Case No. B284093

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION 4

FIX THE CITY, INC.,

Plaintiff and Cross-Appellant,

v.

CITY OF LOS ANGELES, et al.

Defendants and Respondents.

On Appeal from the Los Angeles County Superior Court
Case No. BS166484 the Honorable Amy D. Hogue, Department 86

CROSS-APPELLANT'S REPLY BRIEF

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INTRODUCTION

The City of Los Angeles ("City") and Real Party in Interest AG-SCH 8150 Sunset Boulevard Owner, LP ("Developer") (collectively, "City and Developer") leave no stone unturned in their efforts to defend their ill-gotten project approvals.[1] Responding to even the most trivial observations in Fix the City's ("FTC's") Cross-Appellant's Brief with full-blown legal argument, the City and Developer attempt to bury the weaknesses in their entitlements in a mass of pages and citations.

Ironically, the City and Developer even complain that FTC has not raised in its appeal all of the same arguments that it raised in the trial court. There is nothing unusual, much less improper, about FTC's decision not pursue each of its arguments on appeal. "This process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail . . . is the hallmark of effective appellate advocacy." (*Smith v. Murray* (1986) 477 U.S. 527, 536, quoting *Jones v. Barnes* (1983) 463 U.S. 745, 751-752.) That is what FTC and counsel have done on appeal, reviewing their trial court arguments and arriving at a core of four basic errors that underlie the City's faulty approval.

First, the Project's Environmental Impact Report ("EIR") presented an improper baseline and failed to properly disclose past approval determinations by the City Planning Commission that limited development on the site to 45 feet in height. This determination was made as part of a General Plan consistency determination and resulted in a recorded covenant limiting height for that project or for future projects to 45 feet. The City and Developer contend that it was sufficient for the City to have told the public and decision makers that no height limit applied and that a 45-foot

[1] Pursuant to the parties' briefing stipulation, FTC briefs only its Reply to arguments raised in its Appeal herein. By so doing, FTC does not waive its right to respond at oral argument to the City and Developer's reply arguments on their appeal of the Superior Court's grant of the petition for writ of mandate.

height limit in a different ordinance was inapplicable. When the height of a proposed project is a major public issue in a controversial project, the failure to have informed the public of the imposition of a height limit in the past is a significant and prejudicial non-disclosure.

Second, the density bonus was premised on an improper and erroneous interpretation of the General Plan's permitted density for the Project site. The Hollywood Community Plan, the land use element of the General Plan that applies to the Project site, specifically removed high density residential as a permitted use from all areas outside of the Hollywood Regional Center. The Project site is *not* in the Regional Center. The City disregarded the limitations in the General Plan by using high density residential as the baseline for the Project's density bonus, inflating the bonus from a 22 percent increase to a 72 percent increase. The issue is not that the project conflicts with one or two of the many policies in the General Plan, but rather that the approved density conflicts with clear, binding standards included in the Plan. No deference is due to the City's disregard of the express residential density standards in its General Plan.

Third, the City and Developer ignored the requirements of two state laws: the Streets and Highways Code and the Alquist-Priolo Act. The Street and Highways Code requires a specific public process before a street is removed from vehicular use, but the City has approved the Project, including the creation of a pedestrian only public/private plaza on what is now a public street, without following any such process or committing to do so in the future.

The Alquist-Priolo Act is a critical public safety state law that requires local governments to prohibit development over traces of active surface faults as well as a "setback area" of 50 feet from the fault trace or assumed fault trace. The Project site is located in a mapped surface fault hazard zone, yet the City did not require the Developer to conduct any off-site investigation to determine whether the surface fault – the location of which is only estimated by the state map – is within fifty feet of the site. Without such a study, the law requires that development be set back 50-feet

from the property line, where, absent a study off-site, active fault traces are presumed to be present. The City replaced this requirement with a less strict provision by allowing use of a reinforced foundation; this was prohibited by state law.

Fourth, the City and Developer ignored the requirement of the Hollywood Community Plan that developments that increase density through a subdivision must be supported by findings that the infrastructure and transportation system has adequate capacity for the new development. As the record before the City made clear, the City's emergency response capacity is below standard in this neighborhood and the traffic is already literally choking the streets. The City failed to even make these findings in any meaningful way, and certainly not with substantial evidence, ignoring the requirement in the Plan.

Fix the City is not a neighboring property owner. Its only concern is that the City follows state laws and its own laws, and fulfills its core responsibility of ensuring public safety. When the City ignores the commitments it has made in its General Plan for one project, other projects will soon follow in its footsteps. This Court's review is critical to ensuring that the City does not ignore its past promises and current legal requirements to protect public safety for every flashy project that comes before it. These entitlements are an abuse of discretion and should be rescinded.

REPLY ARGUMENT

I. THE CITY AND DEVELOPER CANNOT SHOW THAT ALL RELEVANT INFORMATION ABOUT THE SITE WAS DISCLOSED IN THE EIR

First, FTC must set the record straight: its arguments regarding the baseline are not waived, nor are these "new" arguments. FTC clearly argued in its trial court briefing that the City did not comply with CEQA when it failed to disclose the prior approvals and covenant limiting future

building heights and square footage in the EIR for the Project. (AJA217-218 ["The failure to disclose the 45 foot height limit, the 80,000 square foot new construction limit, and the other restrictions in the covenant meant that the EIR did not fully disclose the impacts of developing the Project: the true baseline conditions that limited site development were never set forth, so decision makers were not informed that their approval was freeing the site from previously covenanted restrictions."].) [quote from brief].) While the City and Developer concede as much, they misleadingly imply that FTC's argument on appeal presents new theories not raised before the trial court.

Any fair reading of FTC's Cross-Appellant's Brief conclusively demonstrates that focus of FTC's baseline argument is the non-disclosure of the covenant and General Plan Consistency conditions of approval imposed on the Project site in 1986 by the Planning Commission. In connection with this argument, FTC made several observations in its Cross-Appellant's brief regarding additional information that was not disclosed in the EIR. The purpose of these statements – made without any supporting legal argument or elaboration – was to demonstrate that the covenant was not the sole information omitted from the EIR that was relevant to the approval of the Project. However, the covenant and the General Plan Consistency conditions of approval were the only issue that FTC pursued in the trial court and on appeal, because the issue was so fundamentally prejudicial, as discussed below. (See Cross Appellant's Brief, p. 85 ["Most significantly, the EIR nowhere mentioned the covenant mandated by CPC 86-209 that was recorded as a condition of the approval of the currently existing shopping center on the site, which runs with land and limits future development in height and size."].) FTC noted the other omitted items to explain that the EIR was far from full disclosure, putting context around the non-disclosure of the covenant and prior City approval conditions.

For these reasons, the City and Developer's misleading statement that the baseline argument is "newly raised" is disingenuous. The City and Developer's Opposition Brief attempts to shift focus from the issue of the

covenant and prior approval that was masked from the public by focusing on these minor comments in FTC's Cross Appellant's Brief. As the argument in the Cross Appellant's Brief makes clear, FTC does not rely on these omissions for the substance of its CEQA non-disclosure claims, and will not respond in detail to the City and Developer's arguments on these points in this Reply.

The City and Developer further attempt to distract from the significance of their non-disclosure by recasting FTC's argument not as a failure to disclose required information, but as a dispute over the City's land use consistency analysis. (Opp. Br., p. 71.) FTC has consistently framed this issue as one of non-disclosure, arguing under the precise standard articulated in the City and Developer's brief that "the failure to disclose the conflicting precluded informed decisionmaking or informed public participation. " (Opp. Br., p. 73 [quoting *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 987]; see also AJA218; Cross Appellant's Brief, p. 91 [citing *Bakersfield Citizens for Local Control, supra*, 124 Cal.App.4th at p. 1198 ["Failure to comply with the information disclosure requirements constitutes a prejudicial abuse of discretion when the omission of relevant information has precluded informed decisionmaking and informed public participation, regardless whether a different outcome would have resulted if the public agency had complied with the disclosure requirements."].) The City and Developer's efforts to recast FTC's arguments miss the mark.

The City and Developer tepidly argue that FTC failed to raise the issue of the covenant and conditions of approval during the administrative proceedings. (Opp. Br., p77.) Their brief steers clear from any substantial discussion of FTC's Motion to Augment, and for good reason: FTC resoundingly demonstrated that it was unreasonable for FTC and its members, volunteer citizens, to have identified the existence of the prior approval and covenant based upon the information provided in the EIR or elsewhere. For instance, while FTC's members reviewed online approval

files associated with the property address, the 1986 approval had no online documents and only a vaguely described title. (AJA247-250.)

At the same time, City staff reports for the Project that purported to list "on-site and related cases," included mention of past approvals permitting service of alcoholic beverages and the operation of fast food restaurants, as well as the imposition of the D-limitation restricting FAR to 1:1, but did not mention the existence of the 1986 approval, its 45-foot height limit and other conditions, or its covenant. (AR28573-28574.) The Developer's own list of previous cases "affecting the property," likewise omitted the 1986 project approval entirely, while including older cases permitting fast food service. (AR57691-57692.) It was not until FTC's members were reviewing the correspondence between city departments in the administrative record which sparked an inquiry regarding public easements on the Project site that lead FTC members to obtain a preliminary title report, which disclosed the prior approval and covenant. (AJA247-250, 290.)

It therefore was not possible, in the exercise of reasonable diligence, for FTC's members to have recognized that they needed to take the *extraordinary* step of double-checking the staff reports and analysis by having their own title report prepared. (AJA250, 290.) As FTC's members testified, this step was unprecedented, in more than 30 years of experience evaluating and testifying about projects proposed in the City of Los Angeles. (AJA243.) While the Superior Court was somewhat ambiguous about the basis on which it was considering the covenant and prior approvals (RT0170:23-26), the Court considered this evidence, but erroneously concluded that it was irrelevant because it (incorrectly) assumed that this was a voluntary condition (RT0175:23-0176:7). The issue is properly before the Court of Appeal and should be fully considered by this Court, recognizing that the 1986 approvals reflected a General Plan Consistency determination for the Project site.

The City and Developer argue that there was no need to have disclosed the existence of the prior conditions of approval and covenant,

because the EIR described the extent of physical development at the site and thereby *reflected* the limitations imposed in the conditions of approval and covenant. (Opp. Br., p. 79.) Of course, the public had no way to know whether the existing conditions were the embodiment of a private developer's decision or the result of a limitation imposed as a protective condition to ensure consistency with neighboring properties. As the conditions and covenant reveal, the latter is true, but the record before the City was devoid of any such information about the City's prior determinations. Similarly, the fact that the EIR disclosed that a *different* 45-foot height limit – the one imposed by the Commercial Corner standards – did not apply, does not at all substitute for the fact that the public and decision makers were not informed a 45-foot height limit had been imposed in the City's prior approval under CPC 86-209 PC in order to ensure consistency and compatibility with neighboring properties.

CEQA requires a more comprehensive effort at disclosure. "[T]he ultimate decision of whether to approve a project, be that decision right or wrong, is a nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information about the project that is required by CEQA." (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829.) The error is prejudicial "if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712.) The failure to disclose the General Plan consistency determination and its 45-foot height limit impaired the ability of the public and decision makers to be fully informed about the project.

> In reviewing an EIR a paramount consideration is the right of the public to be informed in such a way that it can intelligently weigh the environmental consequences of any contemplated action and have an appropriate voice in the formulation of any decision. . . . Its purpose is to inform governmental decision makers and to focus the political

process upon their action affecting the environment. (*Karlson v. City of Camarillo* (1980) 100 Cal.App.3d 789, 804.)

The City and Developer make a "no harm, no foul," argument, citing the City's finding that "the project substantially conforms with the purposes, intent, and provisions of the General Plan and the Hollywood Community Plan." (Opp. Br., p. 78, citing AR33.) This argument is disingenuous in multiple ways. The cited finding is in support of a conditional use permit for the service of alcoholic beverages, and therefore does not reflect any analysis of the physical form and mass of the proposed project. Moreover, the City and Developer's argument makes a mockery of the required finding in the Planning Commission conditions, memorialized in the covenant. (AJA294, 256-258.) There is not a shred of evidence that any decisionmaking body considered the conditions imposed by the Planning Commission and in the covenant and whether the project would be consistent with the General Plan and Hollywood Community Plan without such conditions. In fact, all of the analysis prepared by the City and relied upon by decision makers assumed that there were no height restrictions that applied to the Project site. (AR6115 ["[T]here is no 45 foot zoning restriction applicable to the project or any requirement to conform the Project to existing 6-10 story buildings."]; AR6213 ["The City has not assigned any height limitations to this area of Sunset Boulevard."].) As discussed at length in part III, *infra*, the project's height *and* density conflict with the Hollywood Community Plan. The City's analysis of the project was misleading and deficient because it failed to address the limitations imposed on the site by the covenant and conditions of approval. Furthermore, the record does not contain any request to remove the Covenant and rescind CPC 86-209 PC.

The City and Developer attempt to make the case that CEQA did not require the disclosure of these past conditions and covenant because CEQA does not require use of a "hypothetical" baseline premised upon permits and approvals. (Opp. Br., pp. 74-75 [citing *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48

Cal.4th 310, 320-322 [“*CBE*”].) *CBE* is inapplicable here. That case evaluated the use of a hypothetical baseline for NOx emissions from a refinery that was based upon the maximum allowable emissions under a permit, not the actual emissions from the present day operation. (*Id.* at p. 317-318.) The Court held that the environmental analysis was required to use a “baseline of physical conditions existing at the time environmental analysis was begun.” (*Id.* at p. 320.) Here, the covenant and prior conditions of approval were not hypothetical: the prior project was constructed and operated within the confines of those limitations. As the court of appeal explained in *Woodward Park Homeowners Association v. City of Fresno* (“*Woodward Park*”), the proper analysis of baseline land use conditions requires *both* a discussion of present day conditions *and* an analysis of possible future land use *if the requested approval was not granted.* (*Woodward Park*, (2007) 150 Cal.App.4th 683, 715.)

By omitting any mention of the prior conditions of approval or covenant, the EIR failed to disclose that development at that site had limits imposed by the City Planning Commission, which also had jurisdiction over the new project. Appendix G to the CEQA Guidelines provides that an EIR ***must*** disclose any “[c]onflict with any applicable land use plan, policy, or regulation of an agency with jurisdiction over the project (including, but not limited to the general plan, specific plan, local coastal program, or zoning ordinance) adopted for the purpose of avoiding or mitigating an environmental effect.” CPC 86-209 PC was a regulation adopted by the Planning Commission. The EIR contains no such disclosure about the covenant or prior approvals.

The public and decision makers were entitled to know that development limitations were imposed as protective measures and that specific findings were required in order to relieve the owner of those commitments. The failure to disclose this information was a prejudicial violation of CEQA.

II. THE CITY AND DEVELOPER IGNORE THE LAND USE RESTRICTIONS INCLUDED IN THE GENERAL PLAN AS REFLECTED IN THE LAND USE MAP

A. The City and Developer Do Not Address the Plain Language of the Municipal Code Permitting Appeals of Off-Menu Approvals

The City and Developer take issue with the Superior Court's conclusion that challenges to the density bonus were timely under Government Code section 65009, subdivision (c)(1). The issue is when that 90-day statute of limitations begins to run on an off-menu density bonus approval for a project that includes other discretionary applications, as this one does. For such projects, the Municipal Code expressly states that "[t]he applicable procedures set forth in Section 12.36 of this Code shall apply." (LAMC, § 12.22.A.25(g)(3)(ii) [which applies to "Housing Development Projects requesting waiver or modification of any [off-menu] development standard(s) . . . and which include other discretionary applications"].) The cited section 12.36 in turn states that the initial decision maker for this Project was the City Planning Commission, so "[t]he City Council shall decide all appeals of the City Planning Commission's decisions or recommendations as the initial decision maker on projects requiring multiple approvals." (LAMC, § 12.36.C.1(b).) Notably, there is no language in subdivision (ii) of (g)(3) stating that the Planning Commission's approval is final. Thus, as the trial court correctly held, it was only after the *City Council*'s final determination that the applicable 90-day statute of limitations began to run.

The City and Developer make three arguments as to why the trial court erred in its holding, but each fails. First, they point to the Planning Commission's Letter of Determination that stated that "[t]he action of the Los Angeles City Planning Commission will be final within 15 days from the mailing date on this determination unless an appeal is filed within that

time to the City Council. Off-Menu Housing Incentive is not further appealable by any party." (Opp. Br., p. 82, citing AR5-6.)

This argument is unpersuasive for several reasons. As an initial matter, the agenda for the July 28, 2016 City Planning Commission hearing clearly stated for under "Appeal Status: Appealable to City Council." (AR62044.) This statement is without qualification and is made in reference to the entitlements that include the off-menu incentive. For this reason alone, the City should be estopped from arguing that the incentive could not be appealed. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488-489 ["Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it."], quoting Evid. Code, § 623.) Although the language would be correct in situations in which a project had no other discretionary approvals, the statement on the form is not correct for projects such as this with other discretionary appeals. (See LAMC, § 12.22.A.25, subd. (g)(3)(i) [which applies to projects "that are not subject to other discretionary applications" and states that "[t]he decision of the City Planning Commission shall be final."].) The form statement cannot override the Municipal Code's plain language regarding when the Commission's approval is final. Additionally, the City Council did in fact reconsider the density bonus when the Commission's other approvals were brought before the City Council, so the City's own actions show that they believed the Commission's density bonus approval was not final. (Seee.g., AR15276:21-23; AR15277:16-19; AR15279:9-20.)

Second, the City and Developer argue that Municipal Code section 12.22.A.25, subdivision (g)(3)(i)(b)'s statement that "[t]he decision of the City Planning Commission shall be final" applies to the Project. This argument ignores the plain text of the section. Within subdivision (g)(3), subdivision (i) applies to "Housing Development Projects that qualify for a Density Bonus and for which the applicant requests [an off-menu] waiver or modification of any development standard(s) . . . *and that are not subject*

to other discretionary applications" and includes the finality language above. (LAMC, § 12.22.A.25(g)(3)(i), emphasis added.) Subdivision (ii), by contrast, applies to "Housing Development Projects requesting waiver or modification of any [off-menu] development standard(s) . . . *and which include other discretionary applications*" and contains no similar language. (LAMC, § 12.22.A.25(g)(3)(ii), emphasis added.) There is simply no basis — and the City and Developer provide none other than an unsupported assertion — to apply the finality language in the first section to a project containing other discretionary applications.

Third, the City and Developer argue that the trial court's holding and the Code's plain language cannot be correct because section 12.36 "is procedural in scope only and does not provide any new appeal rights where none exist." (Opp. Br., p. 83.) As an initial matter, the Court need not reach such a legal argument about the interpretation of the Code when the Code's language is unambiguous as it is here. (*In re Corrine W.* (2009) 45 Cal.4th 522, 529; *MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1083 ["If the statutory language is clear and unambiguous, our task is at an end, for there is no need for judicial construction."].) Additionally, because the finality language in the Code on which the City and Developer rely explicitly *does not apply to this case*, there was no "final" Commission ruling from which a "new appeal right" was required. The City's and Developer's "new appeals right" argument improperly assumes that the finality language from a different section should also apply to this case, but it does not.

Notably, under the City's and Developer's interpretation of section 12.22.A.25(g)(3), subdivision (ii) serves no purpose. Courts must "accord [ ] significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose," and have warned that "[a] construction making some words surplusage is to be avoided." (*People v. Valencia* (2017) 3 Cal.5th 347, 357, quoting *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.) The Code clearly distinguishes between cases like this one that include other discretionary approvals, in

which case the entire case may be appealed to the City Council pursuant to Municipal Code section 12.36, and those not involving other discretionary approvals in which the Planning Commission's approval is final. The Court may not ignore this intentional distinction.

As the trial court correctly held, the plain language of LAMC §§ 12.22.A.25(g)(3)(ii) and 12.36.C.1(b) "permitted Petitioners to appeal the Planning Commission's entire decision, including its decision on off menu incentives, to the City Council." (AJA927.) Accordingly, because the statute of limitations did not begin to run until the City Council's approval of the Project was final, FTC's claims were timely.

B. The City and Developer Ignore the General Plan's Density Limitations That Supersede Zoning Requirements

No party disputes that the Hollywood Community Plan land use map (AR19752) establishes binding, mandatory limitations on the use of land in the Hollywood Community Plan area, serving as the visual depiction of the General Plan designations and land use patterns. The City and Developer, however, fail to read this map in context with the Hollywood Community Plan that it implements. Ignoring this plan and its limitations, as well as the clear land use pattern established on the map, the City and Developer rely on the site's C4 zoning to argue that the high density residential and unlimited height were permitted. This approach effectively doubled the density permitted at the site before the density bonus was even applied.

The land use map makes clear that the General Plan does not permit high density development at the project site. Indeed, reading the map along with the General Plan text itself compels the conclusion that the 1988 Hollywood Community Plan deliberately removed high density development from all areas *except* the delineated Regional Center/former CRA Project Area (AR026984). High-density residential, which is depicted in brown on the map, is exclusively confined to the Regional Center area east of La Brea Avenue. The residential properties nearest to the Project

site are all designated yellow (low density) or orange (medium density, equivalent to R3/RAS3 zoning). (AR19752.)

The City and Developer conflate zoning use and density, which the 1988 EIR for the Hollywood Community Plan makes clear are two distinct issues. (AR26988 [discussing how new plan would render existing R4 density apartment buildings nonconforming as to density, but not as to use].) So, while the land use map lists C4 zoning as a permissible zone for Neighborhood Office Commercial, that does not entitle the developer to override the General Plan density limitations that apply to residential density on the site. Zoning is subordinate to General Plan restrictions. (*Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1183 ["Subordinate to the general plan are zoning laws, which regulate the geographic allocation and allowed uses of land. Zoning laws must conform to the adopted general plan."].) Furthermore, the 1988 EIR residential density table cited by the City and Developer does not even show High Density. (See Opp. Br, p. 91, fn. 9, citing AR26984). The City and Developer appear to be arguing that the Plan's residential density limits do not apply to residential use on a commercial property, but this interpretation would allow the wholesale disregard of the applicable land use pattern reflected in the General Plan land use map. (AR19752.) At the time the Plan was adopted, the City was aware that not all of the limitations provided in the Plan were reflected in the zoning code, but fully expected such restrictions to apply to future projects in the Hollywood Community Plan area. (See AR26978.)

The City and Developer engage in fanciful reconstruction by arguing that the Hollywood Community Plan limitations on density and height were simply "recommendations," that were not adopted into the General Plan. (Opp. Br., pp. 88, 90.) The document on which the City and Developer rely for the statement that "the City took the position that this proposed residential land use designation applies only to purely residential projects and therefore does not apply to this project . . ." (Opp Br., p. 89) says no such thing.

This document clearly states that the residential density limits contained in the plan are not just "proposed" limits as implied in City and Developer's brief, but rather that they are applicable limits to residential projects in the Hollywood Community Plan area. (AR57688.) While C4 zoning may be permissible, the General Plan's residential density limitations still apply to the site, and those limitations make clear that high density residential is not permitted outside of the central Hollywood area. It is as clear as the difference between orange and brown on the Land Use Map.

With respect to the standards set forth in the body of the Hollywood Community Plan EIR, the City and Developer dismiss any statement that was not expressly incorporated into the sparse, 8-page Hollywood Community Plan document itself. However, at the time the City adopted the Hollywood Community Plan, staff reports explained that "measures have been incorporated into the proposed Plan revision which mitigate or avoid the significant environmental effects thereof to the extent feasible." (AR27452.) The staff report explained that "[m]itigation measures cited in the EIR include (1) imposition of development standards for all categories of land use." (AR27453.) Staff reports and the accompanying Hollywood Community Plan EIR explained both that the high density residential development had been intentionally confined to the Regional Center area of Hollywood, and that specific limitations were to be imposed on development in order to mitigate the adverse environmental impacts of increased residential and commercial development permitted by the Plan. RPI purchased Neighborhood Office Commercial property limited to medium density and 45-feet (R3/RAS3, Corner Commercial Ordinance, and CPC 86-209 PC), not in the high-rise high density Hollywood Regional Center.

The Staff Report to the City Planning Commission on July 28, 1988 stated that "The HIGH and HIGH MEDIUM density designation have been limited in coverage to the Redevelopment Project area and the area immediately north of Franklin Avenue in the Highland/Cahuenga corridor."

(AR27459.) Meanwhile, "A [Q]R5 zone has been added to the range of corresponding zones for the HIGH density housing designation. This is [to] enable mixed use (commercial/residential) projects in certain areas of the Hollywood Redevelopment Project designated HIGH density through LAMC 12.24 C1.5(j).)" (AR27458.) Both of these statements are reflected in the land use pattern shown on the map, in which high density residential is not identified as a permitted use anywhere outside of the delineated Regional Center.

The 1988 EIR established a clear intent to impose a 45-foot height limit on all properties designated Neighborhood Office Commercial, whether commercial, residential or mixed-use. The EIR that was presented to decision makers and the public explained that for properties designated "Neighborhood-Oriented Commercial," the zoning should permit "C4 ***uses*** with the limitations specified" which included that "[n]o building ***shall*** exceed 45 feet in height or three stories." (AR27044 [emphasis added].) The City and Developer contend that this statement is "couched within non-mandatory language that such limitations '*should* be implemented through inclusion in the Zoning Code or other enforceable means.'" (Opp. Br., p. 91 [citing AR27042.].) The City and Developer ignore, however, that the referenced section lists "Mitigation Measures." (AR27402.) The staff report explained that such mitigation measures were intended to be implemented, and as the EIR envisioned, when zone changes were approved for properties being redeveloped, the City was expected to follow the restrictions listed in the EIR and impose these requirements as conditions on the project. (AR26978.)[2] The Project site was included

[2] The City and Developer contend in a footnote that use of the term "should" in the staff report means that the City was not required to do so, drawing from CEQA Guidelines section 15005. The applicability of that provision in this circumstance is questionable, since the Guidelines provision is intended to instruct agencies in the use of the Guideline document. Nonetheless, the definition in the Guidelines supports FTC's interpretation of this requirement. "'Should' identifies guidance provided

Ordinance 164,714, which implemented height, density and intensity mitigations reflected on the Land Use Map (AR019752) as Neighborhood Oriented Commercial with Medium Density, 45-feet height and 1:1 FAR D Condition– exactly the mitigations adopted by the City Council in 1988. Although CPC-86-209 preceded the adoption of the 1988 Hollywood Community Plan, the limitations in that approval (including the 45-foot height limit) are entirely consistent with both the substance of the 1988 Hollywood Community Plan limitations on the Neighborhood Office Commercial designation, *and* with the approach described in the EIR of imposing such restrictions as projects are approved by the City.

The supposed "baseline" upon which the density bonus rests is a pure fiction. It imports high density residential standards that do not apply to this area of Hollywood. The result is the award of a 72 percent density bonus, rather than the 22 percent density bonus that was claimed, a massive give-away in exchange for providing only 11 percent affordable housing units. The claim of "unlimited" height, belied both by the General Plan and by the covenant, allowed the developer to conceal and ignore limitations on height increases under the density bonus ordinance for properties adjacent to R2-1XL zoned properties, like the Project site. (See LAMC 12.22.A.25 (f)(5)(i)(A).) The grant of the density bonus was improper because it started on the wrong foot, permits far too many units, and allows a project far taller and denser than would be permitted under the General Plan with a properly-applied density bonus.

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by the Secretary for Resources based on policy considerations contained in CEQA, in the legislative history of the statute, or in federal court decisions which California courts can be expected to follow. Public agencies are advised to follow this guidance in the absence of compelling, countervailing considerations." (Cal. Code Regs., tit. 14, § 15005 (b).)

III. THE STREET VACATION CONTROVERSY IS RIPE AND THIS COURT SHOULD DETERMINE THAT A STREET VACATION PROCEEDING IS REQUIRED FOR THE CONVERSION FROM AUTOMOTIVE USE

A. The Controversy Regarding the Street Vacation is Sufficiently Developed for Review

The City and Developer unconvincingly argue that the issue of the removal of the free right turn lane from automotive use is not ripe for review. The conversion of that traffic lane to non-automotive use—an attribute of the Project analyzed in the EIR and discussed in the City's findings—requires a street vacation is clearly ripe for review. "Before a controversy is ripe for adjudication it 'must be definite and concrete, touching the legal relations of parties having adverse legal interests.'" (*Otay Land Co. v. Royal Indem. Co.* (2008) 169 Cal.App.4th 556, 562, quoting *Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1716, 1722.) "'It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" (*Ibid*.) The legal issues posed "must be framed with sufficient concreteness and immediacy so that the court can render a conclusive and definitive judgment rather than a purely advisory opinion based on hypothetical facts or speculative future events." (*Hayward Area Planning Assn, Inc. v. Alameda County Transp. Authority* (1999) 72 Cal.App.4th 95, 102; see also *Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877, 885 ["A 'controversy is "ripe" when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made.'"].)

In considering whether issues are ripe for review, account should also be taken of the public's interest in a prompt answer to a particular legal question and the relative hardship on the parties if a decision is deferred. (*Hayward*, 72 Cal.App.4th at p. 104.) If an issue is "purely a legal issue upon which the parties express fundamental disagreement," a court is more likely to find the issue ripe for review. (See *id*. at p. 103.) Here, unlike in any of the cases cited by the City and Developer, the legal issue of whether the conversion of a traffic lane to non-automotive use requires a street vacation is framed with the concreteness and immediacy sufficient to allow this Court to render a conclusive and definitive judgment. Additionally, it is in the public's interest to receive a prompt answer to this legal question, which could otherwise burden the parties and the courts at taxpayers' expense if this concrete issue is adjudicated at a later date.

The conversion of a traffic lane here is similar to the situation in *Hayward*. There, two citizens' groups brought a lawsuit against the Alameda County Transportation Authority (ACTA) and Caltrans alleging that those entities were using revenue generated from a voter-approved sales and use tax to implement a highway extension project that contained a route different from the one presented to the voters. (*Hayward*, 72 Cal.App.4th at pp. 98-99.) At the time the suit was filed, ACTA had announced plans to build a highway using the different route and had begun but not completed environmental review and traffic studies for the new route. (*Id*. at p. 103.)

ACTA argued that the controversy was not ripe for adjudication because "until the environmental review and planning documents are finally approved and certified, no final decision regarding the alignment . . . can or will be made." (*Id*. at p. 102.) The trial court agreed but the Court of Appeal reversed, noting that funds had already started to be spent on the project. (*Id*. at p. 104.) The Court emphasized that the government had already signaled its intent to move forward with the new route and that it would be impractical and inefficient to wait to resolve the dispute:

> Absent judicial action, respondents have given every indication that they will, in effect, continue to exercise the very power that appellants claim they do not have and proceed with the putative project. Dismissing this appeal would require the parties to make the identical arguments at a later stage of these proceedings, after an expenditure of large sums of public money on a highly controversial project, the legality of which is still in question. Failure to resolve the tendered issue now will only create "lingering uncertainty" with respect to a transportation project that is the subject of widespread public interest in the Bay Area, and particularly Alameda County. (*Ibid*.)

Similarly, in *Environmental Defense Project of Sierra County*, the Court found a facial challenge to a County's streamlined zoning process ripe for adjudication primarily because the County had made its future intentions clear. (*Environmental Defense Project of Sierra County*, 158 Cal.App.4th at p. 886 ["the county has made it clear that it will continue with streamlined zoning in the future"].) The Court reasoned that because of the County's clearly stated intentions, "we do not have to guess how the county will interpret and carry out the notice provisions" at issue. (*Id*. at p. 887.) The Court also noted that "[t]he purpose of declaratory relief is 'to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs.'" (*Id*. at p. 884, quoting *Travers v. Louden* (1967) 254 Cal.App.2d 926, 931; see also *California Alliance for Utility Safety & Education v. City of San Diego* (1997) 56 Cal.App.4th 1024, 1030–31 [finding facial challenge to present and future practices ripe and noting that resolution of the issue "will protect not only the public's ability to monitor the activities of its public officials but it will also clarify for city officials the manner in which they may proceed in protecting city's legitimate interests under the franchise agreement."].)

Here, the controversy is even more concrete than in *Hayward* or *Environmental Defense Project of Sierra County*. Every version of the project description and the alternatives that were analyzed in the EIR included paving over a busy city street and "merging" or "incorporating" a 9,134 SF city-owned parcel (8118 Sunset Boulevard). (See AR000271, AR000887, AR000915, AR000949, AR000987, AR001021, AR001057, AR004648.) The City, in its findings approving the EIR, discussed the conversion as if it were a settled and important attribute of the project. (See AR027721 [highlighting the Corner Plaza to be created from the conversion as a public amenity], AR027737 [noting that Corner Plaza contributes to Project's consistency with Open Space and Conservation Chapter Policies], AR027788 ["The project also includes a 9,134-square-foot Corner Plaza."].) Additionally, the court has framed this as a purely legal issue, making adjudication even more appropriate. (AJA938 [deciding issue "as a matter of law"]; see also *Hayward*, 72 Cal.App.4th at p. 103.)

Additionally, the City has stated clearly before and during this litigation that it does not plan to ever seek a street vacation, as it is required to do, but instead plans to improperly seek only a B-permit for this Project attribute, which City engineers warned was a "fatal flaw." (AR037244, AR029327; AR056626; AR037136-38; AR029423.) It would therefore be inefficient and waste taxpayer money to require the parties to bring a separate claim at a later date over this exact issue when it is now ready for adjudication. (*Hayward*, 72 Cal.App.4th at p. 104.)

By contrast, each of the cases the City and Developer cite involved a situation that was far less concrete and would have required a court to speculate. In *Wilson & Wilson v. City Council of Redwood City*, the plaintiff sought declaratory relief as to possible unspecified future condemnation when the City had taken no steps to acquire the property at issue or even started proceedings to do so. (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1583–84.) *Pacific Legal Foundation v. California Coastal Commission* involved a challenge to regulations and possible future permitting from the regulations, but the

plaintiff did not challenge any individual permit condition. (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 163.) The Court noted that "the abstract posture of this proceeding makes it difficult to evaluate" and declared the controversy unripe. (*Id*. at p. 172.)

The City and Developer's other key case, *Selby Realty Co.*, involved a hypothetical future implication of a recently passed city general plan, but did not challenge any specific project or other governmental action. (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 115–116.) The Court noted that a city's general plan, unlike a specific project, is "by its very nature merely tentative and subject to change" and that any future action taken pursuant to that plan should be challenged when the action is taken. (*Id*. at p. 118; see also *Silva v. City and County of San Francisco* (1948) 87 Cal.App.2d 784, 788–789 [alleging that a resolution may lead to a future taking of private property when no actual taking of the property had even commenced].)

These cases are all very different from the present situation in which the City certified an EIR that analyzed the conversion of a traffic lane to non-automotive use, and in which the City discussed the conversion in its findings approving the EIR and the Project. It is clear from the City's and the Developer's actions what they plan to do with that traffic lane, but they have not followed the proper procedures required for such a conversion. The controversy is concrete and ready for adjudication.

B. The Project's Conversion of Traffic Lanes to a Part of a Plaza for Pedestrian-Only Use Required a Street Vacation

Under the City's and the Developer's interpretation of the Streets and Highways Code, the City could convert every single street and highway in Los Angeles into a mixed public-private plaza supporting a private, for-profit project and never once follow the Code's public hearing procedures or make the required findings that the streets and highways are unnecessary. (See Sts. & Hy. Code, §§ 8309, 8324, 8325.) This, of course,

cannot be correct, and the plain language of the Streets and Highways Code shows that it is not correct.

The Code states that a "vacation" means a "complete or partial abandonment or termination of the public right *to use a street, highway, or public service easement.*" (Sts. & Hy. Code, § 8309, emphasis added.) The City and Developer argue that there is no vacation here because the public would be able to continue to use the property that is currently a street, but for a different purpose. But a public pedestrian-only plaza is not a street, highway, or public service easement as defined in the code, so the public right to use *the street, highway, or public service easement* will be vacated. (See *id*. at §§ 8308 [defining street and highway in a way that underscores vehicular use], 8306 [defining public service easement].) Thus, under the Code's clear definition, this situation is a vacation of a public street.

The Code clearly distinguishes between vehicular and pedestrian use as it includes an entire division regarding pedestrian malls. (See Sts. & Hy. Code, §§ 11000 et seq.) This division requires a substantial notice and hearing process for converting a vehicular street into pedestrian mall (*id*. at §§ 11200-11311), which is when the City *keeps* a street but limits it to pedestrian-only use (*id*. at § 11006). This process requires the City to make substantial findings regarding the project description, costs, and funding sources, among other things. (*Id*. at §§ 11200-11204.)

The Project here goes beyond keeping a street and converting it to pedestrian-only use. Instead, it completely removes a street from public use and converts it into a section of a pedestrian-only plaza. It makes no sense, then, for the City and Developer to argue that in a situation such as this that goes beyond the creation of a pedestrian mall and instead entirely removes a street, the City does not have to follow the Code's procedures for either a street vacation or a conversion to a pedestrian mall.

The City and Developer cite to a single court case in support of their novel reading that there is no vacation when a public street is converted into a pedestrian-only plaza. In *People v. Vallejos* (1967) 251 Cal.App.2d 414, an existing street was converted half into a highway off-ramp and half

into a drainage channel. (*Id*. at p. 419 ["Thus, what has happened to Choisser Street is that it remains part of the highway system, one half of it being used for traffic, the other half for drainage."].) The court found that neither half was not an abandonment of the vehicular highway use because "[d]rainage of water is an integral part of a highway system." (*Ibid*.) This situation is far removed from the facts at hand, where the City and Developer plan to completely shut down a stretch of vehicular road and convert it into a section of a pedestrian-only plaza with commercial outdoor dining (AR057685 AR058939, AR057832, AR057851, AR057863) part of which will be privately owned, abutting a private development.

In fact, the City and Developer have provided no authority whatsoever for the proposition that the City may convert a public street into a pedestrian-only plaza with outdoor dining without seeking a street vacation. (See 77 Ops. Cal. Atty. Gen. 94 [regarding the conversion of a road to a toll road and noting that the thoroughfare was not being abandoned because the public could still use the "thoroughfare"]; 87 Ops. Cal. Atty. Gen. 36 [finding there was no abandonment of streets because the streets at issue remained open for public use as streets].) FTC, on the other hand, has provided several cases in which public streets were converted to purposes other than public vehicular use, and those courts have consistently found that a street vacation was required. (See, e.g., *Citizens Against Gated Enclaves v. Whitley Heights Civic Assn.* (1994) 23 Cal.App.4th 812, 821; *Zack's, Inc. v. City of Sausalito* (2008) 165 Cal.App.4th 1163, 1170-1171, 1186-1187; *Ratchford v. County of Sonoma* (1972) 22 Cal.App.3d 1056; *Bowles v. Antonetti* (1966) 241 Cal.App.2d 283.) The City and Developer's argument that a street vacation would be required any time the City "expands a sidewalk or creates a bike lane, bus lane, or even an HOV lane" (Opp. Br., p. 98) ignores that the Streets and Highways Code and Vehicular Code already provide procedures for precisely these possibilities. (See, e.g., Veh. Code, § 21207 & Sts. & Hy. Code, §§ 891, 891.8 [governing creation of bicycle lanes]; Sts. & Hy. Code, §§ 149, 149.7, 162 [governing creation of dedicated lanes for buses

and other high occupancy vehicles on highways]; Veh. Code, § 21655.1, subd. (c) [regarding public transit agency duties for bus lanes].) Thus there is no basis for the City and Developer's hypothetical speculation as to what the City would be required to do in such a situation.

Indeed, it is the City's and Developer's position is unsupported and taken to its end would allow the City to convert every street and highway from vehicular use to use as a public plaza without following the required procedures and without making necessary findings. As such, the Court should reverse the trial court's finding that no street vacation is required.

IV. THE CITY AND DEVELOPER DELIBERATELY MISREPRESENT FIX THE CITY'S ARGUMENTS TO DISTRACT FROM THE ABSENCE OF OFF-SITE STUDY IN THE EARTHQUAKE FAULT ZONE

The City and Developer attempt to distract from the simple fact underlying FTC's Alquist-Priolo Act ("Alquist-Priolo") claim: there was *never* any investigation beyond the boundaries of the site in the direction where the State Mining and Geology Board ("State Board") estimates the Hollywood surface fault to be located. No amount of argument or citation to the record can alter that fact, especially as the underlying study clearly states as much. Nothing before the City ever *proved, as required,* that the Hollywood Fault is not located immediately off the site under Sunset Boulevard, yet the City approved construction immediately adjacent to the property line without this critical information, in violation of Alquist-Priolo and the State Board's implementing regulations.

The City and Developer do not contest that Alquist-Priolo applies to the Project, nor do they argue that the development is not a structure for human occupancy under the law. They do not challenge FTC's observation that the entire proposed structure shares one foundation, which is proposed to be constructed on the northern property line. Nor do they contest that the State Board's requirements for geologic studies include study outside the

site's boundaries. Indeed, the City and Developer *had the same interpretation as FTC* of the applicable policies of Alquist-Priolo: that in the absence of off-site investigation toward the northwest, the law prohibited construction of structures for human occupancy within 50 feet of the property line. (E.g., AR488, AR14145, AR14196, AR14214.) The EIR and Alquist-Priolo state that cities can impose *stricter*, but not weaker, standards than the state. (AR489.) By allowing the less restrictive mitigation of a reinforced foundation zone rather than a building setback, the City permitted the use of a *weaker* standard than required by Alquist-Priolo and the State Board regulations, thereby exceeding its discretion.

To be clear about the Developer's geologic investigation, it was not undertaken to establish the location of the Hollywood Fault, the purpose of this report was *not* to identify the location of the fault, but rather "to evaluate whether the active trace of the Hollywood Fault is located on the Project Site and within the footprint of the proposed structures." (AR482.) As the "iterative" review process unfolded, the Developer's consultant conceded that "our investigation was unable to unequivocally establish that the main Hollywood Fault trace is more than 50 feet from the northwest comer of the site." (AR14196.) The consultant further explained that the reinforced foundation zone was placed in the northwest corner *precisely* because "it has not been possible to unequivocally prove that the main trace of the Hollywood Fault is more than 50 feet from this site's northwest corner." (AR14124.) The record reveals that the reinforced foundation zone was deployed because of the recognition that the location of the fault is *unknown*, and is presumed to be within 50 feet of the northwest corner of the site. Absent off-site study, fault traces are presumed to be at the study/property boundary for public safety purposes. The required mitigation is avoidance – namely, a setback. Allowing the less restrictive mitigation of construction with enhanced reinforcement is not permitted. (AR 28298.)

The State Board's regulation makes clear that, "within earthquake fault zones delineated on maps officially issued by the State Geologist," (Cal. Code Regs., tit. 14, § 3600), as is the case for the project site, "the area within fifty (50) feet of such active faults shall be presumed to be underlain by active branches of that fault unless proven otherwise by an appropriate geologic investigation and report . . . [and] no such structures shall be permitted in this area," (*id.,* § 3603, subd. (a).) There was no appropriate geologic investigation and report off-site in the direction of the fault line beyond the property line.

The City and Developer claim that "the 50-foot rebuttable presumption . . . does not apply to the Project site because no part of the Project site is within 50 feet of an active fault." (Opp. Br., p. 101.) This statement materially misrepresents the record before the City. The record makes clear that the location of the fault on the state map is only an *estimate*. As RPI's own Surface Fault Investigation report stated, "It is possible . . . that the fault is located closer to the Site than indicated on the 2014 earthquake fault zone map." (AR002578-2579.) The EIR's maps of fault traces likewise demonstrate uncertainty in fault locations along with the possibility of multiple fault paths in the vicinity of the site, in locations that have not been fully explored. (AR479; see also AR483 [locations where study was conducted for project].) While the City and Developer argue that their studies showed the fault is not *under* the site, that argument dodges the issue. The 50-foot setback applies along the northwest boundary of the site because *no geologic investigation* was undertaken that proved that the fault is absent from that area, thereby failing to satisfy the prerequisite of the regulation and to rebut the mandated presumption of surface faulting in the surface fault rupture hazard zone.

The 50-foot setback from the property line reflects the precautionary nature of Alquist-Priolo, a law that recognizes the uncertainty inherent in the identification of the precise locations of faults and the unpredictable nature of ground rupture activity in the area around surface faults. The intent of Alquist-Priolo is "to provide citizens of the state with increased

safety and to minimize the loss of life during and immediately following earthquakes," by requiring local governments to prohibit development and structures across the trace of active faults. (Pub. Resources Code, § 2621.5.)

In fact, the City consistently articulated the policy requiring a 50-foot setback from faults and areas where the fault has not been proven absent: in the EIR for this project (AR488), in its analysis of the Alquist-Priolo issues in approval documents (AR059980), in technical reviews of this project (AR5143), and in EIRs for other projects (AR28050). Other counties and cities follow similar policies in mapped Alquist-Priolo zones. (AR28099-28100; AR28120-28121; AR28122.)

The City and Developer contend that the back and forth between the parties regarding the geologic studies provided sufficient evidence that project could be built in the area 50 feet from the site boundary, but nothing in that correspondence included any data from the area 50 feet off site. References to other unrelated and remote projects, which themselves may not have complied with Alquist-Priolo (and may have predated the issuance of the fault map in 2014), are not a justification to disregard the legal requirement that structures are not permitted within 50 feet of a fault trace, and that the absence of a fault must be *proven*, by an appropriate geologic study. Failure to provide a 50-foot setback in the absence of an off-site investigation puts the public at risk and is a significant abuse of the City's discretion.

V. THE CITY AND DEVELOPER WISH AWAY THE SUBDIVISION PROCESS AND ITS MANDATORY FINDINGS

The City and Developer attempt to avoid the plain language of the Hollywood Community Plan and its implications for the Project approval. The City and Developer first argue that the Plan's findings for an increase in density through a subdivision do not apply to the Project because it did

not actually increase density, claiming an inflated 278 unit by-right entitlement. As discussed at length in section III, *infra*, the Hollywood Community Plan does not permit R4 density (109 units/acre) anywhere in Hollywood (AR019747), and prohibits High Density (80 units/acre) outside of the demarcated Regional Center. (AR19752, 27459.) The claim that the Project's subdivision does not increase density over "the full residential, commercial, and industrial densities and intensities proposed by the Plan," is premised on an erroneous reading of the Plan that ignores its intention to concentrate residential density in the Regional Center.

The City and Developer also rely upon the Hollywood Community Plan statement that a density bonus "may be granted in the Low-Medium 1 or less restrictive *residential* categories." (Opp. Br., p. 107, citing AR42, emphasis added.) This policy does not include commercial properties, like the Project site, which is zoned C4. Moreover, even if the policy applied, it would not create an inconsistency in the Plan to require findings about adequacy of public services or the transportation system prior to granting a discretionary approval like a zone change or a subdivision. The Developer applied for a subdivision to facilitate the construction of a project that significantly increases both the density and intensity of use on the site. The purpose of the Plan's policy is to ensure that when discretionary applications are considered, the decision makers evaluate carefully the need for additional services prior to granting such requests. No such inquiry was undertaken for the Project.

The City and Developer also improperly dismiss the evidence in the record demonstrating inadequacy of public services. Based on an email from a Los Angeles Fire Department captain, the City and Developer disclaim the City's use of the National Fire Protection Association response time standards. (See AR2983 ["We strive to reach all EMS incidents within 5 minutes 90% of the time[.] Our goal is to reach all fires within 5:20 90% of the time[.]"].) The City and Developer disregard their own statements regarding the City's standard. The EIR is unequivocal about the LAFD's standard: "According to the LAFD, the response standard is five

minutes for 90 percent of fire incidence responses and 5:20 minutes for 90 percent of fire incidence responses." (AR00668; AR005630.) In its analysis of FTC's appeal, the City did not disclaim the applicability of "the LAFD response time standard of reaching the scene within five minutes 90% of the time." (AR26212.) Moreover, the LAFD has clearly articulated that the national NFPA 1710 response time standard sets the standard for its performance. (AJA598,AJA604-605.) Calling it "only an aspirational goal" (Opp. Br., p. 111) betrays all who call 911 and expect a timely response.

The City's response to FTC's appeal reveals the serious deficiency in the City's discussion of fire response times. While acknowledging that "the response standards distinguish between 5:00 minutes for *90 percent of emergency medical services* (EMS) and 5:20 minutes for *90 percent of fire incident responses*," the staff report proceeds to discuss *average* response times for these services—a measurement entirely unrelated to the stated standard. (AR26212 [emphasis added].) Because the City did not provide the proper analysis, the only analysis in the record was provided by FTC, who demonstrated that the stations that serve as first, second, and third in for the Project (Stations 41, 27, and 97) do not meet the response time standards 90 percent of the time, and in fact they are not even close. (AR029921-029922). Station 41 meets the response within the five-minute standard just 53 percent of the time. (AR029921.) Station 27 is at 63 percent, and station 97 is at 35 percent. (AR029921-029922.) ***Not one of the stations meets the performance standards 90 percent of the time, and even the average response time is below the acceptable performance standard.***[3]

[3] To illustrate the fallacy of reporting average times when the standard utilizes a 90 percent threshold, an example is appropriate. If the rule is that temperature cannot exceed 80 degrees, and temperatures are reported at 50, 64, 105, 110, 70, and 81, the *average* temperature would be 80 degrees, but the 80 degree threshold would have been exceeded on 50 percent of the instances.

There is *no* evidence in the record to demonstrate that emergency response services are currently performing up to the LAFD's standards. There is *no* evidence at all demonstrating that 90 percent of incidents are responded to within the 5:00 or 5:20 minute standards. And the decision makers were provided response time data that omitted a key component of response time (turn-out time) and thereby significantly *understated* actual average response times. The City never made the finding under the Hollywood Community Plan that fire services are adequate (because they cannot), and the record before it provides no basis for such a finding.

With respect to the other required finding for a density increase by subdivision in the Hollywood Community Plan, that "the local streets, major and secondary highways, freeways, and public transportation available in the area of the property involved, are adequate to serve the traffic generated," (AR19748) the City and Developer focus on what they contend is the minimal increase in traffic predicted to be generated by the Project compared to the traffic that current site uses may generate. (Opp. Br., p. 113.) This argument ignores the context of the required finding in the Hollywood Community Plan, which explains that "the full residential, commercial, and industrial densities and intensities proposed by the Plan are predicated upon the development of the designated major and secondary highways and freeways." (AR19748.) Accordingly, the City and Developer's focus exclusively on the additional traffic generated by the Project is misplaced. If it is only the incremental traffic that is considered, the system will die the death of a thousand cuts.

As the EIR's traffic analysis cited by the City and Developer reveals, the area in which the Project is located is already faced with crippling levels of congestion. Of the four intersections located in Los Angeles, three are predicted to operate at unacceptable "levels of service," in year 2018 with the Project. (AR4686.) And in the area immediately adjacent in West Hollywood, 8 of 11 intersections will operate at unacceptable levels. (AR4687.) At the only intersection at which the EIR identifies a significant impact from the Project, vehicle delays will increase up to 7 and a half

minutes (452 seconds) in the evening hours. (*Ibid*.) The closest intersection to the Project, Sunset Boulevard and Crescent Heights Boulevard, is operating at LOS F already. The City and Developer contend that this should not matter, because the only question is whether the system can accommodate "the traffic generated." If the system cannot accommodate the traffic that is *already* generated, how can it accommodate additional traffic?

The approval of a subdivision that increased density was not in compliance with the Hollywood Community Plan, because the City did not make, and *could not make*, the mandatory findings that sufficient public services exist to serve the project or that the roadways have the capacity to absorb the traffic generated by the project.

VI. THE APPROVAL OF THE VESTING TENTATIVE TRACT MAP MUST BE SET ASIDE DUE TO THE PROJECT'S INCONSISTENCY WITH THE GENERAL PLAN, ZONING, AND NON-DISCLOSURES

As the City and Developer recognize, the propriety of the Vesting Tentative Tract Map and its findings depend heavily upon the other issues raised by FTC in this appeal. The City and Developer argue at length regarding the City's ability to ignore the 1:1 floor-to-area ratio restriction imposed on the site in a past consistency determination. (Opp. Br., pp. 90-92, see also AR27113.) Again, the City and Developer are barking up the wrong tree. In order to approve the vesting tentative tract map, the City must conclude that a project is physically appropriate for the site on which it is proposed. When the D limitation was placed on the zoning for this site, the City Council specifically found that:

> The Permanent [Q] Qualified Conditions and D Conditions imposed by this action are necessary: to protect the best interests of, and to ensure a development more compatible with, the surrounding property, to secure an appropriate

> development in harmony with the General Plan; and to prevent or mitigate the potential adverse environmental effects on the recommended change. (AR27113; see also AR27109.)

The D limitation was thus imposed in recognition of the need to restrict development intensity beyond what was permissible in the zoning, just as anticipated in the EIR for the Hollywood Community Plan. (AR26978.) Because the Vesting Tentative Tract Map authorized a project at a 3:1 floor to area ratio, effectively terminating the D limitation, the City was required to consider whether the removal of the D limitation would result in a project that was physically appropriate for the site.

As FTC's Cross-Appellant's brief explained, the inadequate off-site fault study, and the density far in excess of permitted General Plan density likewise make the findings approving the Vesting Tentative Tract Map improper. The approval should be reversed.

CONCLUSION

The approval of the Project was premised on several fictions. The density bonus is based on a false reading of the General Plan allowing high density residential and unlimited height on this site. The layout and design of the Project and its "public plaza" ignore legal realities. There was no investigation immediately off site to determine whether potentially destructive surface faults traces exist, putting public safety at risk. Required proceedings and findings were not made. Along with the failure to make appropriate CEQA feasibility findings, the record here reflects a City determined at all costs to approve this Project, no matter the legal or factual impediments. The approvals should be set aside and reconsidered in light of the deficiencies identified by FTC.

DATED: October 31, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 8.204(c)(1)

I certify that, pursuant to Cal. App. Rule 8.204(c), the attached Cross-Appellant's Reply Brief is proportionately spaced, has a typeface of 13 points or more and contains 10,813 words, as determined by a computer word processor word count function.

DATED: October 31, 2017

Respectfully submitted,

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By: 

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Attorneys for Plaintiff and Cross-Appellant Fix the City, Inc.

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Re: *Fix the City, Inc. v. City of Los Angeles et al.*
2DCA No. B284093; L. A. S. C. Case Nos. BS166484, BS166525, BS166487, and BS166528

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 10940 Wilshire Boulevard Suite 2000, Los Angeles, California 90024.

On **October 31, 2017** I served the document described as **CROSS-APPELLANT'S REPLY BRIEF** on all appropriate parties in this action, as listed on the attached Service List, by the method stated.

☒ If U.S. Mail service is indicated, by placing this date for collection for mailing true copies in sealed envelopes, first-class postage prepaid, addressed to each person as indicated, pursuant to Code of Civil Procedure section 1013a(3). I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing contained in the affidavit.

☒ If Electronic Filing Service (EFS) is indicated, I electronically filed the document(s) with the Clerk of the Court by using the EFS/TrueFiling system as required by California Rules of Court, rule 8.70. Participants in the case who are registered EFS/TrueFiling users will be served by the EFS/TrueFiling system. Participants in the case who are not registered EFS/TrueFiling users will be served by mail or by other means permitted by the court rules.

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

Executed on **October 31, 2017**, at Los Angeles, California.

Mindy Lu

SERVICE LIST
Fix the City, Inc. v. City of Los Angeles et al.
2DCA No. B284093; L. A. S. C. Case Nos. BS166484, BS166525, BS166487, and BS166528

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