiting for, or without knowing about, the limited Fault Report that Millennium's expert was preparing. As a result, the DFEIR stated that the Hollywood Fault was 0.4 miles away from the Project Site and included little seismic analysis.

Not until the November 2012 Fault Report did Millennium or the City change its position. The Fault Report repeated the statement that the Hollywood Fault was 0.4 miles away, but acknowledged that the City had required a limited investigation because the 2010 CGS map showed the Hollywood Fault to be within 500 feet of the Project Site. The Fault Report was never included in the FEIR and never released to the public. Although the City's information potentially showed that the Project Site crosses the Hollywood Fault, the FEIR does not disclose or discuss the 2010 CGS Map. Mot. at 15. The City should have recirculated the DEIR with the Fault Report because it constituted significant new information. Pub. Res. Code §21005(a); Guidelines §§ 15088.5, 15144.

Petitioners conclude that the failure to ensure that the public knew about the seismic issue was an abuse of discretion and the DFEIR's reliance on Figure 4 to show the Project as outside the FRSA was clearly erroneous. Mot. at 19-20.

b. Merits

The Opposition seeks to debunk Petitioners' conspiracy theory that the City and Millennium worked to suppress the fact that the Project is located in a state-designated fault zone and in a City-designated FRSA. Opp. at 18-20.

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Even if the Opposition does not successfully do so, the court agrees that no further disclosure about the location of the Project Site's proximity to the Hollywood Fault was required. Petitioner's theory of non-disclosure is based upon (1) the FEIR's failure to include the Fault Report, which stated that the Hollywood Fault was 0.4 miles away from the Project Site, but acknowledged that the 2010 CGS map showed the Hollywood Fault to be within 500 feet, and (2) the fact that the May 2012 report, which was included in the DEIR, attached a Figure 4 which showed the entire Project Site outside the FRSA boundary and deleted a bolded sentence.

Figure 4, the 2010 CGS map on which Petitioners rely to show the Hollywood Fault traversing the Project Site, is not a reliable document. *Compare* Wright Decl., Ex.1 and AR 1385. First, it is not an official CGS fault map. The 2010 map is a "Fault Activity Map" prepared for CGS's 150th anniversary and expressly states that it is "not intended to replace or supersede the Official Maps of Earthquake Fault Zones -- the location of fault traces shown should not be substituted for site-specific fault rupture investigations[.]" AR 49493. Second, a cursory review of the 2010 CGS map reveals that it is a low-resolution, non-scalable, map of the entire state of California. *Id.* It is not something anyone can rely upon to show fault boundaries.¹⁶

As for the contention that the May 2012 report was deliberately rigged to avoid disclosure that the Project Site was within the FRSA, the Opposition contends that the exhibit in the May 2012 report differs from that in the November 2011 report only because of a cut and paste from a graphic in the City's 1996 Safety Element. AR 47303. *Opp.* at 20. Whether or not the accusation of a doctored exhibit is true, it is irrelevant. The Initial Study clearly states that the Project Site is adjacent to, but not within, a City-designated FRSA. The DEIR said that the Hollywood Fault is 0.4 miles away. AR 4591, 4595. A not-to-scale exhibit showing differently is immaterial. AR 680.

Petitioners nonetheless contend that the May 2012 report attached to the DEIR is misleading because at all times the public was told that the Hollywood Fault trace was 0.4 miles away when LADBS actually regarded it as within 500 feet. If LADBS required a fault investigation because of the 2010 CGS map, the public was entitled to know about this same information. The Fault Report continued the City's position that the Hollywood Fault was 0.4 miles away from the Project Site, but at least acknowledged that the 2010 CGS map showed the Hollywood Fault to be within 500 feet. This should have been disclosed. *Mot.* at 19.

The Opposition argues that the Fault Report was prepared by Millennium's consultant for purposes of the VTTM under LAMC section 17.05U. LADBS acted with care by requiring a limited fault investigation despite the fact that the Project Site was not in a fault zone or FRSA, and did so because the Hollywood fault trace was less than 500 feet away. AR 29876. The Fault Report concluded that "active faulting is not present within the limits of our investigation within the Site...." AR 29875. The Fault Report was approved by LADBS for purposes of the VTTM. AR 29810-11. *Opp.* at 15-16.

As Petitioners reply, the VTTM process cannot be separated from the CEQA process, and the City's approval of the VTTM by itself required CEQA compliance. *Pub. Res. Code*

¹⁶ Although the court has declined to judicially notice Petitioners' Exhibits C and D, which purport to show the Project Site within the Hollywood Fault, the Opposition correctly argues that if CGS released for the first time in November 2014 a map showing the Project Site in the Hollywood Fault Zone, how is it possible that CGS's 2010 map already placed the Project in a fault zone? *Opp.* at 19.

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§21080(a); Govt. Code §66474.01. CEQA is essentially an environmental full disclosure statute and the City cannot silo information about seismic issues from the EIR. See Rural Landowners Assn. v. City Council, (1983) 143 Cal.App.3d 1013, 1020. Reply at 15-16.

Nonetheless, the FEIR adequately addressed seismic issues. The Opposition shows, and Petitioners do not dispute, that the City treated the Project as if it were in an earthquake zone. The DEIR included an adequate discussion of potential impacts from fault rupture (AR 4589-4602) and a 48-page Preliminary Geotechnical Engineering study which showed no evidence of faulting. AR 8212-59. Despite the fact that the Hollywood Fault was only proximate, the City adopted mitigation measures to ensure seismic safety, including construction of the Project in accordance with seismic standards and a requirement for final geotechnical engineering report prior to issuance of building or grading permits. See Oakland Heritage Alliance v. City of Oakland, (2011) 195 Cal.App.4th 884, 904 (upholding similar mitigation measures); California Oak, supra, 188 Cal.App.4th at 264 (upholding EIR for project in earthquake zone that required further testing before development of site).

Nothing in the Fault Report supports Petitioners' argument that it should have been included in the FEIR. As the Opposition argues, the DEIR already contained a May 2012 preliminary geotechnical study prepared by Millennium's expert claiming that the Project Site is not located in a FRSA, and that site-specific fault studies were not required. AR 29829. The Fault Report concluded that active faulting is not present at the Project Site, and this conclusion is consistent with the May 2012 report. The City treated the Site as if it was in a FRSA, and the FEIR contained a discussion of seismic issues, a preliminary geotechnical report, and mitigation measures. It did not have to include the Fault Report prepared for LADBS and the VTTM showing no active faulting. See California Oak, supra, 188 Cal.App.4th at 265 (seismic study prepared for compliance with Alquist-Priolo was not required to be included in EIR).

Petitioners argue that case law supports the exclusion of a particular document from the record where the discussion of an environmental impact is present in the EIR, but not where a crucial area of environmental impact has been omitted. Reply at 18.

Perhaps so, but the FEIR did not omit a crucial area of environmental impact. The City performed the proper environmental analysis, consistently stating that the Hollywood Fault was 0.4 miles away. The mere fact that the Fault Report acknowledged that the City required a limited investigation because the 2010 CGS map showed the Hollywood Fault to be within 500 feet of the Project Site, not 0.4 miles (2112 feet), does not mean the FEIR fails as an informational document. As the Opposition contends, the 2010 CGS map is unreliable and unofficial. The City required the Fault Report in order to be cautious and treat the Project Site as if it were in a FRSA, and the Fault Report confirmed a lack of active faulting. The mere fact that the FEIR did not disclose the reason why the City required a Fault Report is insufficient to cause the FEIR to fail as an informational document.

Because the Fault Report did not contain significant new information showing new or substantially more severe impacts, recirculation was not required. See Guidelines §15088.5(a).¹⁷ Recirculation is not required where the new information merely clarifies or amplifies information

¹⁷ Petitioners argue that the Opposition does not cite to any finding or evidence that recirculation is not required, but they bear the burden of showing that it was. See Mot. at 19.

in the EIR. Guidelines §15088.5(b). See Treasure Island, *supra*, 227 Cal.App.4th at 1063-64 (court must defer to decision not to circulate where it is supported by substantial evidence).¹⁸

6. Fire and Protective Services

Petitioners contend that the FEIR relied on inaccurate data concerning the Project's impacts on fire safety and services. The FEIR acknowledged that under CEQA Guidelines Appendix G a significant environmental impact occurs where a project causes substantial adverse physical impacts associated with new or improved government facilities in order to maintain acceptable service rations, response times, or other performance objectives for fire protection. AR 4804. The Millennium Project's impacts would be significant "if the project requires the addition of a new fire station or the expansion, consolidation, or relocation of an existing facility to maintain service." AR 4805. The FEIR concluded that the Project would not require the addition or expansion of a fire station to maintain service, and therefore no significant impacts on this issue area. AR 4806.

LAFD's preferred response time threshold for emergencies is five minutes or better 90% of the time. AR 4800. The FEIR noted that Fire Station 27, which houses a truck company, is 0.7 miles from the Project Site and Fire Station 82, which houses an engine company, is 0.8 miles from the Project Site. AR 4807. Consistent with Fire Code section 57.09.06, this proximity was sufficient to meet the response time requirement. Additionally, the average response times for Fire Stations 27 and 82 are less than five minutes based on data supplied by LAFD for July 5, 2011-December 14, 2011. AR 4807-08.

Petitioners criticize this conclusion as repudiated by another City official. The City Controller's May 2012 audit revealed that over 1/3 of the 1.9 million reported emergency incidents either coded unclearly as either emergency or non-emergency at the discretion of dispatchers. Therefore, the audit was unable to verify that LAFD had met its 90% goal for emergency response times. Pet. Mot. to Augment, Ex. 2. The DEIR acknowledged the Controller's audit, mentioning it "for information purposes only." AR 4800. LAFD subsequently stated that its prior reporting data should not be relied upon until properly recalculated and verified. AR 11187. Consequently, Petitioners argue that the City wrongly relied on the inaccurate data. Reply at 20.

Petitioners ignore the proximity of Fire Stations 27 and 82 to the Project Site. Fire Code section 57.09.07 requires response distances in compliance with Table 9-C, which in turn permits a maximum response distance of 1 ½ miles for engine and truck companies in high density resident and commercial neighborhoods. Fire Stations 27 and 82 are within those distances. The FEIR also noted five other stations nearby, the Project would generate revenue that could be applied to new fire facilities, emergency access would be adequate, and LAFD has experience navigating these streets. AR 313, 4808. Under these circumstances, the Controller's audit discrediting LAFD community-wide response time data does not undermine the FEIR's

¹⁸ The City Council clearly understood that LADBS treated the Project as if it was in an earthquake zone, and the City Council approved an amending motion which imposed a condition of a comprehensive geotechnical report prior to issuance of any grading or building permit. AR 13791-92, 11643.

conclusion that response times to the Project area will meet the standard of five minutes or less 90% of the time.¹⁹

It is also true, as the Opposition argues and Petitioners admit, that Appendix G only requires analysis of whether new or modified facilities will be required, not response times.²⁰ The City concluded that no new facility will be required. AR 4806. Its decision that there is no significant impact from this environmental issue is supported by substantial evidence.

7. The Invalidated Hollywood Community Plan Update

a. The FEIR's Reliance on the HCPU

The HCPU governed the Project Site at the time of the City Council's approval. Like the City's other community plans, the HCPU was an integral part of the General Plan, and formed the General Plan's state law-mandated land use element for the Project area. Govt. Code §§ 65300, 65302(a). The City thus had to make, and did make, findings in the DEIR that the Project was consistent with the HCPU. AR 4689-4700. The FEIR's mitigations also relied on the HCPU.

Following the City Council's approval of the Project, the superior court in La Mirada invalidated the entire HCPU. Pet. RJN, Ex. G. The City elected not to appeal the decision, and rescinded its adoption of the HCPU. Pet. RJN, Ex. H. Since consistency with a general plan or one of its elements is required for any portion of local government land use, the absence of a valid general plan or its valid relevant elements precludes enactment of actions, including approval of entitlements. Neighborhood Action Group v. County of Calaveras, (1984) 156 Cal.App.3d 1176, 1184.

Petitioners argue that the City's land use consistency findings for the Project collapsed when the HCPU was invalidated and rescinded. Mot. at 29-30. The HCPU promoted high-intensity, mixed use development near transit stops, and had goals and policies custom-tailored for the Project. Because the Project approvals cannot be consistent with an invalid HCPU, the Project approvals are null and void. Mot. at 31.

This argument may be dealt with summarily. The FEIR acknowledged that the HCPU was subject to legal challenge, and therefore it analyzed the Project's consistency with both the HCPU and the original 1988 Hollywood Community Plan ("1988 HCP"), which became operative after the City rescinded the HCPU. See AR 24045, 24069-70. The Land Use Planning Section of the DEIR clearly states that the Project does not depend on the HCPU. AR 28213-78. This section provides the separate, parallel consistency analysis for both the 1988 HCP and the HCPU. Table 1V.G-3, analyzes the Project's consistency with the 1988 HCP. AR 28248. Table 1V.G-4 then analyzes the Project's consistency with the HCPU. AR 28249-60. The DEIR concludes that the Project is "consistent with the goal and policies of the 1988 Community Plan and the Community Plan Update and thus would not result in conflicts with local plans and policies." AR 28260. Because the Project is consistent with both plans, the FEIR finds land use consistency impacts to be less-than-significant under either plan. AR 28273.

¹⁹ Petitioners also argue that the FEIR's response time analysis does not include the additional 19,000 daily trips generated by the Project. Mot. at 28. Not so. This issue was addressed in the FEIR's discussion of cumulative impacts of increased residents, households, and employees on fire protection services in the Project area. AR 4813.

²⁰ Petitioners state that the issue of whether emergency response times are themselves an impact which must be assessed is currently before the California Supreme Court. Reply at 19.

A city council's determination that the project is consistent with its general plan carries a strong presumption of regularity. Sequoyah Hills Homeowners Assn. v. City of Oakland, (1993) 23 Cal. App. 4th 704, 717. The foregoing evidence satisfies CEQA's land use consistency requirement and state law.

Moreover, the court agrees with the Opposition (Opp. at 36) that Petitioners waived their land use consistency argument by failing to discuss the FEIR's reliance on the 1988 HCP. When a petitioner challenges an administrative decision as unsupported by substantial evidence, it is the petitioner's burden to demonstrate that the record does not contain sufficient evidence to support the agency's decision. State Water Resources Control Board Cases, (2006) 136 Cal.App.4th 674, 749. A recitation of only the part of the evidence that supports the petitioner's position is not the "demonstration" contemplated by this rule. If a petitioner contends that some issue of fact is not sustained, the failure to set forth in his brief all the material evidence on the point and note merely his own evidence constitutes a waiver. Id. (quoting Foreman & Clark Corp. v. Fallon, (1971) 3 Cal.3d 875, 881.

Petitioners have not met their heavy burden of proving that the City's land use consistency findings for HCP were arbitrary and capricious.

b. Compliance with the La Mirada Judgment

Petitioners further argue that the La Mirada judgment required the City to rescind not only all actions approving the HCPU, but also "all related approvals issued in furtherance of the HCPU", with the exception of "adjudicatory approvals not challenged which the City may have made under the HCPU after its adoption by the City." Pet. RJN, Ex. G. Petitioners contend that this final judgment and supporting writ created a mandatory duty to rescind all approvals for development projects in the Hollywood planning area that were made while the HCPU was in effect, except where no lawsuit was filed against the project. According to Petitioners, the Millennium Project is within the scope of the La Mirada judgment and writ and the City has a mandatory duty to rescind its approvals. Mot. at 31-32.

This argument requires interpretation of the La Mirada judgment. The rules for interpreting a court order or judgment are the same as in ascertaining the meaning of any other writing. Dow v. Lassen Irrigation Co., (2013) 216 Cal.App.4th 766, 780; Los Angeles Local Board of Culinary Workers, etc. v. Stan's Drive-Ins, Inc., (1955) 136 Cal.App.2d 89, 94. Individual clauses or provisions are not considered separately but rather the entire document must be considered on its four corners and construed as a whole to effectuate its intentions. Id.

The Opposition is most certainly correct that the Project approvals are not "related approvals" under the La Mirada judgment. That judgment expressly states that related approvals "refers only to those quasi-legislative actions necessary to carry out the HCPU...." Pet. RJN, Ex. G (Emphasis added.) The Project approvals are independent of, and not necessary to carry out, the HCPU. The La Mirada judgment gives examples of what related approvals are, including the HCPU text and maps, the Resolution amending the 1988 HCP, the actions necessary to effect the HCPU, amendments to the General Plan made to reflect changes in the HCPU, and CEQA findings for the PCPU. The Project is not a related approval, and Petitioners are simply wrong arguing that any project that relied upon the HCPU is a related approval. Reply at 20-21.

Petitioners have not met their burden to show that the City is obligated to rescind the land use consistency findings as related approvals under La Mirada.

8. Violation of the City Charter

Petitioners argue that the Development Regulations and Q Conditions are an unlawful blanket variance and/or an improper delegation of the City's police power. The Sixth Cause of Action alleges that the City granted variances for the Project without making the legally mandated findings under Charter section 562 and LAMC section 12.27(D), and the Seventh Cause of Action contends that the City has unconstitutionally impaired its police powers. Petitioners allege that the City is attempting to elevate the Development Regulations into the position of a municipal ordinance, per LAMC section 12.04 and 12.32, in irreconcilable conflict with Charter section 562. *Id.*, ¶181. In doing so, the City is attempting to override other LAMC provisions. *Id.*, ¶182. The LUEP and development regulations are a grant of *carte blanche* authority which is *ultra vires* and *void ab initio* because they amount to the City unconstitutionally surrendering its police power to regulate land use. *Id.*, ¶183.

Petitioners present a history in which the City created the Development Regulations and LUEP to be adopted in conjunction with the Development Agreement. AR 4105-06. The Development Regulations would prevail over zoning or land use regulations in the LAMC. AR 4105, 18581. At the Planning Commission hearing, Millennium withdrew the Development Agreement when it was determined that the Commission would be disqualified from hearing it. AR 74811-12.²¹ Instead of using the Development Agreement, the City claimed it had the authority to impose the Development Regulations and LUEP as Q Conditions of Approval. AR 74826. *See* LAMC §12.32(G).

Petitioner CURD then submitted evidence to the PLUM on appeal that Q Conditions authorized under LAMC section 12.32(G) must restrict a project, not increase a developer's rights to use property. AR 11169-1172. Implicitly accepting this argument, the City substituted the draft Ordinance for the original ordinance adopted by the Planning Commission. AR 11949-952. The draft Ordinance purported to enact the Development Regulations as Exhibit C. *See* AR 11644-95.

According to Petitioners, the substitution of the Ordinance for the original ordinance was accomplished through the creation of a false PLUM recommendation report that claimed PLUM had voted to recommend substituting the Ordinance for the original ordinance. This report recommended that the City Council "7. PRESENT and ADOPT the accompanying NEW ORDINANCE.... 8. NOT PRESENT and ORDER FILED the Ordinance approved by the [Planning Commission] on March 28, 2013." AR 11950. No such event ever happened, as reflected by the transcript of the PLUM hearing and the two documents approved by the PLUM. *See* AR 75174-299, 18466-470, 19738-42. The PLUM, or the City Clerk, created a false public record in violation of Charter section 281(c). CURD objected to this false record prior to the City Council hearing. AR 11731. Mot. at 35.

Petitioners argue that the Charter is the City's constitution and Charter section 562 protects the rights of residents by mandating that any variance from strict application of the zoning code proceed through a zoning administrator, who must make five affirmative findings. The City's attempt to enshrine the Development Regulations -- whether as the withdrawn Development Agreement, an *ultra vires* Q Condition, or a frantic enactment of City ordinance through a false public record -- cannot override Charter section 562 and is a void effort to grant

²¹ The parties dispute whether the conflict was due to a conflict of interest by Planning Commission President William Roschen as a paid consultant to Millennium and that a City ethics investigation led to his rapid resignation. *Compare* Mot. at 34 *with* Opp. at 34, n.16.

undisclosed variances. See Trancas Property Owners Assn. v. City of Malibu, (2006) 138 Cal.App.4th 172, 181-82 (contract exempting development from zoning law is unenforceable as violation of public policy). Mot. at 35-36. The City cannot adopt a Q Condition that is more permissive than that permitted in the City's zoning code. LAMC section 12.32(G) authorizes the City to approve projects and restrict the land uses to those specified in the Q Condition, not expand a developer's right to override the zoning code. Mot. at 36.²² Additionally, the combined effect of the Ordinance and the agreement signed by Millennium to make the Q Conditions enforceable against it (AR 11656) constitute an unconstitutional contracting away of the City's police power. Mot. at 36-37.

The creation of the Ordinance demonstrates unpalatable eagerness by the City. The Opposition defends the PLUM recommendation report claiming the PLUM had voted to recommend substituting the Ordinance for the original ordinance. AR 11950. The Opposition argues that the report is not false, as the PLUM did modify the original ordinance by adopting a City Planning memo of technical corrections and a letter from Millennium's counsel concerning the Conditions of Approval. AR 75294-95. Opp. at 34. However, the technical changes and changes to the Conditions of Approval submitted by Millennium's counsel and City Planning, they were not the new Ordinance described in the PLUM recommendation report. The PLUM report is false.

Although the brief history of the Ordinance is troublesome, the Opposition correctly argues that the Q Conditions are not a blanket variance. Opp. at 33. A "variance" is a "permit to build a structure or engage in an activity that would not otherwise be allowed under the zoning code." Neighbors in Support of Appropriate Land Use v. City of Tuolumne, (2007) 157 Cal.App.4th 997, 1007. The City did not grant Millennium a variance to deviate from zoning requirements, although it tried to do so in the Development Agreement. Rather, the City made a legislative policy choice in the Ordinance to favorably zone the Project Site, and this zoning rests on equal footing with the other zoning in the City.²³ Charter section 562 does not prevent the adoption of the Ordinance and the Q Conditions in it.

The false trail concerning adoption of the Ordinance does not necessarily invalidate it, and Petitioners do not argue that it does. Instead, they contend that the Ordinance adopts the Development Regulations (Exhibit C), which expressly provide that they shall prevail over any more restriction zoning provision in the LAMC. AR 18581. According to Petitioners, this prevents the City from enacting in the future any zoning provision inconsistent with the Development Regulations and, as such, is an unconstitutional delegation of police power. Since Millennium has potentially 12 years to begin the Project (AR 75052), this is no small consideration. Reply at 22. On this point, Petitioners rely on Cotta v. City and County of San

²² The court agrees with this argument, which however is mooted by enactment of the Ordinance.

²³ This appears to be the converse of "spot zoning", which is a legislative zoning of a specific property in a discriminatory fashion such that it has lesser rights than surrounding properties. See Consaul v. City of San Diego, (1992) 6 Cal.App.4th 1781, 1801. Illegal spot zoning involving the unreasonable and arbitrary regulation of uses of property is an unconstitutional violation of due process. Echevarrieta v. City of Rancho Palos Verdes, (2001) 86 Cal.App.4th 472, 483. The City provided Millennium with favorable zoning, not more restrictive zoning.

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Francisco, ("Cotta") 157 Cal.App.4th 1550, 1557-59 and 108 Holdings, Ltd. v. City of Rohert Park, ("108 Holdings") (2006) 136 Cal.App.4th 186, 194. Reply at 22.

A municipality may not contract away its legislative and governmental functions. 108 Holdings, 136 Cal.App.4th at 194. Such power may not be surrendered or impaired either by contract or ordinance. Id. The controlling consideration is whether the local entity has bargained away its police power or municipal function. Id. at 195.

In 108 Holdings, the city entered into a stipulated judgment that bound it to interpret and apply its general plan in the manner set forth. Id. at 191. The petitioner claimed that this was an unlawful surrender of police power, and the court disagreed. Nowhere in the stipulated judgment did the city agree to refrain from legislating in the future on matters that were subject to the stipulated judgment; the city could amend its general plan as it saw fit and future circumstances dictated. Id. at 195. The court distinguished County Mobilehome Positive Action Com., Inc. v. County of San Diego, (1998) 62 Cal.App.4th 727, in which a county had imposed a 15-year moratorium on the enactment of rent control legislation for mobilehome park owners who entered into an agreement with the county. The agreement specified that its provisions would prevail over any county action, and the county agreed not to adopt any ordinance that would regulate mobilehome rent the owner could charge. This action prevented the county from exercising its police power out of fear that a subsequent enactment would expose the county to a breach of contract action. Id. at 195-96. In contrast, the 108 Holdings stipulated judgment did not limit the city's ability to amend its general plan in the future. Reservation of police power is implicit in all government contracts and private parties take their rights subject to that reservation. Id. at 196.

In Cotta, the court addressed an exercise of police power after an airport commission entered into a contract granting certain benefits to taxi drivers of clean air taxis providing service at San Francisco Airport. The plaintiffs purchased compressed natural gas taxis and operated them. Then the commission adopted a new resolution that conferred fewer benefits. 157 Cal.App.4th at 1553. The court held that the commission's earlier resolution did not create a contract and was in fact a regulatory framework which involved no vested right. If construed as a contract, it would be unenforceable as an unlawful delegation of police power. Id. at 1563-64.

Petitioners point to nothing in the Ordinance and the Development Regulations which prevents the City from adopting a future ordinance changing the Project's zoning. To the contrary, Millennium had to sign an agreement that it is bound by the Conditions of Approval, which restrict its use of the property. AR 11656. The Development Regulations, which are part of the Ordinance, do state that they trump inconsistent zoning provisions. AR 18581. But this is merely one ordinance controlling the application of another existing ordinance of equal dignity. Petitioners point to no provision of the Ordinance or Development Regulations which prevents the City from changing the zoning at the Project Site, either before Millennium begins development or afterwards (when vested rights may occur).

It is worth noting that the now withdrawn Development Agreement expressly stated that the City accepted the Development Agreement's restrictions on its police powers only to the extent required to achieve the parties' mutual objectives and to obtain public benefits which go beyond those obtained by traditional city controls on projects. AR 23437. Otherwise, the City reserved all remaining police powers to itself. AR 23436. Presumably, the Ordinance, which was created to substitute for the Development Agreement, was intended to effectuate the same result.

The Ordinance is not an unconstitutional delegation of police power.

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9. Violation of Due Process and Recirculation

Petitioners argue that the PLUM and City Council hearings violated due process and their right to a fair hearing.

Specifically, at the PLUM hearing Millennium's attorney was permitted to make new substantive claims that CURD was not permitted to rebut (AR 11735-39), and major changes were made to the Development Regulations as set forth in a May 31, 2013 letter from Millennium's counsel and in a June 18, 2013 Planning staff memo without providing a copy to the public (AR 18466079), 19038-42).

At the City Council hearing, (1) Millennium's attorney submitted a 311-page letter and supporting evidence, including a 120-page geological report, less than 18 hours before the hearing and the City Council provided no opportunity to refute these arguments, (2) the City Council required CURD and the public to testify before calling City staff to give new presentations and evidence, and (3) the City Clerk announced at the hearing that an amending motion had been circulated when in fact it had not.

Finally, persons who attended the PLUM and City Council hearings either had no opportunity to speak or were given an impossible one minute to present evidence. Petitioners argue that each of the 131 persons who asked and were denied the opportunity to be heard at the public hearing should have been heard. *See Manufactured Home Communities, Inc. v. County of San Luis Obispo*, (2008) 167 Cal.App.4th 705 (mobilehome park owner denied fair hearing where rent control board exercised judicial-like powers in deciding the parties' rights in their leases and relied on uncross-examined testimony of tenants). Mot. at 39-40. Petitioners contend that they were deprived of an opportunity to refute and explain as a result. Mot. At 38-39.

Due process is flexible and does not require any particular procedure, so long as there is notice and a reasonable opportunity to be heard. *Horn v. County of Ventura*, (1979) 24 Cal.3d 605, 612. Rather, these requirements vary according to the competing interests of the government and the citizen. *Skelly v. State Personnel Board*, (1975) 15 Cal.3d 194, 208. At a minimum, due process requires notice and an opportunity for a hearing. *Id.* When an agency conducts adjudicatory proceedings, the hearing must comply with principles of due process. *Morongo Band of Mission Indians v. State Water Resources Control Board*, (2009) 45 Cal.4th 731, 737. The tribunal must be free of bias, and an adjudicator is presumed impartial unless he or she has a financial interest in the outcome. *Id.* Where city council has authority to make final adjudications of fact, it may not rely on information of which the parties were not apprised and of which they had no opportunity to controvert. *Clark v. City of Hermosa Beach*, (1996) 48 Cal.App.4th 1152, 1171 (property owner was denied fair hearing on application to construct two-unit condominium).

Petitioners have not shown they have a due process right. Some of the City's actions (*e.g.*, the Ordinance) were legislative in nature. No person has a due process right for a body's legislative approvals; only governmental decisions which are adjudicative in nature are subject to procedural due process principles. *Horn, supra*, 24 Cal.3d at 612. For that portion of the City's approvals that were quasi-adjudicative, Petitioners must show that they a property right supporting a due process violation. *Horn, supra*, 24 Cal.3d at 615. This requires a protected property interest, which must be more than an abstract need or desire for an outcome. *Smith v. Board of Quality Medical Assurance*, (1988) 202 Cal.App.3d 316, 326. While Petitioners have shown they are property owners or community members, they have not shown that their property

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rights are protected because they are adversely affected by the Project. See Abrahams Decl., ¶'s 3-4, 8; Dodge Decl., ¶3-4; Schwartz Decl., ¶3-4.

Aware of this fact, Petitioners rely on a dignitary interest – which is an interest in being informed of government action and in being able to present his or her side. Reply at 24. But this is putting the cart before the horse. A dignitary interest in due process only applies once it is determined that the plaintiff has a constitutionally protected property interest; Petitioners cannot use a dignity interest to create a property interest. See Mohilef v. Janovici, (“Mohilef”) (1996) 51 Cal.App.4th 285-87 (deciding existence of protected property interest before using dignitary interest to decide what process was due).²⁴

Assuming that Petitioners have a due process interest, the hearings provided the notice and opportunity to be heard that are the basics of due process. It is undisputed that the City provided notice. The City also provided an opportunity to be heard, fairly dividing the presentation time. At the PLUM hearing, Petitioners were given ten minutes to present its case. Members of the public opposing and supporting the Project were given 20 minutes, respectively. At the City Council hearing, Petitioners’ side (including another appellant) was given 20 minutes, twice as much time as Millennium. Members of the public were given ten minutes each. Petitioners individually and through their counsel also submitted many letters, reports, opinions, and emails to the City. Consequently, Petitioners certainly had an opportunity to be heard. As for the public at large, Petitioners cite no case holding that every person who attends a public hearing must be given a chance to speak; local government could never perform the people’s business if that were true. The City Council was entitled to limit the number and time of speakers to avoid cumulative information.

There were aspects of the hearing process which appear unfair, including the PLUM’s acceptance of changes to Q Conditions and the Development Regulations through a May 31, 2013 letter from Millennium’s counsel and through a Planning staff memo without providing either to the public, the submission by Millennium’s attorney of a 311-page letter rebutting Petitioners’ arguments less than 18 hours before the City Council hearing, requiring CURD and the public testify before City staff gave its presentation, and the City Clerk’s announcement at the City Council hearing that an amending motion had been circulated when one had not been circulated.

The court need not decide whether these errors individually or cumulatively denied a fair hearing because Petitioners have not discussed prejudice: why the City’s procedural due process errors require a new hearing. Prejudice is required for public agency decisions on land use matters. Govt. Code §65010; Rialto Citizens for Responsible Growth v. City of Rialto, (2012)

²⁴ Petitioners’ reliance on American Tower Corp. v. City of San Diego, (9th Cir. 2014) 763 F.3d 1035, 1050-51 is not to the contrary. In that case, the Ninth Circuit interpreted Horn as relying on the broader due process principles of the California Constitution in holding that reasonable notice and an opportunity to be heard is required before an agency makes a land use decision that is a substantial deprivation of landowner property rights. Id. at 1051. Thus, American Tower concluded that adjacent and nearby property owners could make a due process objection to a city decision to permit dozens of antennas perched on hundred foot towers alongside sizable equipment shelters. Id. Whatever the correctness of American Tower’s interpretation of Horn, Petitioners have made no such showing of significant impact from the Project. See Mohilef, *supra*, 51 Cal.4th at 285, n.16 (equating scope of federal and state due process for purposes of nuisance abatement case).

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208 Cal.App.4th 899, 920-22. Petitioners argue that they are relying on constitutional, not statutory principles (Reply at 25), but due process does not mandate that all governmental decision-making comply with standards that assure perfect, error-free determinations. Machado v. State Water Resources Control Board, (2001) 90 Cal.App.4th 720, 725-26.²⁵

The due process and fair hearing claims are denied.

G. Conclusion

The Petition is granted in part. The First and Second causes of action under CEQA are granted. The Third Cause of Action under CEQA is denied. The Sixth, Seventh, and Eighth causes of action (violation of City Charter, delegation of police power, and violation of La Mirada are denied, as are the Fourth and Fifth causes of action (due process and fair hearing). A writ of mandamus shall issue directing the City and City Council to vacate and set aside the actions approving the FEIR, Project approvals, and all land use entitlements. An injunction shall issue enjoining the City from granting any authority, permits, certificate of occupancy, or entitlements for the Project pursuant to the City's prior actions, and enjoining Millennium from undertaking construction on the Project pursuant to the set aside approvals.

~~Petitioners' counsel is ordered to prepare a proposed judgment and writ of mandate, serve them on counsel for the opposing parties for approval as to form, wait 10 days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment and writ along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for June 11, 2015 at 9:30 a.m.~~

²⁵ Petitioners also argue that recirculation of the DEIR was required under Guidelines section 15088.5, which provides for recirculation is required where significant new information is added after public notice is given for review of the DEIR. New information is not significant unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment. *Id.* Petitioners point to nearly 400 pages of new or revised tables and analysis, much of it related to traffic and noise analysis (AR 5824-6222) and to Millennium's 120-page geology report and other materials submitted 18 hours prior to the City Council hearing. Petitioners argue that disclosure of this information and analysis was mandatory in the DEIR, not later when the public could no longer officially comment on it. Mot. at 33. The Opposition does not respond to this issue which is mooted by the fact that a new EIR is required.