CASE NO. B284089

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION: FOUR

LOS ANGELES CONSERVANCY, a California non-profit corporation,
Petitioner and Respondent,

v.

CITY OF LOS ANGELES, CITY COUNCIL OF THE CITY OF LOS ANGELES, LOS ANGELES DEPARTMENT OF CITY PLANNING
Respondents and Appellants.

AG-SCH 8150 SUNSET BOULEVARD OWNER, L.P., a Delaware Limited Partnership, and ROES 1 through 5, Inclusive,
Real Parties in Interest and Appellants.

APPELLANTS' JOINT OPENING BRIEF

On Appeal From the Superior Court for the State of California,
County of Los Angeles, Case No. BS166487, Hon. Amy D. Hogue

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL Second APPELLATE DISTRICT, DIVISION 4	COURT OF APPEAL CASE NUMBER: B284089
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APPELLANT/ PETITIONER: AG-SCH 8150 Sunset Boulevard Owner L.P. RESPONDENT/ REAL PARTY IN INTEREST: Los Angeles Conservancy	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party *(name)*: AG-SCH 8150 Sunset Boulevard Owner L.P(Real Party)

2. a. [ ] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [X] Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest *(Explain):*
(1) AG-SCH 8150 Sun't Blvd. Parent Owner L.P	99% limited partner of AG-SCH 8150 Sunset Boulevard Owner L.P
(2) AGR VIII (A) 8150 Sunset, L.L.C	24% limited partner of AG-SCH 8150 Sunset Blvd. Parent Owner L.P
(3) 3. AGR VIII 8150 Sunset, L.L.C.	56% limited partner of AG-SCH 8150 Sunset Blvd. Parent Owner L.P
(4) AG Realty Fund VIII (A), L.P.	Sole Member of AGR VIII (A) 8150 Sunset, L.L.C
(5) AG Realty Fund VIII, L.P.	Sole Member of AGR VIII 8150 Sunset, L.L.C.

[X] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: August 21, 2017

Gordon E. Hart
(TYPE OR PRINT NAME)

Gordon E. Hart
(SIGNATURE OF APPELLANT OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2017]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
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Attachment 2

Counsel does not understand Rule 8.208 to require disclosure of the numerous investors in the listed funds (AG Realty Fund VIII, L.P. and AG Realty Fund VIII (A), L.P.) based on the language in subdivision (e)(1) that requires a list of parties with "an ownership interest of 10 percent or more in the *party*." (Italics added.) The funds are not parties. In addition, although subdivision (e)(2) requires disclosure of any person or entity that a "party reasonably believes the justices should consider," the exemptions to this requirement in subdivisions (A) through (C) suggest that the Court is not interested in knowing the identities of all fund investors. Counsel nevertheless is prepared to submit under seal a supplemental list of those investors if the Court believes that information is needed to evaluate disqualification or recusal.

TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL Second **APPELLATE DISTRICT, DIVISION** 4	COURT OF APPEAL CASE NUMBER: B284089
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: 215602 NAME: Shaye Diveley FIRM NAME: Meyers Nave Riback Silver & Wilson STREET ADDRESS: 707 Wilshire Blvd., 24th Floor CITY: Los Angeles STATE: CA ZIP CODE: 90017 TELEPHONE NO.: 213-626-2906 FAX NO.: 213-626-0215 E-MAIL ADDRESS: sdiveley@meyersnave.com ATTORNEY FOR (*name*): City of Los Angeles City Council of the City of Los Angeles, and Los Angeles Department of City Planning	SUPERIOR COURT CASE NUMBER: BS166487
APPELLANT/PETITIONER: City of Los Angeles, et al. RESPONDENT/ REAL PARTY IN INTEREST: Los Angeles Conservancy	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): City of Los Angeles City Council of the City of Los Angeles, and Los Angeles Department of City Planning

2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest *(Explain):*
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: August 21, 2017

Shaye Diveley
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF APPELLANT OR ATTORNEY)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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INTRODUCTION AND SUMMARY OF ARGUMENT[1]

The trial court in this case rejected all but one of multiple claims in four lawsuits challenging the approvals of Appellants/Respondents City of Los Angeles and City Council ("City") for the 8150 Sunset Boulevard Project ("Project"), a sustainably designed, mixed-use development. In its sole finding against the City, the trial court decided that the City failed to comply with the California Environmental Quality Act ("CEQA") when the City Council adopted findings rejecting the alternatives that would have preserved a historic resource on the site (the "preservation alternatives") on the grounds that those alternatives were infeasible.

CEQA does not compel public agencies to preserve historic resources. Rather, an agency may approve a project with significant environmental impacts (including impacts to historic resources), if it finds that "specific economic, legal, social, technological, or other considerations" make alternatives identified in the Environmental Impact Report ("EIR") infeasible.[2] (Pub. Res. Code, §21081, subd. (a)(3).) Here, the City Council made detailed findings that the preservation alternatives were infeasible because they did not achieve Project objectives designed to implement City planning policies. These findings were supported by substantial evidence in the record, including evidence that preservation alternatives were financially infeasible.

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[1] Appellants have coordinated on the preparation of a joint opening appellate brief for submission in this case and in *Fix the City, Inc. v. City of Los Angeles*, BS166484 (FTC), which involves the same project. More specifically, the claim at issue in this appeal was briefed and argued for petitioners in both cases exclusively by the Los Angeles Conservancy.

[2] The agency must also make findings of overriding considerations (Pub. Res. Code, § 21081, subd. (b)), which the City did in this case and which are not in dispute in this case.

In setting aside the City Council's findings, the trial court made four key errors:

- First, the trial court erred in concluding that a lead agency is not allowed to determine that an alternative is infeasible based on failure to satisfy project objectives. This conclusion is contrary to the express language of the CEQA statute as well as years of precedent, including that of the California Supreme Court. Rather than follow well-established law, the trial court created a new, more narrow test: a lead agency can reject an alternative as "unreasonable" if it fails to meet "basic" project objectives. This was an entirely new argument raised *sua sponte* by the trial court in violation of jurisdictional exhaustion requirements.
- Second, using this newly created test, the trial court erred by unilaterally determining which of the Project objectives listed in the EIR were "basic" and could be used to reject an alternative. This action by the trial court was a clear violation of an established principle in CEQA and land use planning case law—strongly rooted in the separation of powers doctrine—of deferring to a local agency's decisions about its planning priorities. That is indisputably the role of the elected decision-makers, and not the courts.
- Third, in compounding these earlier errors, the trial court determined that the City's grounds for rejecting the preservation alternatives were "non-basic" objectives. In so doing, the trial court opined that objectives involving beneficial social byproducts of the Project (such as aesthetic appeal and pedestrian experience) could not be used to reject an alternative. This opinion ignores the broad discretion

given to lead agencies by CEQA, as well as established precedent holding that such considerations *are* appropriate in an agency's evaluation of alternatives. It also disregarded the City's own general plan policies that focused on such considerations.

- Fourth and finally, the trial court misapplied the substantial evidence standard and went far beyond the limited judicial review authorized by CEQA. The trial court failed to give the City the required deference—or any deference—when weighing evidence and ignored the substantial evidence in the record supporting the City's rejection of the preservation alternatives as infeasible.

The trial court's decision setting aside the City's findings on alternatives is contrary to CEQA and should be reversed. Moreover, the unprecedented nature of this decision has serious consequences for every project approval under CEQA that requires an EIR. It deprives the elected officials of public agencies of their authority over their own land use policies and priorities at the final approval phase of the CEQA process. In this critical stage, CEQA vests significant discretion in the elected body of the lead agency to make the ultimate determination to approve the Project or an alternative based on the EIR and the City's objectives and other considerations. This Court should reverse the judgment of the trial court on this one point and uphold the Project approvals.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. Project Overview

The 8150 Sunset Project is a sustainably designed, mixed-use development comprised of 229 residential dwelling units (including 26 units set aside for Very Low Income households and 12 units set aside for

Workforce Income households), 65,000 square feet of commercial uses, and public spaces.

The Project will replace a commercial strip mall and large surface parking lot. The Project site is a storied location in Hollywood lore. From 1927 to 1959, it was the site of the Garden of Allah hotel, a complex of villas and gardens whose guests and long-term residents included Ronald Reagan, Humphrey Bogart, Ginger Rogers, and F. Scott Fitzgerald. (AR2135.) In 1959, Bart Lytton, the founder of a regional bank chain, purchased and demolished the hotel to make way for a new bank headquarters. (AR2142-43, 5869.) The Bank still stands, but both the building and associated structures have been altered over time, and some features were removed to make way for the current strip mall and surface parking lot. (AR450-51.)

The Project evolved during the CEQA process in response to concerns expressed by the community and decision-makers during a three-year administrative and environmental review process that fully vetted the Project and disclosed its impacts. Members of the public criticized the original proposal for its aesthetic quality, massing, lack of pedestrian amenities, above-ground parking structure and obstruction of views. Encouraged by the City, Respondent/Real Party in Interest AG-SCH 8150 Sunset Boulevard Owner, L.P. ("Real Party") developed a new, architecturally distinctive proposal, designed by architect Frank Gehry, that addressed community concerns and would be a better fit as the centerpiece for the area, but that could not be constructed to maintain the bank.

The City ultimately approved a Project that was smaller and had fewer and less-significant impacts on the environment than the original proposal, while providing green housing for the City's residents, generating jobs and bringing a landmark structure to the eastern gateway to the Sunset Strip. (AR186.) The City's approval of the Project also fulfilled numerous

stated goals of the City's General Plan and Design Guidelines, including goals to: "upgrad[e] the quality of development and improv[e] the quality of the public realm" (General Plan Objective 5.5, AR561); provide "pathways and connections that may be improved to serve as neighborhood landscape and recreation amenities" (General Plan Policy 6.4.8.a & b, AR562); "implement streetscape amenities that enhance pedestrian activity" (General Plan Objective 3.16, AR560); "[s]upport the development of public and private recreation . . . by incorporating pedestrian-oriented plazas, benches, [and] other streetscape amenities" into new developments (General Plan Policy 3.9.8, AR560); and "[e]mploy High Quality Architecture to Define the Character of Commercial Districts" (City Design Guidelines Objective 2, AR570-72). This process of creating a better project in response to public comments by reducing environmental impacts and ensuring achievement of key project objectives is exactly how the CEQA administrative review process is supposed to work.

II. Administrative Proceedings

A. Original Proposal

Real Party submitted a Master Land Use Permit Application for the Project to the City on August 19, 2013 (AR55695-756), and the City conducted a scoping meeting to collect public input on October 2, 2013 (AR55905). At this early stage, the Project consisted of two towers (one 16-stories and the other 9-stories), which would hold 249 residential units, approximately 110,000 square feet of commercial and restaurant space, and open spaces. (AR55904-05.) The towers would sit atop a podium structure that would house commercial and retail uses on three floors, two of which were aboveground. (AR55904-05, 259.)

Real Party designed the Project to qualify as an Environmental Leadership Development Project ("ELDP"). (See Pub. Res. Code,

§ 21178.) To qualify for this program, the proposal had to offer: an investment of at least $100 million within the state; jobs paying the prevailing wage; transportation efficiency at least 10% better than comparable projects; and no net increase in greenhouse gas ("GHG") emissions, as certified by the California Air Resources Board. (Pub. Res. Code, §§ 21180(b), 21183; AR56418-55.) On April 8, 2014, Governor Jerry Brown determined the Project satisfied the ELDP criteria on April 8, 2014, and certified the proposal as a development that would offer "new, cutting-edge environmental benefits." (Pub. Res. Code, § 21178(c); AR56447-49, 56443.)

The City undertook environmental review of the Project and, on November 20, 2014, circulated the DEIR for public review. As part of the DEIR, City staff and their consultants developed 15 objectives for the Project, which ranged from providing affordable housing and increasing rental stock close to jobs, public transit, shops, restaurants and entertainment uses, to revitalizing the site by improving the visual character through high quality architectural design and enhanced pedestrian activity and neighborhood street life. (AR264-65.)

The DEIR recognized that under historic preservation guidelines, the Bank might be considered a local historic resource, although it had not been officially designated at the time of the Project approvals. Accordingly, the DEIR concluded that removal of the Bank would constitute a significant environmental impact under CEQA. (AR470.) The DEIR considered eight alternatives to the Project, including three alternatives (Alternatives 5, 6, and 7) that could preserve the Bank. Based upon the information available at the time, the DEIR concluded that the preservation alternatives were feasible and environmentally superior to the proposed Project, with Alternative 6 identified as the environmentally superior alternative, even though it did not fully satisfy all Project objectives. (AR206-12.) The

DEIR also concluded that the proposed Project and all alternatives (except for the no project alternative) would have significant construction vibration, construction-related traffic, and increased operational traffic impacts and that alternatives that did not preserve the Bank would have significant impacts on historic resources. (AR205, 214-50.)

B. Revised Project

The City received 975 comment letters on the DEIR, many of which were critical of the design. (AR4638.) Specifically, the City received comments that the overall massing and concept of the Project and several alternatives would obstruct views, would not be pedestrian-friendly and would not enhance the neighborhood. (AR4644.) There were also concerns about the air quality and visual impacts of an above ground parking structure. In response to this criticism of the original building design and its perceived impacts, Real Party proposed a new design by architect Frank Gehry (Alternative 9, or the "Enhanced View Corridor and Additional Underground Parking Alternative"). (AR4638, 4644.)

Alternative 9 proposed the development of approximately 65,000 square feet of retail and commercial uses, including a 24,811 square-foot organic grocery store, 23,158 square feet of restaurant uses, 11,937 square feet of traditional community-serving retail uses and a 5,094 square-foot walk-in bank, and provided additional underground parking beneath the current site of the Bank. (AR57684-85.) The Gehry design: enhanced the pedestrian-serving public spaces by creating transparent retail storefronts along Sunset and view corridors that connect the Project's open spaces and retail uses to the main roads; preserved views from the Hollywood Hills by incorporating an approximately 150-foot-wide, open north-south oriented view corridor between the taller east and west building elements; and provided a 27,000-square-foot publicly accessible central plaza. (AR57683-85, 57730.) Despite considering multiple design options that

would preserve the Bank, Gehry was unable to create an assembly of buildings that would simultaneously preserve the Bank and invite pedestrian activity through a vibrant urban development with high quality architecture, preserve views, and replace aboveground parking with additional underground parking. (AR57731.)

Although the addition of Alternative 9 did not mandate recirculation of the DEIR, the City decided to recirculate portions to solicit public input and ensure better-informed decision-making. (AR4638.) The Recirculated DEIR (RP-DEIR) was circulated for a 61-day public review from September 10, 2015, through November 9, 2015. (AR5320.)

C. Project Approvals

The City issued the Final EIR ("FEIR") on May 13, 2016. (AR5311-8595, 61380.) On May 24, 2016, the Deputy Advisory Agency and Hearing Officer held a public hearing on the approvals for the Project and recommended approval of the vesting tentative tract map. (AR14792-927; 58477-80.) On June 23, 2016, the Advisory Agency certified the EIR for the Project and approved the vesting tentative tract map. (AR61380.) Several individuals and organizations appealed the Advisory Agency's determinations to the City Planning Commission. (AR59438-600.) The Planning Commission held a public hearing on July 28, 2016, and voted unanimously to confirm certification of the EIR, adopt the Project approvals and related findings, and deny the appeals, adding a condition that the Project include an additional 4 percent affordable housing ("workforce housing") units on top of the 11 percent already incorporated into the Project. (AR5-6, 8, 62040-301.)

Many of the same parties then filed appeals of the Planning Commission determinations to the City Council. (AR59438-600, 62952-3131.) The City Council's Planning and Land Use Management ("PLUM") Committee held an appeal hearing on October 25, 2016. (AR15162-254.)

The PLUM Committee unanimously recommended that the City Council deny the appeals, adopt the findings of the Planning Commission and approve the Project as modified to reduce the residential unit count from 249 to 229 and lower the height of the tallest tower from 234 feet to 178 feet. (AR15240-50, 27650-51.) In doing so, the PLUM Committee found that, pursuant to Public Resource Code Section 21081, subd. (a)(3), that "specific economic, legal, social, technological, or other considerations make infeasible" the preservation alternatives identified in the DEIR. (AR27793.) Specifically, the City concluded the following:

> The record includes numerous public comments raising concerns about the overall massing and design concept of the original project and its alternatives on the grounds that it would not enhance the quality of the neighborhood, would be visually unappealing, would obstruct views, would not be pedestrian-friendly. . . . [T]he three bank preservation alternatives would result in a design that would concentrate development of the remaining project site and would create a large and flat monolithic design that would not allow for views through the project site, which were a primary concern from the public. Moreover, they would result in a disjointed design to sidewalks, project accessibility and would not be as visually appealing or pedestrian friendly compared to Alternative 9.

(AR27794.) The City also found that the preservation alternatives would not achieve the following Project objectives:

- Provide an attractive retail face along street frontages;
- Redevelop and revitalize an aging, and underutilized commercial site and surface parking lot with a more efficient and economically viable mix of residential and commercial uses;
- Build upon the existing vitality and diversity of uses in Hollywood by providing a vibrant urban living development along a major arterial and transit corridor;

- Provide high-quality commercial uses to serve residents of the westernmost area of Hollywood in a manner that contributes to a synergy of uses and enhances the character of the area;
- Create a development that complements and improves the visual character of the westernmost area of Hollywood and promotes quality living spaces that effectively connect with the surrounding urban environment through high quality architectural design and detail; and
- Enhance pedestrian activity and neighborhood commercial street life in the westernmost area of Hollywood.

(AR27280-1, 27826.) The PLUM Committee recommended approval of Alternative 9 because it addressed the concerns of the community and achieved the Project Objectives listed above, despite the fact it would not preserve the Bank:

> Alternative 9 would not be feasible if it incorporated a preserved bank building. The Lead Agency acknowledges the significant and unavoidable impact incurred from demolition of the Bank, however, Alternative 9 achieves a design that is significantly more accessible to the City in its provision of publicly accessible open space, affordable housing, green building, and iconic architecture that will significantly transform Sunset Boulevard, and which will contribute to the City's- and Hollywood's- identity as a destination City for residents and tourists alike.

(AR 27819.) On November 1, 2016, the City Council adopted the PLUM Committee's recommendations and findings, and unanimously approved the modified Project. The City then posted the Letter of Determination for the Project approvals. (AR188-89.)

III. Trial Court Proceedings

On or before December 1, 2016, four different petitioners filed separate cases challenging the Project approvals. These cases were: *Los Angeles Conservancy v. City of Los Angeles*, Case No. BS166487; *Fix the City, Inc. v. City of Los Angeles*, Case No. BS166484; *JDR Crescent v. City of Los Angeles*, Case No. BS166525; and *Manners v. City of Los Angeles*, Case No. BS166528. The trial court ordered the four cases related (AJA082), and the parties agreed to coordinate and consolidate their arguments as much as possible. The City and Real Party filed one joint, consolidated brief in response to all of the petitioners' claims.

The trial court heard oral argument on April 19-20, 2017, and issued one Final Order Granting Petition for Writ of Mandate as to Rejection of Preservation Alternatives and otherwise Denying Petitions for Writ of Mandate on August 25, 2017, applicable to all four cases. The trial court rejected 24 allegations of noncompliance with law, including all challenges against the EIR. The decision found for certain petitioners on only one claim, granting narrow relief on the same limited allegations that the City's findings supporting its rejection of preservation alternatives were not supported by substantial evidence. (AJA332.)

With respect to the historic preservation argument, the trial court concluded that the City's findings rejecting the preservation alternatives did not comply with CEQA and were not supported by substantial evidence. Specifically, the trial court made the following conclusions:

- CEQA does not allow a lead agency to determine an alternative is infeasible based on failure to satisfy project objectives. Rather, the trial court concluded a lead agency can reject an alternative as "unreasonable" if it fails to meet "basic" project objectives. (AJA349-58.)

- The City improperly relied on "non-basic" objectives for rejecting the preservation alternatives. (AJA355-56.)
- The City's aesthetic considerations were not social or policy considerations justifying the rejection of the two preservation alternatives. (AJA363-64.)
- The City's findings of infeasibility were based on aesthetic concerns that were not supported by substantial evidence. (AJA364-65.)
- The City's pedestrian traffic considerations were not social or policy considerations justifying the rejection of the two preservation alternatives. (AJA365-66.)
- There was not substantial evidence to support the City's rejection of the preservation alternatives based on pedestrian traffic concerns. (AJA366-67.)
- There was not substantial evidence to support the City's rejection of the preservation alternatives based on reduced profitability and financial infeasibility. (AJA368-71.)

Based on these conclusions, the court granted the petition of Petitioner Los Angeles Conservancy ("LAC"), granted in part and denied in part the petition of Petitioner Fix the City ("FTC"), and denied the petition of Petitioners JDR Crescent, LLC and IGI Crescent, LLC. The case filed by Petitioner Suzanne Manners is still awaiting a final judgment.

STATEMENT OF APPEALABILITY

The trial court entered judgment in this case on July 21, 2017. On July 26, 2017, the City and Real Party each filed a Notice of Appeal, seeking review only of the grant of the petitions for writ of mandate. The Judgment appealed from is final.

STANDARD AND SCOPE OF REVIEW

This case challenges the City's broad discretion to make a fundamental policy decision to reject alternatives as infeasible, assess the financial and social feasibility of alternatives based on the entirety of the record, and approve a Project that achieves the City's objectives and addresses concerns of the electorate. The standard of review counsels deference to the separation of powers and recognition of the expertise of the agency acting within its scope of authority.

In a case under CEQA, when a petitioner challenges an agency's findings for lack of evidentiary support, both the trial court and appellate court review the agency's record to determine whether substantial evidence supports the agency's decisions. (*Poet, LLC v. State Air Resources Bd.* (2017) 12 Cal.App.5th 52, 63.) "[I]n that sense appellate judicial review under CEQA is de novo." (*Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427.) Regardless of the outcome before the trial court, the petitioner must establish, at every stage in the litigation, that "the determination or decision is not supported by substantial evidence." (Pub. Res. Code, § 21168.5; *Center for Biological Diversity v. Dep't of Forestry & Fire Prot.* (2014) 232 Cal.App.4th 931, 941 [*CBD*].) Appellee thus has the burden of proof. (Evid. Code, § 664; *Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 Cal.App.4th 911, 918-919; *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 530.) To meet this burden, it must present the evidence supporting the agency's decision and show why it is lacking. (*Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1064.)

In reviewing whether an agency's factual determinations are supported by substantial evidence, courts apply "a deferential standard that is satisfied if 'the record contains relevant information that a reasonable

mind might accept as sufficient to support the conclusion reached.'" (*CBD, supra*, 232 Cal.App.4th at p. 941, quoting *Great Oaks Water Co. v. Santa Clara Vall. Water Dist.* (2009) 170 Cal.App.4th 956, 968 [*Great Oaks Water Co.*].) The opinion of an expert constitutes substantial evidence that supports the findings of an administrative agency. (Pub. Res. Code, § 21082.2, subd. (c) ("Substantial evidence shall include…expert opinion supported by facts."); Cal. Code of Regs., tit. 14 ["Guidelines"], § 15384, subd. (b); *Lewis v. Seventeenth Dist. Agricultural Assn.* (1985) 165 Cal.App.3d 823, 831; *Coastal Southwest Dev. Corp. v. Cal. Coastal Zone Conservation Com*. (1976) 55 Cal.App.3d 525, 532.) The issue for the appellate court is not whether substantial evidence supports any of the *challengers'* assertions, but whether substantial evidence supports the *lead agency's* decisions. (*Laurel Heights Improvement Assn. v. Regents of Uni. of Cal.* (1988) 47 Cal.3d 376, 412-13 [*Laurel Heights I*].) "[A]dministrative determinations are presumed correct" and the appellate court must "indulge all reasonable inferences from the evidence supporting those determinations." (*CBD, supra*, 232 Cal.App.4th at p. 941.) In addition, "[a] court may not set aside an agency's [decision] on the ground that an opposite conclusion would have been equally or more reasonable." (*Laurel Heights I, supra,* 47 Cal.3d at p. 393.) This deferential standard of review stems from the fact that the agency has the discretion to resolve questions of fact and make policy decisions. (See *Cal. Native Plant Soc'y v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 984-985 [*CNPS*].)

Regarding the substantive law applicable to this case, CEQA is undeniably "concerned with the preservation of historic resources." (*Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 183 fn.10; Pub. Res. Code, §§ 21001, subd. (b), 21084, subd. (e), 21084.1.) At issue in this case, however, is the feasibility of preservation alternatives, which "must be evaluated within the context of the proposed project" by

the final administrative decision-maker (*Sustainability, Parks, Recycling & Wildlife Defense Fund v. San Francisco Bay Conservation & Development Com.* (2014) 226 Cal.App.4th 905, 918 [*SPRAWLDF*]) and with reasonable doubts resolved "'in favor of the administrative findings and decision.'" (*Citizens of Goleta Vall. v. Bd. of Supervisors* (1988) 197 Cal.App.3d 1167, 1177 [*Goleta*].) With respect to the lead agency's evaluation and rejecting of alternatives, "[a]bsent legal error, the City's infeasibility findings are entitled to great deference and are presumed correct." (*Town of Atherton v. Cal. High-Speed Rail Authority* (2014) 228 Cal.App.4th 314, 353 [*Atherton*]; *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1508 [*Napa*] ("recognizing that the ultimate decision of…feasibility rest[s] . . . with the agency deciding whether to allow the project to go forward notwithstanding its effects on the environment").)

ARGUMENT

I. The Feasibility Determination For Alternatives Under CEQA

CEQA requires a lead agency to refrain from approving a project with a significant environmental impact if there is a feasible alternative that could substantially lessen or avoid that impact. (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134; Pub. Res. Code, §§ 21002, 21081.) To effectuate this mandate, CEQA requires the identification of alternatives to the Project early in the environmental review process. (See, e.g., Pub. Res. Code, §§ 21002, 21003.1.) The EIR must list alternatives that the decision-maker can adopt at the project approval stage if such alternatives are deemed feasible. (Pub. Res. Code, §§ 21002, 21002.1, 21003, subd. (c), 21100, subd. (b)(4).) However, CEQA does not require that the EIR make a determination of whether those alternatives are actually feasible—the lead agency determines this when it

makes its decision to approve the project and adopt findings. (Pub. Resource Code, § 21081(a); Guidelines, § 15091, subd. (a)(3).)

Thus, there is no requirement that the lead agency adopt the alternatives in the EIR. Rather, Public Resources Code Section 21081, subd. (a)(3), invests the lead agency's governing body with the authority, before a project is approved, to determine whether an alternative is actually feasible by requiring the agency to find that "[s]pecific economic, legal, social, technological, or other considerations . . . make infeasible the mitigation measures or alternatives identified in the [EIR]." (Pub. Res. Code, § 21081, subd. (a)(3); Guidelines § 15091, subd. (a)(3).) This finding must be based on "substantial evidence in the record." (Pub. Res. Code, § 21081.5.) As explained in *California Native Plant Society,* this requirement creates a two-step process under which the lead agency evaluates feasibility of alternatives:

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

(*CNPS, supra,* 177 Cal.App.4th 957 at p. 981; see also Guidelines, § 15091, subd. (a)(3); *San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1, 18 [*San Diego Citizenry*]; *Mira Mar Mobile Cmty. v. City of Oceanside* (2004) 119 Cal.App.4th 477, 489.)

Accordingly, CEQA anticipates that the elected decision-makers (not the staff or consultants that prepare the EIR) will make the final

determination of what alternatives are feasible based on the evaluation of project objectives and other considerations to the satisfaction of those elected officials. (See *Napa, supra*, 121 Cal.App.4th at p. 1508 ("recognizing that the ultimate decision of…feasibility rest[s] not with the drafters of the EIR, but with the agency. . .").) Conclusions in the EIR regarding feasibility and project objectives are not binding on the agency decision-maker. Rather, the elected agency decision-makers can take into account "[b]roader considerations of policy" involving social or other considerations, or compliance with project objectives when evaluating feasibility questions. (*CNPS, supra*, 177 Cal.App.4th at p. 1000.)

II. The City's Findings that the Preservation Alternatives Were Infeasible Fully Complied with CEQA

On its own volition (see, *infra*, Section II.C), the trial court decided that CEQA does not allow the lead agency's infeasibility determination under section 21081(a)(3) to be based on an alternative's failure to meet project objectives. (AJA351-52.) Instead, the trial court created its own test that an agency can reject an alternative as "*unreasonable* (as opposed to *infeasible*)" if the alternative fails to achieve the project's specified "underlying fundamental purpose" or "basic project objectives." (AJA355, 358.)

This new interpretation of CEQA was both inconsistent with established law and was never raised during the administrative proceedings, and so the City could not have identified which of the 15 Project objectives were "basic" project objectives. The trial court made this determination for the City and decided that, in this case, the only "basic" objectives were the developer's economic goals. The court held that the objectives the City relied on (which involved, among other things, fulfillment of General Plan policies related to architectural quality, aesthetic appeal and pedestrian experience) could not be used to reject an alternative under Public

Resources Code Section 21081. (AJA359.) This interpretation of CEQA has no basis in the statute or case law, and should be rejected.

A. Failure to Meet Most of a Project's Objectives Can Provide Grounds for a Finding of Infeasibility

Despite the City's careful application of Public Resources Code Section 21081, subd. (a)(3), in finding the preservation alternatives to be infeasible for failing to achieve Project objectives, the trial court concluded "[t]he notion that failure to meet objectives renders an alternative 'infeasible' is not supported by any language in CEQA or the Guidelines." (AJA352.) The trial court determined that failure to meet project objectives can never be used by the decision-maker under Section 21081 to determine infeasibility of an alternative. (AJA361.)

This interpretation runs directly contrary to the California Supreme Court's decision in *In re Bay-Delta* (2008) 43 Cal.4th 1143, which recognized that "*feasibility is strongly linked to achievement of . . . the primary program objectives*." (*Id.* at p. 1165, italics added.) Applying this concept, the Supreme Court held that the lead agency "properly exercised its discretion" in not considering an alternative "after concluding that such an alternative would not achieve the [program's] fundamental purpose and thus *was not feasible.*" (*Id.* at p. 1166, italics added; see also *CNPS, supra*, 177 Cal.App.4th at p. 1001 ("[A]n alternative 'may be found infeasible on the ground it is inconsistent with the project objectives as long as the finding is supported by substantial evidence in the record'," quoting 2 Kostka & Zischke, *Practice Under the Cal. Environmental Quality Act* (Cont.Ed.Bar 2014) § 17.30, p. 825).) Likewise, in *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383 [*AIR*], the court applied these principles in upholding a lead agency's rejection of an environmentally superior reduced-herd-size alternative to a proposed dairy because the reduced alternative would produce less milk and producing

milk was a fundamental project objective. (*Id.* at pp. 1399-40 (finding "economic feasibility is implicit in the project objective").)

Rejecting this line of case law, the trial court decision relies on its own novel construction of Guidelines § 15126.6 to conclude that a project alternative could be deemed *unreasonable* for failure to meet project objectives, but that same failure could not be used as a basis to classify the project alternative as *infeasible*. (AJA358.) Specifically, the decision noted that "failure to meet most of the basic project objectives" and "infeasibility" are distinct reasons under Guidelines § 15126.6, subd. (c) for determining that an alternative is unreasonable. (AJA353.) The court further noted that failure to meet project objectives is not one of the "factors that may be taken into account when addressing the feasibility of alternatives" described under subdivision (f)(1) of the Guideline. (AJA352.) Importantly, however, Guidelines § 15126.6 provides guidance to lead agencies on the discussion and range of alternatives at the EIR stage, not the final approval and findings stage. The trial court decision acknowledges this, but assumes the feasibility standard would be the same at both stages, without citing authority. (AJA353.) They are not the same—only the ultimate decision-maker has the authority and discretion to determine whether an alternative is actually feasible. (See *CNPS*, *supra*, 177 Cal.App.4th at p. 1001 (approving lead agency's infeasibility findings for master trail plan alternative that would avoid impacts to special-status plants "based on policy considerations, particularly the City's interest in promoting transportation alternatives as well as access to its open space for persons with disabilities").) Moreover, even if Guidelines § 15126.6 would be relevant to the lead agency's ultimate findings, the plain language does not establish an exclusive list of considerations.

Indeed, the trial court acknowledged (AJA369) that existing case law has uniformly recognized that "'[t]he feasibility … of alternatives must

be evaluated within the context of the proposed project,'" meaning that agencies must take the project objectives into account when evaluating feasibility. (*SPRAWLDF, supra*, 226 Cal.App.4th at p. 918, quoting *Center For Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 883.) The analysis of an alternative's consistency with the project objectives in turn takes into account the proposed project itself and uses the proposed project as a benchmark for evaluating alternatives. (*Ibid.*; see also *San Diego Citizenry*, *supra*, 219 Cal.App.4th at p. 18 (lead agency within its discretion to find that none of the project alternatives "would achieve the core objectives *to the same extent as the Project*," italics added).)

Furthermore, even if Guidelines § 15126.6 were applicable to the findings stage and project objectives cannot be used to determine feasibility, the City's findings and the substantial evidence in the record would still support the rejection of the preservation alternatives. Guidelines § 15126.6, subd. (f)(1), allows for alternatives to be found infeasible based on "economic viability, . . . general plan consistency, [and] other plans or regulatory limitations." These are same considerations applied by the City when it determined the preservation alternatives failed to meet the Project objectives. (See, *infra*, Sections II, IV.B.)

B. The Lead Agency, When Approving the Project and Making CEQA Findings, Determines What Are the Basic Project Objectives

Compounding its error in restricting the lead agency's ability to evaluate a project alternative based on project objectives, the trial court determined that only "basic" project objectives can be used to reject an alternative as unreasonable. (AJA358.) In doing so, the trial court decision did not provide the City Council any deference in determining which

objectives were of primary importance for the City *when it approved the Project*. This, too, has no support under the law.

As the trial court observed, "Guidelines § 15124(b) directs that an EIR *should* include a 'statement of the objectives sought by the proposed project' and that the 'statement of objectives *should* include the underlying purpose of the project.'" (AJA347, fn. 4, italics added.) The plain language of Guidelines § 15124 does not, however, require that a lead agency elevate one or more objectives over all others. (See *North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647, 668 (recognizing that reliance on a single or limited set of objectives can result in an impermissibly narrow definition of the project purpose).)

Even more important, nothing in the Guidelines nor CEQA limits the ultimate decision-maker (i.e., the City Council) in making its feasibility determinations to the relative importance such objectives are assigned in the EIR. CEQA is not so rigid. Rather, just as the agency decision-maker makes the ultimate decision as to feasibility of alternatives (see *CNPS, supra,* 177 Cal.App.4th at p. 981), it is the duty of the agency decision-maker to place the appropriate emphasis on what objectives should be achieved with respect to the project and evaluate the project and the alternatives based on its independent review. (*Id.* at p. 991-92 (recognizing that "[r]anking the relative importance of the various objectives in the overall context of the project [is] a policy decision entrusted to the [public agency]" which may determine in its findings document that some objectives are more important than others and on that basis reject alternatives analyzed as potentially feasible in the EIR).) For example, in *California Oak Found. v. Regents of University of California* (2010) 188 Cal.App.4th 227, the court upheld the university's rejection of each of five fully analyzed project alternatives after the university concluded "none could feasibly attain most of the … Project's objectives." (*Id.* at p. 276; see

also *id.* at p. 285.) The court emphasized that "CEQA does not restrict an agency's discretion to identify and pursue a particular project designed to meet a particular set of objectives." (*Id.* at pp. 276-77.)

The trial court determined that the City failed to meet its duties under CEQA to identify "the underlying purpose of the project" and then unilaterally winnowed down the list of Project objectives from the EIR to a court-determined subset of two objectives (out of 15) that the court deemed "basic project objectives." (AJA362.) According to the trial court, "beneficial social byproducts of the project," including "revitalization, aesthetic appeal, increased jobs, increased affordable housing, [and] promotion of public transportation," cannot be used to reject an alternative. (AJA355.) In doing so, the decision misinterpreted CEQA to require the City to expressly identify in the EIR the basic project objective(s) and improperly usurped the role of the lead agency to determine for itself which of the 15 Project objectives constituted the basic project objectives.

The trial court's underlying premise—that the stated objectives of a project analyzed in an EIR "should be limited to the information necessary to evaluate the project's *impacts* on the environment"—has no basis in law. (AJA355.) CEQA is not so limited. (See, e.g., *California Oak Found., supra*, 118 Cal.App.4th at p. 272 (upholding the university's rejection of alternatives because they did not fully meet a set of objectives for the new stadium including "to promote and inspire relationships vital to the health of the University" and "to create extraordinary new spaces in the southeast campus").)

The court's (and petitioner's) contention that failure to meet the City's aesthetic and visual objectives could not be the basis for rejecting alternatives because the City was not required to analyze visual impacts for a project in a transit priority area under Public Resources Code Section 21099, subd. (d)(1), also misses the point. Even if CEQA does not *require*

the City to evaluate aesthetic impacts, the City has a right under state planning laws, and under its general police power, to ensure that aesthetic and visual considerations are incorporated into its planning decisions. (See, e.g., *Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal.4th 1006, 1023 ("[P]romotion of scenic and aesthetic objectives within the scope of the police power" are "unquestionably legitimate government purposes"); Govt. Code, § 65302.4 (providing that a general plan may "express community intentions regarding urban form and design").)

The City Council was legally justified in rejecting the preservation alternatives on the basis of its determination that, from a public policy standpoint, the preservation alternatives failed to achieve what the *City Council* determined were the primary objectives of the Project. Indeed, as the City explained to the trial court, "oftentimes the developer may have an economic interest or motivation to build a project; however, the City may have certain political and policy interests that are equally as important as that economic objective." (DAY 1 TRANS. at p. 25:25-28.) The trial court's decision unreasonably restricted the City Council's discretion to considering only the developer's economic interests. This "result[ed], effectively, in an [improper] elevation of the developer's objectives as exerting primacy over major policy considerations that a city may have in connection with the approval of a project or political implications in City Council being able to respond to concerns by their constituents on some very fundamental issues related to a project." (*Id.* at p. 26:9-17.) The City Council based its rejection of the preservation alternatives on matters of importance to the City and in so doing complied with the requirements of CEQA. The trial court decision should be overturned on this point.

C. The Trial Court's Decision Improperly Relied on a Legal Argument Not Raised by Petitioner in its Papers or Exhausted in the Administrative Proceedings

Even if the trial court's novel legal interpretation of CEQA's feasibility requirements had merit, its reliance on that interpretation is further improper because the argument was not raised by any petitioner or anyone else during the administrative proceedings or the litigation.

Exhaustion of administrative remedies is a "jurisdictional prerequisite, not a matter of judicial discretion," that bars courts from deciding issues not raised during the administrative review process. (*Cal. Aviation Council v. Cnty. of Amador* (1988) 200 Cal.App.3d 337, 341.) CEQA expressly provides that "[a]n action or proceeding shall not be brought pursuant to Section 21167 unless the alleged grounds for noncompliance . . . were presented to the public agency orally or in writing by any person during the public comment period . . . or prior to the close of the public hearing on the project . . . ." (Pub. Res. Code, § 21177, subd. (a).) As interpreted by California courts, this provision allows public agencies an opportunity to consider and respond to objections, correct errors, and decide matters within their area of expertise before litigation ensues. (*Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1138 ("'The essence of the exhaustion doctrine is the public agency's opportunity to receive and respond to articulated factual issues and legal theories *before* its actions are subject to judicial review.' [Citation.]").) Courts have also interpreted the provision to narrowly restrict jurisdiction to the "exact issue[s]" presented by interested parties during the administrative review process. (*Mani Bros. Real Estate Grp. v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1394.) Significantly for this case, the exhaustion doctrine applies equally to factual and legal arguments that an agency failed to comply with CEQA. (*Porterville Citizens for*

Responsible Hillside Dev. v. City of Porterville (2007) 157 Cal.App.4th 885, 910 (explaining that an agency should have opportunity to respond to "factual issues *and legal theories* before its actions are subject to judicial review," italics added).)[3]

Here, Petitioners only challenged the City's infeasibility findings as lacking evidentiary support. (See AJA114.) However, the trial court broadened the inquiry to "whether, *as a matter of law*, the City's findings supporting its rejection of preservation alternatives complied with CEQA." (AJA349, italics added; AJA360.) Petitioner did not present this or any other questions of law to the Court The administrative record shows that no party argued, or even implied, during the administrative process that the City improperly failed to identify "basic project objectives" or that the criterion used to determine that the preservation alternatives were infeasible—failure to meet most of the basic Project objectives—was inconsistent with CEQA.

Instead, these arguments were made for the first time by the trial court at the hearing on the merits and in the Order. This sequence of events deprived the City of its jurisdictional entitlement to consider and act on these arguments in the first instance. The City and Real Party respectfully ask that the Court reject these arguments on this additional ground.

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[3] Although Appellants did not raise exhaustion before the trial court, the argument is not waived because the issues noted above were not briefed and appeared for the first time in the trial court's order. Petitioners never argued that the City failed to identify basic project objectives, nor did they challenge the legality of the City's criteria for rejecting the preservation alternatives, in their trial court briefs. Because exhaustion is a question of law reviewed *de novo* on appeal, appellants were not required to object to the trial court's order after it was issued to preserve the issue for appeal. (*Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 251-52 (holding that exhaustion argument is not waived where issue appeared for first time in statement of decision).)

III. The City's Finding that the Preservation Alternatives Would Not Meet Project Objectives Is Supported By Substantial Evidence

The trial court decision concluded that even if the City could reject the preservation alternatives for failure to meet Project objectives, the City's findings were not supported by substantial evidence and improperly relied on the benefits of the proposed Project in comparison to the preservation alternatives. (AJA359-60.) As explained below, the decision failed to apply the proper level of deference to the City in evaluating its findings and supporting evidence.

CEQA requires that an analysis of environmental impacts be based upon "substantial evidence." Substantial evidence consists of "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts," and not merely "[a]rgument, speculation, unsubstantiated opinion or narrative, [or] evidence which is clearly inaccurate or erroneous . . . ." (Pub. Res. Code, § 21082.2(c); see also *id.*, § 21168.) In reviewing whether an agency properly relied on such evidence, courts apply "a deferential standard that is satisfied if 'the record contains relevant information that a reasonable mind might accept as sufficient to support the conclusion reached.'" (*Center for Biological Diversity*, *supra*, 232 Cal.App.4th at p. 941, quoting *Great Oaks Water Co.*, *supra*, 170 Cal.App.4th at p. 968.) The administrative determinations are presumed correct, and if more than one conclusion can be drawn from the evidence, "'the reviewing court is without power to substitute its deductions'" for those of the agency. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571, quoting *Crawford v. Southern Pac. Co.* (1953) 3 Cal.2d 427, 429; see also *Atherton*, *supra*, 228 Cal.App.4th at p. 353 (infeasibility findings are entitled to great deference and presumed correct); *Topanga Assn. for a Scenic Cmty. v. County of Los*

Angeles (1974) 11 Cal.3d 506, 514 (reasonable doubts must be resolved in favor of the agency's findings).) This highly deferential standard of review empowers the agency to resolve questions of fact and make policy decisions. (*CNPS, supra,* 177 Cal.4th at pp. 984-85.)

A. The City Properly Determined, Based on Substantial Evidence, that the Preservation Alternatives Would Not Achieve Project Objectives

The City determined that the preservation alternatives were not feasible and would not allow for completion of the Project in a successful manner because the preservation alternatives would not achieve several important Project objectives. (AR27819-21, 27825-26.) Specifically, the City found that Alternatives 5 and 6 would *not* meet the following objectives:

- Redevelop and revitalize an aging, and underutilized commercial site with an economically viable mix of residential and commercial uses;
- Provide an attractive retail face along street frontages;
- Build upon the existing vitality and diversity of uses in Hollywood by providing a vibrant urban living development along a major arterial and transit corridor;
- Provide high-quality commercial uses to serve residents of the westernmost area of Hollywood in a manner that contributes to a synergy of uses and enhances the character of the area;
- Create a development that complements and improves the visual character of the westernmost area of Hollywood and promotes quality living spaces that effectively connect with the surrounding urban environment through high quality architectural design and detail; and

- Enhance pedestrian activity and neighborhood commercial street life in the westernmost area of Hollywood.

(AR 27819, 27825.)

The City further found that Alternatives 5 and 6 would only partially meet these objectives:

- Maintain and enhance the economic vitality of the region by providing job opportunities that attract commercial and residential tenants;
- Bring convenient neighborhood-serving commercial uses within walking distance of numerous apartments and single-family residences in the westernmost area of Hollywood; and
- Capitalize on the site's location in Hollywood by concentrating new housing density and commercial uses, thereby supporting regional mobility goals to encourage development around activity centers, promote the use of public transportation, and reduce vehicle trips and infrastructure costs.

(AR27820-21, 27826.)

The EIR had preliminarily determined that Alternatives 5 and 6 could meet or partially meet these objectives. (AR982-84; 1016-18.) The difference between the EIR and the City Council's findings was due, in large part, to the context in which the City evaluated achievement of Project objectives after Alternative 9 was proposed and considered as the final approved Project. The EIR's discussion of whether the alternatives would meet Project objectives simply assumes that the original proposal would fully meet the Project objectives and then compares how well the alternatives met the objectives *in comparison to the original proposed Project*. (AR982, 1016.) But, Alternative 9 was developed because of community concern and comments indicating that the original proposal did

not achieve the objectives. (See, e.g., AR4644; *infra* Section IV.B.) Indeed, the RP-DEIR notes that Alternative 9 "is the superior Alternative for reducing a number of impacts that were of concern to the public (including, but not limited to, aesthetic/visual, parking and traffic impacts)." (AR4707.) Thus, the City Council, in making its findings, compared the preservation alternatives instead to the final approved Project (Alternative 9). (See, e.g., AR27795.) While the trial court rejected this step as improper (AJA361, 363), it was not only proper but also a necessary step for the City to take because such a comparison between these alternatives was not done in the EIR itself. The City Council had to weigh how the alternatives and the final approved Project would each achieve the City's goals and objectives for the site in order to make an informed and reasoned decision about the Project.

Unlike the preservation alternatives, the City found that the final approved Project (Alternative 9) would meet the Project objectives identified in the RP-DEIR by "[p]rovid[ing] high-quality commercial uses to serve residents of the westernmost area of Hollywood in a manner that contributes to a synergy of uses and enhances the character of the area." (AR27794-95.) As observed by the City, "Alternative 9 achieves a design that is significantly more accessible to the City in its provision of publicly accessible open space, affordable housing, green building, and iconic architecture that will significantly transform Sunset Boulevard, and which will contribute to the City's—and Hollywood's—identity as a destination City for residents and tourists alike." (AR27795.)

The City's evaluation of the preservation alternatives also changed as the City and Real Party developed a better understanding of the physical and economic realities of both the original proposed Project and Alternative 9. Specifically, the economic analyses prepared after the circulation of the DEIR and RP-DEIR, and the public's favorable reaction

to the new Gehry design, demonstrated that the preservation alternatives could not meet the economic and social goals of the Project, which were closely tied to the development of a vibrant and dynamic retail space that could be accessed and easily explored on foot, or provide the high quality architectural design needed to satisfy the City's planning objectives.

This approach in evaluating the feasibility of the preservation alternatives and Alternative 9 was consistent with CEQA and, as explained below, was well-supported in the administrative record.

B. Substantial Evidence Supports the City's Infeasibility Findings Based on Project Objectives

The trial court decision concluded that the City's determination that the preservation alternatives were infeasible was not supported by substantial evidence. (AJA362-71.) This conclusion improperly dismissed the substantial evidence in the record demonstrating that the preservation alternatives would not meet the Project objectives, including written statements from the expert architect that concluded the Project objectives could not be fully achieved if the Bank were preserved; the professional designs showing how the preservation alternatives require substantial additional above-ground parking opposed by the neighborhood; an independent analysis of the economic viability[4] of the preservation alternatives; and multiple public comments expressing substantial preference for the Alternative 9 design. (AR949, 987, 15193-209, 27819-24, 27825-26, 29873-78, 57731.)

In making its findings, the City considered the community's complaints about the visual impacts of the original proposal, noting that

[4] The substantial evidence that the Project does not meet the first project objective of creating an "economically viable" mix of residential and commercial uses is discussed, *infra*, Section IV.A.

Alternatives 5 and 6, like the originally proposed Project, "would create a large and flat monolithic design that would not allow for views through the project site." (AR29735.) As with the original proposal, the preservation alternatives would be built on a podium supporting the commercial retail uses, which would not provide an open, pedestrian-friendly design or activate the streetfront. (AR27818, 27824.) The City concluded that preservation Alternative 6, compared to the selected Alternative 9, would impair "project accessibility and would not be as visually appealing or pedestrian friendly…." (AR29735.) In addition, the City further observed that:

> Preservation of the Bank Building would increase the depth of excavation necessary to construct below-grade parking since the area under the Bank Building would not be used for parking, as it would under the proposed project/Alternative 9. Similar to the original project, Alternative 6 would have a parking podium with three subterranean levels, and would extend 3 levels above ground (as measured from grade at Sunset Boulevard), a point of contention in comments received, which took issue with the air quality implications of open parking lots near residences. In contrast, the proposed project's enclosed parking structure is entirely subterranean or semi-subterranean, providing an aesthetic benefit that is especially pronounced given the project's proximity to multi-family residential uses to the south and to the west, and improving the pedestrian experience in the surrounding area.

(AR27824; see also AR27819 (observing the same for Alternative 5).) These conclusions can logically be drawn from a comparison of the professionally produced project layouts for the preservation alternatives (AR949, 987) and Alternative 9 (AR 4648), and are thus supported by substantial evidence.[5]

[5] Additional substantial evidence that the project objectives related to visual and architectural quality, and a vibrant urban living environment is discussed, *infra,* Section IV.B.

The Real Party commissioned noted architect Frank Gehry to study the site and determine how the community's concerns could best be addressed, and whether those concerns could be addressed with a design that preserved the Bank. After significant study, Gehry concluded that a redesign fully meeting all of the Project objectives and addressing community concerns could not accommodate retention of the Bank, because such a design

> does not provide street-front engagement along Sunset Boulevard, it turns its back to Havenhurst Drive, and it impedes pedestrian access to the project from Havenhurst and Sunset. The size and layout of the building limits the number and types of tenants that could occupy the space. We do not believe that this building has the flexibility to adapt to a new usage, which would severely limit the programming of that building to the detriment of the excitement that you are trying to create on the site. The bank consumes a sizeable portion of the available property, which if preserved, would leave insufficient space to design buildings with comparable function to the ones that we would have to abandon.

(AR57731.)[6]

[6] Before the trial court, the petitioners argued that this evidence merely addressed the "willingness of the applicant to accept a feasible alternative," citing *Uphold Our Heritage v. Town of Woodside* (2006) 147 Cal.App.4th 587, 602. However, Gehry's comments are not merely evidence of an applicant's unwillingness to accept a feasible alternative; rather, they are substantial evidence from a licensed, prominent architect who considered how to incorporate the Bank and determined that preservation was not feasible given the objectives of the Project. (See *AIR*, *supra*, 107 Cal.App.4th at p. 1400-01 (applicant's lender drafted a letter and economic analysis that, combined with the applicant's own testimony, , provided acceptable evidence of infeasibility]; *Flanders Found. v. City of Carmel-by-the-Sea* (2012) 202 Cal.App.4th 603, 620-23 (upholding economic infeasibility of alternatives to sale of city property based on economic analysis prepared by property owner's consultant).)

The preservation alternatives additionally could not accommodate the "expanded 12-foot sidewalks" and "garden areas" on Sunset Boulevard, which were added to Alternative 9 to facilitate the pedestrian uses targeted by the Project objectives. (AR27853-54.) The findings also recognized that while Alternative 9 "enhances the pedestrian environment along Sunset Boulevard, providing a publicly accessible internal pedestrian network linking and expanding pedestrian connectivity from Havenhurst Drive through the Project site to Crescent Heights Boulevard" and other access points "making the site permeable to pedestrians from all directions," "[t]he retention of the Bank building would impede on the quality of the proposed pedestrian-level amenities, including the plaza entries proposed at the northwest and northeast corners of the project site" and would reduce the size of the plaza. (AR27824, 27854.)

In rejecting this evidence, the trial court dismissed the City's concerns that the preservation alternatives would be inconsistent with the City's vision for the site and the Project's objectives. For example, the City accepted Gehry's expert opinion that preserving the bank is "at odds with a pedestrian-friendly vision for development" because it has a "non-porous façade and extends right up to the existing narrow sidewalk." (AR57731.) In rejecting the City's findings on this point, the trial court observed how the preservation alternatives would enhance ground floor transparency through replacing *ground floor* windows. But the trial court ignored the City's main concerns that the entirely windowless *second floor* and the lack of a meaningful set-back from the street would discourage pedestrian interaction with the site. The preservation alternatives would not address either of those issues. (AJA367.) Of the site uses contemplated under the Project, the almost 30,000 square-floor Bank building, with its windowless second floor, is suitable only for bank uses. Bank uses account for no more than 5,000 square feet under any of the Project alternatives; although the

Bank could potentially be converted into office uses, such uses are not consistent with the Project objectives. (AR27795 (architect's opinion that other uses (i.e., retail and residential) will not work within the confines of the existing structure).) There was simply no way to preserve the upper story of the bank building and repurpose this space consistent with the open, pedestrian-friendly mixed use development.

Any suggestion that adaptive reuse in a manner consistent with the Project objectives is feasible is further belied by LAC's own comments during the administrative process, which suggested that the Bank renovations necessary to provide the projected commercial space under Alternatives 5 and 6, including rotation of the floating staircase and relocation of the 8-foot by 57-foot glass and concrete screen, would not be acceptable from a preservation perspective: "Cumulatively[sic], more alterations, especially those that affect significant character-defining features, may jeopardize the continued eligibility of Lytton Savings as an historical resource." (AR5819.)

The trial court decision further asserts that Section 21081 requires the City or Real Party to prepare "drawings identifying any impediments, estimates of the volume or timing of anticipated pedestrian flow on Sunset or the adjacent streets or analysis of how or the extent to which the bank building alternatives marginally impact such traffic," apparently to refute the EIR's conclusions that the preservation alternatives "include numerous design features to enhance the neighborhood character and pedestrian environment." (AJA366-67; AR966.) This level of detail goes far beyond what courts have required for substantial evidence. The substantial evidence standard "does not require a lead agency to conduct every recommended test and perform all recommended research to evaluate the impacts of a proposed project. The fact that additional studies might be helpful does not mean that they are required." (*AIR*, *supra*, 107

Cal.App.4th at p. 1396.) "A project opponent or reviewing court can always imagine some additional study or analysis that might provide helpful information." (*Laurel Heights I*, *supra*, 47 Cal.3d at p. 415.) "That further study . . . might be helpful does not make it necessary." (*Ibid.*)

The City Council can evaluate each alternative's ability to meet Project objectives related to pedestrian access, commercial street life, and high quality architecture based on the project designs in the EIR itself and the underlying facts on which the EIR analysis was based, including the professional architectural drawings prepared for each alternative and expert opinions from the architect. (See, e.g., AR27794.) That is substantial evidence. Requiring the City to conduct studies to *prove* that an alternative would not achieve Project objectives exceeds any previously applied standards and places an unjustified burden on lead agencies to respond to mere lay opinions with reams of quantified data.

IV. Substantial Evidence Supports the Conclusion that the Preservation Alternatives Are Infeasible for Economic, Social and Other Considerations

The City Council found that "specific economic, legal, social, technological, or other considerations" made infeasible the preservation alternatives identified in the DEIR. (AR27793.) While the City's individual findings focused on the well-established practice of applying this feasibility standard in the context of ability to achieve Project objectives, the determinations embodied in the City's findings also demonstrate that the preservation alternatives are infeasible due to economic, social and other considerations. This conclusion is further bolstered by other evidence of infeasibility in the record that was clearly considered by the City.

A. The Preservation Alternatives Are Infeasible Due to Economic Considerations

The trial court decision concluded that the City's showing of financial infeasibility in this case was vague and rested on opinions rather than facts. (AJA370.) As explained below, the City's conclusion that Alternatives 5 and 6 were not economically viable or feasible is supported by economic factors presented to the City and documented in the record.

When determining feasibility of alternatives, courts have not required "any particular economic analysis or any particular kind of economic data," but they generally require "'some context' that allows for economic comparison" between the proposed project and the alternatives. (*SPRAWLDF, supra*, 226 Cal.App.4th at p. 918, citing *Woodside, supra*, 147 Cal.App.4th at p. 600-01.) Reduced profitability is one such metric on which to draw a comparison when evaluating feasibility. (*See ibid*.) To render an alternative infeasible, "[w]hat is required is evidence that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project." (*Goleta, supra,* 197 Cal.App.3d at 1181.) The question is then "whether the marginal costs of the alternative as compared to the cost of the proposed project are so great that a reasonably prudent [person] would not proceed with the [altered project]." (*Woodside, supra,* 147 Cal.App.4th at p. 600.)

In this case, as part of the Project approvals, the Real Party provided the City with extensive economic analysis comparing the estimated return on investment and profit margin for Alternatives 5 and 6 against those calculated for the original proposal and Alternative 9 in order to meaningfully compare the expected financial performance under each development scenario. As detailed below, this economic analysis constitutes substantial evidence of economic infeasibility. (See *San Franciscans Upholding the Downtown Plan v. City and County of San*

Francisco (2002) 102 Cal.App.4th 656, 692 [*San Franciscans*] (analysis of the economic feasibility of alternatives compared with the proposed project constituted substantial evidence).)

Specifically, Real Party initially submitted, and the Planning Department reviewed, two analyses addressing financial feasibility of the Project as proposed (without affordable housing incentives and a FAR of 1:1), and Alternative 9. (AR57477-94, 59418-27.) The economic analyses were prepared by HR&A Advisors ("HR&A"), an independent consultant pre-approved for contracts for City-initiated work. In addition, Real Party engaged RSG, Inc. ("RSG"), another independent financial real estate expert, to verify the methodology and underlying assumptions upon which HR&A's analyses were based. (AR57495-500, 59431-37.)[7] RSG conducted an independent review of the methods and assumptions used in HR&A's analysis of the Proposed Project and the results of this independent review were submitted to the City. (AR57477, 57495-500.) RSG also conducted a second independent review of HR&A's economic analysis of Alternative 9, even though the methods and assumptions remained the same. (AR59431-37.)

HR&A employed two investment return metrics to evaluate financial feasibility: (1) return on total development cost for the income-producing

[7] The fact that these analyses were prepared pursuant to a contract with Real Party is irrelevant because the City is permitted to rely on information from Real Party in making a feasibility determination. (1 Kostka & Zischke, *supra*, § 15.36 ("It is appropriate for lead agencies to consider information provided by project applicants in evaluating and comparing alternatives, including information regarding the feasibility of project alternatives."); *see also Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1357 (*PAC*) (recognizing that infeasibility determinations can be supported by independent analysis or other meaningful detail).)

residential and commercial areas and (2) the profit margin generated by the Project (or an alternative). HR&A weighed these two metrics against minimum thresholds, which HR&A considered "conservative (i.e., relatively low), considering the significant entitlement and litigation risk associated with a large project in the Hollywood Community Plan area." (AR59421, 57479.) HR&A selected a minimum threshold for return on cost for new development at the location to take into account the investment risk (5.7% for the Proposed Project with affordable housing incentives and 5.6% for Alternative 9 with affordable housing incentives). (AR57482, 59422.) The threshold profit margin for the sale of the Project as a whole (rather than individual units or components) was set at 12.5% based on HR&A's experience with "typical return threshold[s] for Los Angeles development projects (i.e., midpoint of a 10-15 percent range)." (AR59421, 57479.) RSG conducted an independent review of these metrics and concluded that "the assumptions incorporated in HR&A's financial feasibility analysis are reasonable" and that "these assumptions align with current market realities." (AR57500, 59437.)

HR&A also gathered data from independent sources to estimate costs and projected income and revenue. This data included development costs, condominium net sales revenue, and net operating income. (AR57490-93, 59425-27.)[8] In each case, RSG reviewed the estimates and the underlying methods for differentiating between costs and concluded

[8] HR&A relied on industry-standard Marshall & Swift Costs Estimator software, its own review of the market, other third-party data, and assumptions generally used for this type of project. (AR57491-92, 59427.) Real Party also necessarily provided project-specific information such as land area, building square-footage, rentable residential and commercial square-footage, building apartments, apartment and affordable housing rental rates, parking, estimated EIR and related legal costs, to inform the financial feasibility analysis. (AR57490-93, 59425-27.)

that the estimates and assumptions were "reasonable." (AR57497-99, 59434-37.) During the course of the Planning Commission hearing on the Project, the underlying assumptions and methods for the peer-reviewed independent financial analysis of the economic feasibility of the Project were discussed in detail. (AR15004-6, 15101-4, 15121-22.)

Relying on the same peer-reviewed methods and assumptions used to analyze the economic feasibility of the proposed Project and Alternative 9, HR&A completed a third economic analysis to evaluate the financial feasibility of Alternatives 5 and 6.[9] (AR29873-78.) HR&A concluded that Alternatives 5 and 6 "*would not* be financially feasible" because Alternatives 5 and 6 failed to meet the profitability thresholds HR&A established for either feasibility metric. (AR29874-75.)

Moreover, comparing the cost of Alternatives 5 and 6 against the expected return and the profit margin, HR&A arrived at a return on investment and a profit margin that do not meet the thresholds required for a reasonably prudent investor to proceed with the Project. (*See, e.g.*, AR29873 (HR&A relied on "two investment return metrics commonly used in the real estate industry" to evaluate the financial feasibility of Alternatives 5 and 6); AR29874 (finding that, with a return on cost of 5.1% and a profit margin of 7.6%, Alternatives 5 and 6 are "not financially feasible").) Significantly, the difference in developer profits between Alternatives 5 and 6 and Alternative 9 is $31,405,865—a loss of nearly 50 percent of the expected profits—which is "sufficiently severe" so as to make it impractical to proceed with Alternatives 5 or 6. (Compare AR29873 with AR59422; see also *Goleta*, *supra*, 197 Cal.App.3d at

[9] Real Party submitted this analysis to each City Council Member on October 31, 2016, prior to the final approval of the Project and final adoption of the CEQA findings. (AR29808-74.)

p. 1181 (An alternative is infeasible if there is "evidence that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project.").)

It is important to note that HR&A's analysis is overly conservative because it reviews Alternatives 5 and 6 as they were presented in the EIR and does not incorporate the adverse economic impacts of the subsequent conditions imposed by the Planning Commission and the City Council's PLUM committee to: require an additional 4 percent affordable housing; reduce the total number of units to 229; to reduce the height of the Project; expand the width sidewalks; and other conditions. (AR8, AR15240-50, 27650.) Incorporating these conditions into Alternative 6, which assumed revenue from 291 units, would obviously reduce the profitability substantially more than the 50 percent HR&A calculated—perhaps to zero.

Unlike economic analyses rejected by other courts, HR&A's analyses allow for a meaningful comparison that would allow the City to make an informed decision about the economic feasibility of the Proposed Project as compared with the alternatives. (See *Woodside, supra*, 147 Cal.App.4th at pp. 598-99 (because the costs of the proposed project had not been estimated, there was no cost comparison or analysis to support a finding that alternatives were economically infeasible); *PAC, supra*, 141 Cal.App.4th at pp. 1356-37 (because no economic analyses were performed, there was not substantial evidence to support a finding of economic infeasibility).) In each case where courts found the "substantial evidence" of economic infeasibility lacking, the agency was missing a critical metric by which the alternatives could be compared with the proposed project. For example, in *Woodside*, although the costs of the alternatives were estimated, the costs of the proposed project were not. (*Woodside, supra*, 147 Cal.App.4th at p. 598-99.) The town had no way of knowing whether the costs of refurbishment and reconstruction were

significantly different. In contrast here, independent third party analyses conducted for the Proposed Project, Alternative 9, and Alternatives 5 and 6 allow for the necessary comparisons.

Indeed, despite the trial court's conclusion that the "sparse record in this case is in stark contrast to the record in *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco*" (AJA369), HR&A's economic analyses is on par with or exceeds the detailed analysis conducted in that case. In *San Franciscans*, the developer engaged Sedway Group ("Sedway"), a third-party expert, to perform an analysis of the proposed project that would involve demolishing a significant part of a historical building and two alternatives that would preserve the building. (*San Franciscans, supra*, 102 Cal.App.4th at p. 671.) Sedway performed a detailed, quantitative analysis that involved "subtract[ing] the estimated development costs from the estimated value of the historically rehabilitated Building under either [alternative], taking into account all projected costs of rehabilitation, the probable future revenue stream from the completed development, and the available monetary incentives for historic restoration and preservation, including potential historic tax credits and [transfer development rights] associated with the property." (*Id.* at p. 680.) The City then retained Keyser Marston Associates ("KMA") to independently review Sedway's analysis and verify the method, assumptions, and conclusions. (*See id.* at p. 681 (KMA confirmed that, among other things, the "investment methodology fundamental to [Sedway's analysis] is the method commonly utilized in the industry" and that it had reviewed "independent information available as to key factors of th[e] project including retail industry trends, development costs, and market changes", internal quotations omitted).) The court held that the "conclusions and opinions of the[se] two real estate valuation experts…constitute[d]

substantial evidence in support of the City's administrative findings." (*Id.* at pp. 681-82.)

The economic analyses performed by HR&A share the important hallmarks of the analysis performed for the contested project in *San Franciscans*. Specifically, both analyses (a) evaluated the feasibility of the Proposed Project and the alternatives; (b) calculated project-specific costs including, for example, construction costs; (c) calculated project-specific revenues including, for example, retail income and office lease revenue; and (d) used investment return metrics to determine feasibility. (AR57479-94, 59420-27, 29873-78; *San Franciscans, supra*, 102 Cal.App.4th at pp. 680-681, 684-86, 693.) Furthermore, the assumptions in HR&A's economic analyses were based on the expert options of the underwriters as well as data gathered from multiple independent sources, including CoStar, Marshall and Swift Cost Estimator and the LA Housing and Community Investment Department. (AR27932, 57491-92, 59427.)

Petitioner cannot point to any contrary economic evidence in the administrative record that would undercut the analyses prepared by HR&A with methodologies and assumptions verified by RSG. Thus, the conclusions and opinions of two real estate valuation experts constitute substantial evidence in support of the City's administrative findings and determination that Alternatives 5 and 6 are infeasible. (*San Franciscans, supra*, 102 Cal.App.4th at pp. 681-82 (holding that the "conclusions and opinions of [] two real estate valuation experts…constitute substantial evidence in support of the City's administrative findings" and noting that "appellants are unable to point to *any* contrary economic evidence in the entire administrative record").)

B. Bank Preservation Is Infeasible Due to Social and Other Considerations Embodied in City-Adopted Plans and Policies

The trial court decision concluded that neither aesthetic nor pedestrian traffic concerns are social or policy considerations that can render an alternative infeasible under Section 21081, and, even if they were, the City's findings were not supported by substantial evidence. (AJA363-66.) The court held the bases for infeasibility are limited to the overall economics of the Project, generalized social conditions or existing government plans. (AJA363.) CEQA does not limit the City's discretion in such a manner.

Public Resources Code Section 21081 places no limitations on the "specific economic, legal, social, technological, or other considerations" that the lead agency can use to determine the feasibility of an alternative. Given the generality of "social" or "other considerations," the matters that decision-makers might consider broad and diverse. In *Dusek v. Redevelopment Agency* (1985) 173 Cal.App.3d 1029, for example, the court held that a less impactful preservation alternative could be discarded to "foster[]" the lead agency's "continuing goal of redevelopment . . . even in the absence of a specific development plan." (*Id.* at p. 1043; see also *City of Del Mar v. City of San Diego* (1982) 133 Cal.App.3d 401, 416-17 (general plan amendment alternatives that would conflict with the growth management program, which embodied policy objectives and planning goals, were infeasible); *Sierra Club v. Gilroy City Council* (1990) 222 Cal.App.3d 30, 44 (housing project alternatives were infeasible in light of the city's need for additional housing); *Found. of San Francisco's Architectural Heritage v. City and County of San Francisco* (2002) 106 Cal.App.3d 893, 913 (preservation alternative was not feasible because,

inter alia, it would not meet "the needs of the City's many constituencies").)

Such considerations include aesthetics, quality and functionality of design, and public accessibility, which have long been recognized as within a city's land use authority. (See, e.g., *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 866 ("[A]esthetic conditions have long been held to be valid exercises of the city's traditional police power . . . The requirement of providing art in an area of the project reasonably accessible to the public is, like other design and landscaping requirements, a kind of aesthetic control well within the authority of the city to impose.").) These considerations justify the City Council's rejection of the preservation alternatives here.

Project objectives related to architectural quality, transportation options, and other considerations, rejected by the trial court as "non-basic objectives," were, in fact, selected to ensure that the Project would be consistent with numerous plans, policies, goals and objectives adopted by the City to guide its decision making. Specifically, Project objectives aiming to (1) redevelop and revitalize an aging and underutilized commercial site; (2) provide a vibrant urban-living development along a major arterial and transit corridor; (3) provide high-quality commercial uses that contribute to a synergy of uses; (4) complement and improve the visual character of the neighborhood through high quality architectural design; (5) enhance pedestrian activity and neighborhood commercial street life; and (6) provide an attractive retail face along street frontages all mirror and were in furtherance of the goals and objectives of the Los Angeles General Plan ("GP"), the Hollywood Community Plan ("HCP"), the Do Real Planning guidance, the Citywide Design Guidelines, the Walkability Checklist, the 2012-2035 Regional Transportation Plan and the Southern California Association of Governments Compass Blueprint Growth Vision.

These goals, objectives and policies that correspond with the Project objectives include, but are not limited to:

- GP Policy 3.2.1: “Provide a pattern of development consisting of distinct districts [and] centers[] that are differentiated by their functional role, scale, and character” (AR558);
- GP Objective 5.5: “Enhance the livability of all neighborhoods by upgrading the quality of development and improving the quality of the public realm” (AR561);
- GP Policy 6.4.8.a & b, “Encourage . . . pathways and connections that may be improved to serve as neighborhood landscape and recreation amenities” (AR562);
- GP Objective 7.6: “Maintain a viable retail base in the City to address changing resident and business shopping needs” (AR562);
- GP Objective 3.16: “[I]mplement streetscape amenities that enhance pedestrian activity” (AR560); GP Goal 5A: “A livable City for existing and future residents and one that is attractive to future investment” (AR561);
- GP Policy 3.9.7: “Provide for the development of public streetscape improvements, where appropriate” (AR559);
- GP Policy 3.9.8: “Support the development of public and private recreation and small parks by incorporating pedestrian-oriented plazas, benches, other streetscape amenities and, where appropriate, landscaped play areas” (AR560);

- HCP Objective 1: “To further the development of Hollywood as a major center of population, employment, retail services, and entertainment” (AR566);
- HCP Objective 3: “To make provision for the housing required to satisfy the varying needs and desires of all economic segments of the Community, maximizing the opportunity for individual choice” (AR566);
- HCP Objective 5: “To encourage open space and parks in both local neighborhoods and in high density areas” (AR567);
- Design Guidelines Objective 1: “Site Planning 4: . . incorporate passageways or paseos into mid-block developments, particularly on through blocks, that facilitate pedestrian and bicycle access to commercial amenities from adjacent residential areas. Maintain easy access to commercial areas from adjacent residential neighborhoods to avoid unnecessary or circuitous travel . . . . Site Planning 6: Place buildings around a central common open space to promote safety and the use of shared outdoor areas” (AR568-70);
- Design Guidelines Objective 2: “Employ High Quality Architecture to Define the Character of Commercial Districts,” which includes 18 specific policies related to pedestrian scale, building facade and form, and building materials that support the building design” (AR570-72);
- Design Guidelines Objective 5: “Include Open Space to Provide Opportunities for Public Gathering” (AR573-74);

- Walkability Checklist Objective: "Use the design of visible building facades to create/reinforce neighborhood identity and a richer pedestrian environment" (AR582);
- Walkability Checklist Objective: "Support ease of pedestrian movement and enrich the quality of the public realm by providing appropriate connections and street furnishings in the public right of way" (AR576);
- Walkability Checklist Objective: "Use the relationship between building and street to improve neighborhood character and the pedestrian environment" (AR578); and
- Walkability Checklist Objective: "Contribute to the environment, add beauty, increase pedestrian comfort, add visual relief to the street, and extend the sense of the public right-of-way" (AR581).

Even the trial court recognized that consistency with existing agency plans, including "antigrowth plans" and land use plans, are "absolutely legitimate considerations." (DAY 1 TRANS. at p. 58.) The City's pursuit of these goals and objectives, through its approval of the Project, was justified by substantial evidence in the record.

In addition, the City also took into account social considerations, as voiced by members of the community. Numerous commenters complained about the massing and visual impacts of the original proposal and its impact on views and other resources. Commenters called the original proposal a "disgusting mass" (AR8298) and complained that it would block light and views of the hills (AR8162, 8206, 8277, 8307, 8313, 8471). Others asserted that the original proposal would "cover our open skyline" (AR8359.) Commenters also complained about the uninspired original proposal. (AR6288, 6290-91, 6370-71, 6534.) The EIR notes that these concerns also apply to the preservation alternatives: "As shown in Draft

EIR Figures 5.E-2 through 5.E-5, 5.F-2 through 5.F-5, and 5.G-2 through 5.G-5, the three Bank preservation alternatives would result in a design that would concentrate development of the remaining Project site and would create a large and flat monolithic design that would not allow for views through the Project site, which were a primary concern from the public." (AR27794.)

At the public hearing on the Project before the City Council's PLUM Committee, a leader of the opposition to the original proposal explained that he removed his opposition to the Project because the redesign addressed his concerns:

> I was responsible for gathering 800 signatures, more, in fact, against the original cookie-cutter high-rise that was meant to be built and proposed in the original DEIR. I delivered it personally to this building [City Hall] on January the 20th of last year. In the following months, our council [member] arranged a meeting between myself and the development team. My house – they came to my house which directly overlooks the cite [sic]. I explained our grievances at length, and three months later Townscape returned with the Frank Gehry project…. They are proposing a visionary project. I support the Frank Gehry project.

(AR15201.) A dozen other speakers at the PLUM hearing identified themselves as nearby residents who now supported the Gehry design. (AR15193-209.) Considering this testimony and the other evidence described above, it was reasonable for the City Council to conclude that the "cookie-cutter high-rise" design of the original proposal and its related alternatives (including preservation alternatives) were infeasible due to "social considerations" and "other considerations" associated with creating a vibrant urban living development with visual character, and high architectural quality.

CONCLUSION

For all the foregoing reasons, the City and Real Party respectfully request that the trial court's judgment granting the writ of mandate be reversed and that judgment be directed in the City's and Real Party's favor.

DATED: August 21, 2017

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

The text of this Opening Brief consists of 13,524 words as counted by the Microsoft Word software used to generate this Opening Brief.

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Alameda, State of California. My business address is 555 12th Street, Suite 1500, Oakland, CA 94607.

On August 21, 2017, I served true copies of the following document(s) described as **APPELLANTS' JOINT OPENING BRIEF** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address CSauceda@meyersnave.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Meyers, Nave, Riback, Silver & Wilson's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on August 21, 2017, at Oakland, California.

Cynthia Sauceda

SERVICE LIST
Los Angeles Conservancy v. City of Los Angeles
B284089

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