Case No. B284093

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION 4

FIX THE CITY, INC.,

Petitioner and Cross-Appellant,

v.

CITY OF LOS ANGELES, et al.

Defendants and Respondents.

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

CROSS-APPELLANT'S OPPOSITION AND OPENING BRIEF

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INTRODUCTION

In a thoroughly reasoned 30-page analysis of statutory language and governing precedent, the Superior Court correctly determined that the City of Los Angeles ("the City") did not comply with the substantive requirements of the California Environmental Quality Act ("CEQA") when it approved a 333,000 square-foot, 178-foot high, 229 unit mixed-use project and Vesting Tentative Tract Map and other entitlements ("the Project") proposed by Real Party in Interest AG-SCH 8150 Sunset Owner LLP ("RPI" or "Developer"). The Superior Court's ruling was based on a comprehensive statutory analysis of the core CEQA requirement that governmental entities not approve projects with significant, unmitigable impacts, if a feasible alternative would eliminate or mitigate the impact. Because the Project that the City approved would result in the demolition of the Lytton Savings Building, a recognized historic resource that is now an Historic-Cultural Monument of the City of Los Angeles, the City was obligated to consider whether a feasible alternative could avoid or eliminate the significant environmental impact from the demolition of a structure of cultural and architectural significance.

After devoting so much effort and energy to the issue discussed above, the Superior Court afforded the remaining issues in this matter extremely short shrift, and failed to find numerous errors identified by Petitioner Fix the City, Inc. ("FTC"), including critical public safety and

environmental concerns, likewise did not comply with CEQA and other state laws, including the Alquist-Priolo Act and the Subdivision Map Act.

The Project was falsely pitched to decision makers and the public through critical omissions and false or erroneous statements, the antithesis of full disclosure required by CEQA. Ignoring the Project's location, the City claimed the site was unlimited in height, located in Hollywood's Regional Center, and entitled to high residential density (204 units prior to a 35% affordable housing density bonus for 26 units). These claims are unsupported by substantial evidence, and the entitlements fatally conflict with the baseline zoning.

The Hollywood Community Plan Land Use Map, the blueprint for development entitlements, clearly shows that the Project site is about two miles *outside* the Regional Center – not even close to the area in which a project would be eligible for high density residential development. Based on the Land Use Map, the 1988 Hollywood Community Plan, and its EIR, the Project site was limited to 45 feet height (not the 178 feet that was approved) and to 102 dwelling units (not 204 used as a baseline). Rather than granting a 22-percent density bonus, in reality, the City granted an unlawful 72-percent density increase.

Not only was the Project site limited to 45-feet height and medium density under the General Plan, it was also limited by a Planning Commission case and a recorded covenant that ran with the land to enforce

the City's zoning determination to limit the site to 45-feet height, 80,000 square feet total buildable area, and to limit the Havenhurst Driveway to right-turn ingress and egress. The recorded covenant memorializes the conditions imposed by the Planning Commission: it was not a voluntary agreement, but the imposition of a zoning regulation to ensure that the now-existing mall was consistent with the General Plan.

Although that planning case was listed on the documents prepared by the City, the City and RPI failed to disclose these prior site-specific conditions to the public or decision makers. This failure to disclose is all the more notable because the same City Planner signed the approval to record the covenant and the 2016 report to the City Council regarding the Project. The 2016 report noted that the Havenhurst Driveway had right-turn only restrictions, but failed to explain that the right-turn only restriction was based upon a prior condition of approval and a recorded covenant. Not one of the numerous reports or lengthy EIR on the Project disclosed that there was a covenant and prior approval that significantly restricted development in order to protect the neighboring residents and provide consistency with the Hollywood Community Plan and comply with Gov. Code, §65860, subd. (d).

Oversizing the project compounded public safety issues that were also ignored during approval. Even though the Los Angeles Fire Department ("LAFD") told the City fire service was inadequate and that

there were no plans or budget to improve service, the City assured the public that improvements in service were on the way. The City failed to even examine the required findings mandated by the Hollywood Community Plan regarding the adequacy of public service for this project that significantly increased residential density.

The site is perilously close to a known surface earthquake fault, yet RPI did not even attempt to investigate 50-feet off the boundaries of the site in the direction of the fault as required by the Alquist-Priolo Act, or in lieu of such investigation, move the project and its foundation 50-feet from the property line. The City overruled their staff who demanded off-site investigation or a 50-foot setback. The City admitted that there is such a requirement when it claimed that the Project satisfied the 50-foot setback requirement by moving the *habitable* component back 50-feet. However, the pseudo-setback did not meet the Alquist-Priolo setback requirements because state law requires moving any structure for *human occupancy*, including the project's grocery store and restaurants. Additional substantive and procedural violations only further illustrate how, in its zeal to approve the Project, the City failed to impose the basic protections that its citizens are entitled to receive from their local officials – these actions all render the approvals prejudicial abuses of discretion, and invalid.

STATEMENT OF FACTS

The 8150 Sunset Project is a 333,000-square foot, 178-foot high, 229 unit mixed-use residential and retail development project located in the City of Los Angeles on Sunset Boulevard just outside of the border of the City of West Hollywood, at the base of Laurel Canyon (AR000259, AR000295, AR029605-029606.) The Project is located at the gridlocked intersection of Sunset Boulevard and Crescent Heights Boulevard, which is currently so congested that it is operating at failing levels during peak hours. (AR004686, see also AR061716, AR005033 [software analyzing traffic had to be manually adjusted to calculate intersection impacts due to heavy congestion].) Contrary to statements in the EIR (AR000260, AR005318), the Project is not located within or even close to the high-density Hollywood Regional Center: it is about two miles west of the boundary of the Regional Center, as shown on the Hollywood Community ("HCP") Land Use Map (AR019752.) The Project is located within the state-mapped Hollywood Earthquake Fault Zone (AR005646) and in a city-designated Mountain Fire District (AR000053, AR025868, AR055444). The Project will include 229 residential units that include 30 luxury condominiums, 26 units affordable to Very Low-Income residents, 12 workforce income housing units, and 65,000 square feet of commercial space. (AR004646, AR029605, AR029612, AR029607.) The Project will provide 494 commercial parking spaces as well as residential parking

required by Los Angeles Municipal Code sections 12.21.A4 and 12.22.A.25, in an underground garage. (AR029606.) In order to construct the Project, a City of Los Angeles Cultural and Historic Monument, the Lytton Savings Bank Building, would be demolished. (AR004669.) The current development on the site consists of 80,000 square feet of structures (AR060787), and is limited to 45 feet height by CPC 86-209 as well as a recorded covenant (AJA294, 256-258).

The general location of the Project is characterized by low- to mid-rise residential and commercial development (see AR000540-000541, AR000545, AR000551), with notable historic apartment complexes listed on the National Register of Historic Places, immediately adjacent on Havenhurst Drive as well as along Crescent Heights (AR062319; AR00447-AR000449), and R2-1XL (low density, limited height) property located across Havenhurst (AR060788). Residential development in the area surrounding the project is limited to medium density (20-40 dwelling units per gross acre), as indicated by an orange coloration on the Hollywood Community Plan Land Use Map. (AR019752.) By contrast, high density residential development (60-80 dwelling units per gross acre) is shown on the Land Use Map in light brown and located exclusively within the Hollywood Regional Center, about two miles to the east of the project site, near La Brea Avenue, demarcated by a boundary shown on the Land Use Map. (*Ibid*.)

The Project is situated on a 2.56-acre parcel that is currently zoned for commercial development. The site has a General Plan land use designation of Neighborhood Office Commercial, in which the General Plan limits structures to 45 feet in height. (AR027044.) The General Plan also restricts this site to RAS3 (24-40 dwelling units/gross acre), the Corresponding Zone for mixed-use (AR019752) for a total of 102 dwelling units and a height limit of 45-feet (Los Angeles Municipal Code 12.21.1).[1] High Density (60-80 dwelling units/gross acre) residential development and the 3:1 floor area ratio are confined to the Hollywood CRA Project Area Regional Center, which is defined as the area east of La Brea, about two miles from the site. (AR019752, AR027459.) The height and density approved for the Project far exceed the entitlements permitted the applicant by virtue of the zoning and General Plan designations applicable to the property it purchased, as well as the terms of CPC 86-209 PC and a 1986 recorded covenant limiting development at the site to 45 feet height, 80,000 square feet total buildable area, while prohibiting left-turn ingress and egress from the Havenhurst driveway. (AJA294, 256-258.)

[1] The site also contains a permanent D limitation on development that restricts floor area ratio to 1 square foot of building for every square foot of lot area. (AR000260.) This D limitation was imposed as part of the mitigation measures certified by the City Council in a 1988 environmental impact report in order to not further overburden the traffic system, infrastructure and public services. (AR026967, AR027113, AR027115-027120.)

The Project also includes the removal of a 60-foot right-turn lane Highway Dedication on Crescent Heights Boulevard (AR037133-AR037134, AR058932, AR036049) from vehicular use to connect the applicant's property to property owned by the City of Los Angeles Department of General Services, a 9,134-square foot parcel located at 8118 Sunset Boulevard.

A City of Los Angeles Historic and Cultural Monument, the Lytton Savings Bank Building, is located on the property where the 8150 Sunset Project would be constructed. (AR004444-004447.) The Lytton Savings Bank Building would be demolished in order to accommodate construction of the project. (AR004669.) The Lytton Savings Bank Building is a 1960 modernist savings bank building that the Los Angeles Conservancy and the City's Cultural Heritage Commission call a significant example of postwar era bank design in Los Angeles. The building was designed by noted architect Kurt Meyer and contains an integrated, monumental glass and concrete screen designed by acclaimed artist Roger Darricarrere. The building remains in use today as a Chase Bank. (AR000295.)

In August 2013, RPI first submitted a Master Land Use Application and Subdivider's Statement for Vesting Tract Map No. 72370 (AR055695-055756, AR056554-056645), and an "Affordable Housing Referral Form" (AR055675-AR055681). In August 2014, RPI submitted "City of Los Angeles Department of City Planning Subdivider's Statement (AR056659-

056661) and a "Project Narrative – Vesting Tentative Tract Map No. 72370" (AR56664-AR056682). On September 12, 2013, the City issued a Notice of Preparation and an Initial Study for the 8150 Sunset Project, soliciting public comments on the scope of the Draft EIR. (AR001145-001222.) 151 letters were submitted in response to the Notice of Preparation, including from public entities such as the Los Angeles Police Department and the City of West Hollywood, from private organizations such as the Los Angeles Conservancy and the Federation of Hillside and Canyon Associations, the Hollywood Hills West Neighborhood Council, and from 102 individuals. (AR001441-001728.) On October 2, 2013, the City held a public scoping meeting to receive comment from the public on the scope of the environmental review for the project EIR, which was attended by approximately 70 individuals. Comments raised concerns about vacating the Crescent Heights turn lane, height, protection for the Lytton Savings Bank Building, the ability of public service infrastructure to support the project, the proximity of the project to the Hollywood Fault, and neighborhood compatibility of project design. (AR001759-001796.)[2]

[2] The Project took advantage of a state law imposing a form of streamlining on CEQA litigation, presently codified at Public Resources Code 21178 et seq. (AR003752-003753; AR003761-003765.) Public Resources Code section 21185 required the Judicial Council to adopt rules of court with procedures to include the resolution of challenges to the project, including appeals, be resolved within 270 days of certification of the record. On August 24, 2017, the California Supreme Court ruled that a similar requirement in a ballot measure, amending Penal Code section 190.6 to

On November 20, 2014, the City issued the Draft EIR ("DEIR") for the Project, providing for a public comment period which closed on January 20, 2015. During that comment period, the City received 975 primarily negative comment letters on the DEIR. (AR004638.) The project analyzed in the DEIR included 111,339 square feet of commercial retail and restaurant use, 249 apartment units (including 28 affordable housing units, and 30 luxury condos), a 9,134-square-foot public space at the northeast corner of the project site (AR032180, AR037256, AR032160, AR037244), a 34,050 square-foot central public plaza at the interior of the site, other public and private amenities, and 849 subterranean parking spaces. The total development would include up to 333,872 square feet of commercial and residential space with a maximum floor area ratio of 3:1.

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require the Judicial Council to expedite appeals and habeas corpus review in capital cases and complete review within 5 years of entry of judgment, presented significant separation of powers concerns and could be interpreted as merely directory, rather than mandatory. (See *Briggs v. Brown* (Aug. 24, 2017, S238309) 400 P.3d 29, slip op., p. 55 ["Deciding cases and managing dockets are quintessentially core judicial functions. They are grounded in the Constitution and may not be materially impaired by statute."]; see also slip op., p. 58 ["Legislated time limits can establish as a matter of policy that the proceedings they governs should be given 'as early a hearing and decision as orderly procedure . . . will permit.' They may serve as benchmarks to guide courts, if meeting the limits is reasonably possible. What is reasonably possible, however, will depend on a variety of factors, both structure and case-specific." (citation omitted)].) Accordingly, while this Court should resolve the instant appeals as quickly as reasonably possible within the existing constraints of the judicial system, it need not view the 270-day time limit as a strict constraint on its ability to take the necessary time to evaluate the record and legal arguments relevant to this appeal and cross-appeal.

(AR000259, AR00265.) The DEIR identified 15 objectives for the project, as follows:

> "Redevelop and revitalize an aging and underutilitized commercial site and surface parking lot with a more efficient and economically viable mix of residential and commercial uses.
>
> "Provide housing to satisfy the varying needs and desired of all economic segments of the community, including very low income households, maximizing the opportunity for individual choices and contributing to Hollywood's housing stock.
>
> "Increase the number of affordable rental housing units in the westernmost area of Hollywood.
>
> "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.
>
> "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.
>
> "Create new living opportunities in close proximity to jobs, public transit, shops, restaurants and entertainment uses.
>
> "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.

"Bring convenient neighborhood-serving commercial uses within walking distance of numerous apartments and single-family residences in the westernmost area of Hollywood.

"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.

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

"Provide an attractive retail face along street frontages.

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

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

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

"Maintain and enhance the economic vitality of the region by providing job opportunities that attract commercial and residential tenants." (AR000264-265.)

The DEIR analyzed the Project's impacts on the environment in the following areas: aesthetics; air quality; cultural resources; geology and

soils; greenhouse gas emissions; land use; noise; population, employment and housing; public services; transportation and circulation; and utilities and service systems. The DEIR concluded that significant unavoidable impacts could occur, including significant impacts to historical resources, emergency response times, traffic, significant construction noise and vibration impacts, and significant construction–related traffic impacts. (AR000205.)

The DEIR evaluated eight alternatives to the proposed project. These included the no project/no build alternative; existing zoning alternative; reduced height alternative; reduced density alternative; bank preservation alternative; reduced height and bank preservation alternative; on-menu alternative (which also preserved the bank); and residential and hotel alternative. Of these eight alternatives, other than the no project alternative, the DEIR concluded that the reduced height and bank preservation alternative was both feasible and the environmentally superior alternative. (See generally AR000206-AR00212; AR00837-AR001092.) The DEIR concluded that both the bank preservation and the reduced height and bank preservation alternative (Alternatives 5 and 6 referred to collectively as "preservation alternative") would result in the fewest significant unavoidable impacts and would meet most of the fifteen project objectives, only partially meeting three of the objectives and fully meeting twelve of the objectives. (AR001085.) The reduced commercial uses

provided in these alternatives meant that the alternatives would not fully satisfy the objectives to "contribute to a synergy of site uses," and would provide fewer job opportunities and reduced on-site economic activity as compared to the proposed project. (*Ibid.*, see also AR000983 & 001017.) Reducing the commercial square footage did not reduce project size, but merely reallocated it to the residential portion of the project. (AR040340.)

On September 10, 2015, the City recirculated the DEIR ("RDEIR") for an additional public comment period, which closed on November 9, 2015. (AR004616, AR57306.) The RDEIR included an analysis of new ninth alternative, known as the enhanced view corridor and additional under-ground parking alternative, which proposed what became the selected Project. Alternative 9 contained a 234-foot high design by architect Frank Gehry. (AR029648.) This project contained 65,000 square feet of retail, 249 residential units (including 28 affordable housing units and 30 for-sale luxury condominium units). The commercial square footage of this alternative was similar to the two preservation alternatives in the DEIR. This alternative also included the 9,134-square foot public space, a somewhat smaller 27,000 square foot central plaza, and other private amenities for the residential units. (AR004644-004645.) The alternative in the RDEIR removed driveway access from Sunset Boulevard, added driveways on Havenhurst Drive (located within the City of West Hollywood), and expanded the Crescent Heights driveway. (AR004645.)

The RDEIR maintained the DEIR's conclusion that the reduced height and bank preservation alternative was the environmentally superior alternative. (AR004707.) The RDEIR also concluded that Alternative 9, like the bank preservation alternatives (5 & 6), would only partially satisfy the project objectives to "contribute to a synergy of uses" with commercial uses; provide job opportunities; and bring commercial uses to the neighborhood. (AR004705.) The other project objectives would be fully satisfied by this new alternative. (*Ibid.*) In this respect, the RDEIR's alternative was ***identical*** to Alternatives 5 and 6 in the DEIR.

On May 13, 2016, the Final EIR ("FEIR") was issued. The FEIR presented the comments and responses to comments on the DEIR and RDEIR, as well as a mitigation and monitoring program. (See AR005311-008595.) On June 10, 2016, the City issued an Errata to the FEIR. (AR015306-015311.) On May 24, 2016, the Advisory Agency and Hearing Officer held a public hearing on the entitlements for the 8150 Sunset Project. (AR014792-014927.) On June 23, 2016, the Advisory Agency issued its recommendations for approval of the Vesting Tentative Tract map. (AR059211-059415.) Five parties, including FTC, as well as JDR Crescent, Susanne Manners, the Laurel Canyon Homeowners Association, and the City of West Hollywood appealed the Advisory Agency determination to the City Planning Commission. (AR059438-059600.)

On July 28, 2016, the Los Angeles City Planning Commission held a public hearing on the appeals of the Advisory Agency decisions. (AR062040-062301.) Numerous residents spoke at the hearing, including many in opposition to the proposed project. (AR015016-015076.) The City Planning Commission approved the project proposed in the RDEIR, with significantly reduced parking. (AR015129-015133, see AR015131 for parking reduction.)

The same five parties appealed the determination of the City Planning Commission. (See generally AR059438-0059600 [VTT appeals]; AR062952-063131 [CPC determination appeals].)

On October 25, 2016, the Planning and Land Use Management ("PLUM") Committee of the Los Angeles City Council held a hearing on the appeals of the project approvals, at which the Hollywood Hills West Neighborhood Council, Petitioners, and many residents testified in opposition to the project, and urged the preservation of the Lytton Building. (AR015162-15254.) The project's residential unit count was reduced from 249 to 229 and the height lowered from 234 feet to 178 feet for the taller of the two towers. (AR015240, AR015182.) The total square footage of the project, however, was not reduced. The PLUM Committee voted to recommend that the City Council approve a version of the project containing 229 units, including 26 Very Low Income affordable units, 12 Workforce Housing units, a maximum height of 178 feet, and 65,000

square feet of retail and restaurants, in addition to the construction of parts of the project over a public street and the incorporation of city-owned private-property (AR037256, AR037244) into the Project. (AR027650-027651.) In order to approve the Project, the City adopted a "Statement of Overriding Considerations" under the CEQA, stating that benefits of the Project outweighed the significant, unmitigated impacts on, among other things, cultural and historic resources. (AR026236, AR027650-027651.) On November 1, 2016, the Los Angeles City Council held a public hearing on the Project and voted unanimously to approve the Project as modified during the PLUM Committee hearing. (AR000188-000189.) The Notice of Determination for the Project was posted on November 1, 2016. (AR00001.)

Four lawsuits were timely filed challenging the City's determination to approve the Project, including by FTC. (AJA0001.) The cases were eventually all assigned to a single Superior Court department, before the Honorable Judge Amy Hogue. Due to the expedited briefing requirements and scheduling imposed by the ELDP statute and Court rules, Judge Hogue expressed concerns about the length of briefing in all four cases, and expressly ordered the four petitioner parties to confer and to join in each other's arguments to avoid repetitive briefing. (Jan. 5, 2017 Transcript, p. 32:4-15.) The petitioners abided by the Court's request and incorporated arguments as each party saw fit, as well as relying upon a single statement

of facts prepared by FTC. FTC joined in the arguments of Petitioner Los Angeles Conservancy regarding the inadequacy of the City's findings rejecting alternatives that would have preserved the Lytton Bank building as infeasible. (AJA216). After reviewing the administrative record and noting comments regarding various public agency easements, FTC obtained a preliminary title report, which revealed that a condition of CPC 1986-209 PC, a zoning consistency appeal to the Los Angeles Planning Commission, was to require a 1986 covenant to be recorded on the property. The covenant remains on the title. (AJA248-249.) The covenant, which ran with the land and bound future owners, limited height of new development to 45 feet, limited development to 80,000 square feet, and further imposed other conditions on the configuration of the property, unless the City made findings that such restrictions were no longer necessary to avoid the impacts of development on the site. (AJA258-259.) The covenant had not been disclosed to the public or decision makers during the approval process. FTC requested that the Court augment the record with CPC 86-209 PC and the covenant, or, in the alternative, take judicial notice of it. (AJA236-245.)

The cases were consolidated for hearing only, and heard on April 19 and 20 for approximately 6 hours of argument. Prior to the hearing, the Court issued a lengthy tentative ruling. On April 25, 2017, the Court issued an order granting the Petition for Writ of Mandate brought by the Los

Angeles Conservancy, and granting in part and denying part FTC's Petition for Writ of Mandate. (AJA746.) The Court also orally stated that it was inclined to grant FTC's motion to augment the record, but to find that the covenant was not relevant because the Court did not believe that the 1986 property owner could have intended to permanently restrict the development of its property, in spite of the language of the covenant providing that the covenant ran with the land. (April 20, 2017 Transcript, p. 36:23-37:7.) The Court stated that it did not believe that anyone would "freely" agree to limit future development in the manner described in the covenant, but did not address the origin of the covenant in the Planning Commission's approval of the prior project at the site. (*Ibid*.)

The Superior Court's Order determined that the City had failed to comply with CEQA's mandate that "an agency should not approve a development project causing environmental impacts where feasible alternatives would mitigate those impacts." (AJA942.) Extensively analyzing the statutory and regulatory scheme, including the specific requirement under Public Resources Code 21081, subdivision (a)(3) to make findings that "specific economic, legal, social, technological, or other considerations . . . make infeasible the mitigation measures or alternatives identified in the environmental impact report," the Superior Court concluded that such a finding must be based on a determination that an alternative either could not achieve the "basic objectives," of a project or

that the alternative was not feasible due to specific social, economic, or other considerations. (AJA945.) The Court found that the City's findings rejecting the preservation alternatives relied upon the alternative's inability to achieve non-basic objectives from the 15 item list of objectives included in the EIR (AJA955), that the City's findings improperly relied on aesthetic considerations as a basis for a feasibility finding (AJA956-957), and that the findings based on aesthetic, social, and economic factors were not supported by substantial evidence (AJA957-963).

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

(AJA975.) The Order rejects the other challenges to the approval of the Project in a more cursory manner, devoting more than half its pages to the single issue of the preservation alternatives. With respect to other CEQA challenges, the Court concluded that the EIR's analysis of fire and emergency response was adequate because fire response times are not an environmental impact under CEQA. (AJA964-966.) With respect to the non-CEQA challenges to the Project's approval, the Court determined the approval of the project did not violate the Alquist-Priolo Act, did not vacate a public street without compliance with the Streets and Highways Code, did not improperly give away City property for private use, or conflict with provisions of the Hollywood Community Plan. (AJA931-938.) While the

Court concluded that challenges to the density bonus were not barred by the statute of limitations, the Court upheld all aspects of the award of the density bonus, ignoring the fact that the bonus was applied to an inflated base entitlement as well as the 45-foot height limit that applied to the site based on the zoning, the covenant, and mitigations from General Plan EIR. (AJA925-930.)

After the submission of proposed judgments and arguments regarding the scope of the Court's order (see AJA801-907), the Court entered judgment on July 21, 2017, attaching as Exhibit A the Court's April 25th Order. (AJA917.) The City and RPI filed Notices of Appeal on July 26, 2017. (AJA977, AJA981.) As required by Rule of Court 8.702, FTC timely filed a Notice of Appeal and designated the record on July 28, 2017. (AJA983.)

STATEMENT OF APPEALABILITY

FTC filed a Notice of Appeal on July 28, 2017, seeking review of the denial of the writ on its CEQA, Planning and Zoning, and related public law provisions. The Judgment appealed from is final.

STANDARD OF REVIEW

In this mandamus action under Public Resources Code section 21168 and Code of Civil Procedure section 1094.5, the Court must determine whether the City prejudicially abused its discretion. A prejudicial abuse of discretion is established if the City failed to proceed in the manner required

by law or if its findings are not supported by substantial evidence. (Code of Civil Procedure, § 1094.5; Pub. Resources Code, § 21168.)

As the California Supreme Court explained in *Vineyard Area Citizens v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427 ("*Vineyard*"), the standard of review in a CEQA action varies depending upon the nature of the claimed defect. When a court reviews a claim regarding compliance with disclosure requirements, such as "where an agency failed to require an applicant to provide certain information mandated by CEQA and to include that information in its environmental analysis," the Court may conclude that "the agency 'failed to proceed in the manner required by CEQA.'" (*Ibid.*) However, legal disputes regarding factual conclusions by the agency "would be reviewed only for substantial evidence." (*Ibid.*)

Interpretation of the mandates of the Public Resources Code and the CEQA Guidelines may require statutory construction and judicial consideration of the intent of the legislature, which this Court may consider de novo. (E.g., *Friends of Sierra Madre v. City of Sierra Madre* (2001) 24 Cal.4th 165, 188-190.)

In reviewing environmental documents for compliance with CEQA, courts have held that the failure to comply with the information disclosure requirements constitutes a prejudicial abuse of discretion when the omission of relevant information has precluded informed decisionmaking

and informed public participation, regardless whether a different outcome would have resulted if the public agency had complied with the disclosure requirements. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1197-98.)

An agency's CEQA findings regarding the feasibility of project alternatives are deferentially reviewed for substantial evidence. (*Vineyard, supra*, 40 Cal.4th 412, 435.) If the City's findings are based on a disputed question of law, the Court's review of the legal question is de novo. (*City of Marina v. Board of Trustees* (2006) 39 Cal.4th 341, 355.) The City's findings certifying the EIR and approving the project must disclose the analytic route between the record evidence and decisions. (*Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 511–512, 515.)

The Court of Appeal reviews the administrative record in CEQA case for legal error and substantial evidence in the same manner as the trial court: the Court "reviews the agency's action, not the trial court's decision; in that sense appellate judicial review under CEQA is de novo." (*Vineyard, supra*, 40 Cal.4th at p. 427.)

The non-CEQA claims in this action are subject to the standard of review for administrative mandamus. (Code of Civil Procedure § 1094.5; *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 511.) Under this standard, the court reviews the whole

administrative record to determine whether the agency's findings are supported by substantial evidence and whether the agency committed any errors of law. (*Neighbors in Support of Appropriate Land Use v. County of Tuolumne* (2007) 157 Cal.App.4th 997, 1005.) Abuse of discretion is established if the City has not proceeded in the manner prescribed by law; the order or decision is not supported by the findings; or the findings are not supported by the evidence. (*West Chandler Boulevard Neighborhood Association v. City of Los Angeles* (2011) 198 Cal.App.4th 1506, 1518.) "Substantial evidence" is defined as "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." (*California Youth Auth. v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 584.)

The interpretation of state and local law is a legal issue over which a court exercises its independent judgment. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11-12.)

ARGUMENT

I. OPPOSITION TO APPEAL: THE CITY'S FINDINGS DID NOT SATISFY CEQA'S SUBSTANTIVE MANDATE THAT AN AGENCY MAY NOT APPROVE A PROJECT WITH A SIGNIFICANT IMPACT IF A FEASIBLE ALTERNATIVE WOULD AVOID THE SIGNIFICANT IMPACT

CEQA's central, substantive mandate is that "public agencies *should not approve projects as proposed* if there are feasible alternative or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects . . . ." (Pub. Resources

Code, § 21002 (emphasis added).) The purpose of intended for public CEQA's procedures is to assist agencies in

> "identifying . . . the feasible alternatives . . . which will avoid or substantially lessen such significant effects." (*Ibid.*) The statute provides that only "in the event specific economic, social, or other conditions make infeasible such project alternatives . . . [may] individual projects be approved in spite of one or more significant effects..." (*Ibid.*)

Public Resources Code section 21081further elaborates CEQA's core substantive policy when an EIR identifies a significant effect on the environment, in order to approve a project a public agency must make one of three findings: (1) that project changes have been mitigated or avoided the environmental effects; (2) that the necessary changes or mitigations are the responsibility of another agency and can or should be adopted by that agency; or, that

> "(3) [s]pecific economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the environmental impact report."

(*Id.*, § 21081, subd. (a).) Such findings must be supported by substantial evidence. (*Id.*, § 21081.5)

These substantive mandates are central to CEQA's primary purpose: "to compel government to make decisions with environmental

consequences in mind." (*Laurel Heights Improvement Assn. v. Regents of the University of Calif.* (1988) 47 Cal.3d 376, 393.) Requiring agencies to adopt specific findings that address the feasibility of project alternatives forces them to meaningfully consider whether any of the significant impacts can be feasibly averted.

Here, the City approved a project that calls for demolition of the historic Lytton Building, now a City of Los Angeles Historic and Cultural Monument. The demolition is conceded to be a significant impact. The Superior Court's ruling correctly concluded that the City's findings under Public Resources Code section 21081, subdivision (a)(3) were not supported by substantial evidence and did not satisfy the legal standards of CEQA.

The City's findings explain that the EIR had evaluated several alternatives that would avoid significant impacts to the Lytton Building altogether, rehabilitating it in place under well-accepted protocols. (AR027794.) The findings explain that the draft EIR had determined that at least one such alternative also "met, or could partially meet, all of the objectives of the project." (*Ibid.*) The findings also observe that "the record includes numerous public comments raising concerns about the overall massing and design concept of the original project and its alternatives on the ground that it would not enhance the quality of the neighborhood,

would be visually unappealing, would obstruct views, would not be pedestrian-friendly." (*Ibid.*)

> The findings summarily pronounce that the 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." (AR027794.)

The findings state that "in response to these concerns [the City] finds that the historic 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;
>
> 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." (AR027794-95.)

The findings pronounce that the City selects Alternative 9 "because it addresses these concerns and achieves the above-listed Project Objectives. Alternative 9 would not be feasible if it incorporated a preserved bank building." (AR027795.)

The findings reference a March 24, 2016 letter by project architect Frank Gehry that stated that "it was not feasible to meet [the design objectives and the above-listed project objectives] with a design that preserved the bank building." (*Ibid.*) The findings concur in the following statement from the Gehry letter:

> "It [the Bank building] 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. . . . 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." (*Ibid.*)

The findings contain nearly identical analysis specifically purporting to conclude that Alternatives 5 and 6 were infeasible. (AR027818-27821; AR027823-27827.)

The Superior Court ruled that the City's findings are inadequate under CEQA: they are not supported by substantial evidence in the record and they are based upon improper factors. The Superior Court's ruling in this regard is not only correct, it presents a necessary interpretation of CEQA that provides critical guidance on the criteria that should guide agencies' feasibility determinations under Public Resources Code section 21801.

A. The Superior Court's Statutory Interpretation Is Consistent with Decades of CEQA Caselaw and Standard Principles of Statutory Construction

The findings required by section 21081, subdivision (a) are central to achieving CEQA's core mandate; The statute, the Guidelines, and the cases interpreting those provisions make clear that an agency's determination that an alternative is infeasible must be supported with substantial evidence, to

> "ensure there is evidence of the public agency's actual consideration of alternatives and mitigation measures, and reveal[] to citizens the analytical process by which the public agency arrived at its decision. Under CEQA, the public agency bears the burden of affirmatively demonstrating that, notwithstanding a project's impact on the

environment, the agency's approval of the proposed project followed meaningful consideration of alternatives and mitigation measures." (*Mountain Lion Found. v. Fish & Game Comm.* (1997) 16 Cal.4th 105, 134.)

An agency may not simply accept the word of a project applicant as to the feasibility of alternatives.

> "Since CEQA charges the agency, not the applicant, with the task of determining whether alternatives are feasible, the circumstances that led the applicant in the planning stage to select the project for which approval is sought and to reject alternatives cannot be determinative of their feasibility. The lead agency must *independently* participate, review, analyze and discuss the alternatives in good faith."

(*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 736 (emphasis in original).)

The Public Resources Code and the CEQA Guidelines provide additional guidance as to meaning of the terms utilized in section 21081. Section 21061.1 provides that "'[f]easible' means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors," while the Guidelines add "legal factors" as a permissible consideration on that list (Cal. Code. Regs., tit. 14, § 15364). The Guidelines define substantial evidence as

> "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. . .

> . Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence. Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (*Id.*)

The Superior Court's decision is an application, not an extension, of well-established law governing the evaluation of findings of feasibility. A project alternative or mitigation measure may be rejected by the decision maker if it is impractical (*Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1458 [land exchange alternative would be "impractical" if record contained substantial evident that federal agency is unwilling to enter exchange); if it does not make sense economically (e.g., *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 692 [preservation alternative is economically infeasible because of cost of restoration exceeds property value]); if it is legally impossible to complete (e.g., *Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco* (2002) 106 Cal.App.3d 893, 913 [failure to comply with building code requirements made reuse of existing structure infeasible]); or if social conditions prevent the alternative or mitigation measure from being constructed or implemented (e.g., *City of Del Mar v. City of San Diego*

(1982) 133 Cal.App.3d 401, 417 [regional need to accommodate population growth makes alternatives that limit growth infeasible]). Courts have also held that if an alterntive does not achieve core, central project objectives, that alternative can be rejected by the decision makers. (e.g., *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 1000 ("*CNPS*") [decision makers do not need to adopt environmentally preferable alternative because it does not satisfy "primary objectives"]).

It is the City and Developer who seek to dramatically broaden the ability of the decision maker to reject an alternative. They offer a paradigm in which a decision maker could conjure up literally any set of project objectives – crafted with whatever outcome a proponent might have in mind – against which to measure an alternative. The decision maker could then reject the alternative on the basis of its nonconformity to those objectives. To give meaning to the Legislature's command that agencies adopt "feasible" alternatives – those that are reasonable capable of being constructed – that avoid significant impacts to the environment, the finding that the preservation alternatives are "infeasible" must be overturned.

The Superior Court correctly construed CEQA's statutory scheme, coupled with the Guidelines and caselaw. The types of conditions that may serve as a basis for an infeasibility finding are limited to those that include "a specific economic, legal, or social consideration or an existing governmental policy or plan that rendered implementation of the alternative

impractical to construct." (AJA953.) The Superior Court, viewing the statutory language in the full context of CEQA, determined that a project's failure to comply with project objectives does not fall within the criteria set forth in section 21081, subdivision (a)(3) as "[s]pecific economic, legal, social, technological, or other considerations." Instead, consistent with caselaw interpreting CEQA and the statutory and regulatory language regarding project alternatives, a failure to achieve "basic project objectives," may render an alternative "unreasonable," under CEQA. (AJA945-946.) That is different from "infeasible."

The Superior Court's analysis reconciles several statutory provisions, aspects of the CEQA Guidelines, and previous cases, in a manner that is consistent with "the foremost principle under CEQA is that the Legislature intended the act 'to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.'" (*Laurel Heights Improvement Assn. v. Regents of the University of Calif.* (1988) 47 Cal.3d 376, 390 [quoting *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259].)

The Superior Court's analysis achieves the "fundamental task [of] effectuat[ing] the intended purpose of the statutory provisions at issue." (*Ryan v. Rosenfeld* (2017) 3 Cal.5th 124, 128.) Under this approach, courts

> "generally assign statutory terms their ordinary meaning, while also considering the context – which includes related provisions and the overall structure of the statutory scheme – to further [the Court's] understanding of the legislative purpose and guide [its] interpretation." (*Ibid.*)

The overall statutory scheme is critical in interpreting these provisions, because the findings required by section 21081 are the primary tool provided by the Legislature to achieve CEQA's central substantive mandate that "public agencies should not approve projects as proposed if there are feasible alternatives . . . which would substantially lessen the significant environmental effects of such projects." (Pub. Resources Code, § 21002.)

The key phrase in section 21081 – "specific economic, legal, social, technological, or other considerations," – is mirrored in the definition of "feasible," "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors." (*Id.*, § 21061.1.) It also appears in section 21002, stating that "in the event specific economic, social, or other conditions make infeasible such project alternatives . . . individual projects may be approved in spite of one or more significant effects thereof." The similar phrasing in these provisions strongly suggests that the Legislature intended for a consistent interpretation of these terms, as the type of conditions or considerations required to support a finding of infeasibility.

Under the doctrine of *ejusdem generis*, when a statute uses a "general term or category," that term is "restricted to those things that are similar to those which are enumerated specifically." (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1160, fn. 7.) "The canon presumes that if the Legislature intends a general word to be used in its unrestricted sense, it does not also offer as examples peculiar things or classes of things since those descriptions would be surplusage." (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 141.)

> "[W]hen a statute contains a list or catalogue of items, a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope. In accordance with this principle of construction, a court will adopt a restrictive meaning of a listed item if acceptance of a more expansive meaning would make other items in the list unnecessary or redundant, or would otherwise make the item markedly dissimilar to the other items in the list."

(*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1011–1012.)

The Superior Court's interpretation comports with the principle of *ejusdem generis*, by consistently applying all of the terms on the list: economic, technological, legal, and social considerations. These terms relate to external conditions independent of comparisons to a project and its potential alternatives. (See, e.g., *CNPS*, 177 Cal.App.4th at p. 1001 [interest in promoting transportation alternatives and access to open space

for persons with disabilities is a "social" or "other" consideration justifying infeasibility finding].) An alternative may be economically feasible or not; it may be legally permissible or legally prohibited; it may or may not be acceptable to construct under societal conditions. These questions are quite different from the question whether a proposed project may accomplish something in a manner that an agency or developer simply finds is *preferable* to an alternative that avoids a significant environmental impact. (See, e.g., *Citizens of Goleta v. Board of Supervisors* (1988) 197 Cal.App.3d 1172, 1181 ["[T]he fact that an alternative may be more expensive or less profitable is not sufficient to show that the alternative is financially infeasible."] "*Goleta I*".)

The Superior Court reconciled caselaw relying upon an alternative's failure to comply with central project objectives with the language of section 21081 and other provisions of CEQA. The statute's catchall phrase, "other considerations," is not susceptible of the broad meaning the City and Developer seek to impose on it (i.e., any possible reason that an agency might not wish to construct an alternative project), because under principles of *ejusdem generis*, the general term "other," must be interpreted consistently with the preceding list, "specific economic, legal, social, [or] technological . . . considerations."

The Superior Court correctly observed that section 21081 does "not authorize a finding of 'infeasibility' based on the alternative's failure to

meet project objectives." (AJA945.) Again, the statutory definition of "feasible," is "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (Pub. Resources Code, § 21061.1.) If the Legislature intended for project objectives to be a factor in assessing feasibility of alternatives, it could have included the phrase or the concept in the definition or specifically in section 21081; It did not. The statute is *silent* on the role of project objectives, which are solely a creature of the CEQA Guidelines promulgated by the California Resources Agency.

The Superior Court also correctly consulted the Guidelines to interpret what role, if any, project objectives may play in the determination whether an alternative is "feasible." As recently held by the California Supreme Court, courts consult the CEQA Guidelines as "the interpretation of the agency charged with [CEQA's] implementation," particularly "where the statute at issue is a complex, technical one," and "afford great weight to the Guidelines when interpreting CEQA." (*Calif. Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, 381.) The Guidelines address the selection of alternatives to be included in an EIR, providing "the basic framework for analyzing the sufficiency of an EIR's description of alternatives." (*In re Bay-Delta* (2008) 43 Cal.4th 1143, 1162.) Because the purpose of an EIR's alternatives discussion is "to allow the decisionmaker to determine whether there is an environmentally

superior alternative that will meet most of the project's objectives," the Guidelines' discussion of the factors that govern both the identification of "feasible" alternatives, and the relationship between alternatives and objectives, is highly relevant to the issues in this litigation. (*Watsonsville Pilots Ass'n v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1089.)

The Guidelines provide two particularly relevant interpretive provisions. First, they establish the requirement, echoed in numerous cases, that an EIR's project description include "a statement of objectives sought by the proposed project," which "should include the underlying purpose of the project." (Cal. Code Regs., tit. 14, § 15124, subd. (b).) The Guidelines specify that the purpose of the EIR's statement of objectives it to "help the lead agency develop a reasonable range of alternatives to evaluate in the EIR and will aid the decision makers in preparing findings. . . ." (*Ibid.*)

The Guidelines explicitly link project objectives to the EIR's selection of alternatives, providing that "the range of potential alternatives to the project shall include those that could feasibly accomplish most of the ***basic*** objectives of the project." (*Id.*, § 15126, subd. (c)(emphasis added).) The Guidelines explain that an alternative may be rejected from EIR analysis due to "failure to meet most of the basic project objectives." (*Ibid.*) The Superior Court's conclusion that an alternative must satisfy the "basic objectives" of a project or else it is "unreasonable" is drawn directly from the Guidelines, and is also reflected in cases such as *In re Bay-Delta*,

supra, 43 Cal.4th at p. 1165 [alternative could be rejected for study in EIR if it would not achieve "this basic underlying goal of reducing conflicts" which was identified as party of the underlying purpose of the project].)

The Guidelines also elaborate on the identification of feasible alternatives by identifying "factors that may be taken into account," including "site suitability, economic viability, availability of infrastructure, general plan consistency, other plans or regulatory limitations, jurisdictional boundaries. . . and whether the proponent can reasonably acquire, control or otherwise have access to the alternative site." (Cal. Code Regs., tit. 14, § 15126, subd. (f)(1).) The Superior Court correctly used this provision to inform its understanding of the appropriate criteria for a feasibility determination, as the criteria listed in the Guidelines are directly related to the factors set forth in section 21081, "economic, legal, social, [or] technological . . . considerations." The caselaw endorses use of the Guidelines as "gap filling" measures to elaborate on the statutory scheme. (*Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 959.)

The City and Developer attempt to spin the Superior Court's analysis an unprecedented extension of law, but it is they who propose a dramatic and troubling extension: that a decisionmaking body may conclude (contrary to the EIR) that an alternative is infeasible if it does not

meet one of an EIR's listed project objectives, regardless of how tangential or idiosyncratic the objective might be. As the Superior Court recognized,

> "…such a rule would turn CEQA's substantive mandate on its head by allowing private and public proponents to articulate objectives that no proposed alternative could match. For example, Real Party in this case could have articulated an objective of "constructing a mixed-use development designed by architect Frank Gehry"

thereby rendering any proposed alternative not approved by Mr. Gehry infeasible." (AJA951.) An EIR's list of objectives cannot provide carte blanche to decision makers to reject alternatives that satisfy "most" of the "basic objectives," or else the substantive mandate of CEQA would become nothing more than a formality to be easily disregarded under the mask of "deference."

B. The City's Findings Lacked Substantial Evidence that the Preservation Alternatives Are Infeasible.

i. Evidence of Economic Infeasibility Is Insubstantial

As the Superior Court noted, economic feasibility is a legitimate question when an agency considers project alternatives. Here, although the findings do not expressly state that the preservation alternatives are economically infeasible, the City and Developer contended below that economic infeasibility was a basis for the City's finding rejecting alternatives to the demolition of the Lytton Building. (AJA 446-448.) It is well-settled that

> "the fact that an alternative may be more expensive or less profitable is not sufficient to show that the alternative is financially infeasible. What is required is evidence that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project."

(*Goleta I*, *supra*, 197 Cal.App.3d at p. 1181.) The record evidence relating to economic feasibility did not constitute substantial evidence in support of the City's determination: economic evidence was scanty, was provided only by the developer, was not subject to *any* independent review or analysis by the City, and on scrutiny, does not consider relevant factors and departs from previous assumptions by the same analysts without explanation.

The City and Developer make much of the last second, October 31, 2016 pro forma submitted by the developer to the Los Angeles City Council, the day before the Council approved the project at a morning hearing. (AOB, p. 51.) The City and Developer significantly overstate the quantity and quality of evidence on the supposed economic infeasibility of the preservation alternatives. To be clear, the preservation alternatives identified a project of essentially the same square footage as the proposed project, with nearly the same space devoted to commercial use. (Compare AR004644 to AR000947, AR000985.) The approved project even includes a savings bank, as is currently located in the Lytton Building. (AR004644.)

Until October 31, the only economic evidence before the City were the pro formas prepared by the developer in support of its density bonus

application. (See AR057479-93, AR059420-27.) These pro formas are focused on the relative cost of the proposed project versus the cost of providing affordable housing without the density bonus, and as required by the density bonus ordinance, the pro formas were peer-reviewed by another consultant hired by the developer. (AR057495-57500, AR059433-059437.) These pro formas are *not* focused in any way on the cost of the historic preservation alternatives.

Thus, at the time that the City Planning Commission issued its determination on August 17, 2016, there was no evidence in the record of the economic feasibility of the historic preservation alternatives. On October 25, 2016, at the last significant public hearing on the project before the PLUM Committee, there was no evidence before the City Council regarding the economic feasibility of the preservation alternatives.

On October 31, the developer sent City Councilmembers a five page pro forma analyzing the cost to construct the preservation alternatives. (AR029873-29875.) Unlike the prior pro formas, this pro forma was *not* peer-reviewed (AR029873-29878.) The pro forma was included in an 80-page letter emailed to the City Councilmembers, but was not emailed to the City Clerk for inclusion in the public file. (AR027862.) Because of the timing of the submission, neither the public nor the City had an opportunity to independently review or analyze the pro forma. The next day, on November 1, 2016, the City Council adopted the recommendation of the

PLUM Committee to approve project as modified at the PLUM Committee hearing. (AR000188-89.)

There was absolutely no discussion of the economic feasibility of the preservation alternatives at the final City Council hearing, nor at any of the hearings leading up to the approval of the project. Indeed, there is not one shred of evidence that the City "independently participate[d], review[ed], analyz[ed] and discuss[ed] the alternatives in good faith," as required, with regard to any finding of economic infeasibility. (*Kings County Farm Bureau v. City of Hanford*, *supra*, 221 Cal.App.3d at p. 736.)

The developer's pro forma analyzing the preservation alternatives was thus insulated from meaningful critical review by the public or by decision makers because it was submitted at the last possible minute. Such review would have revealed that the last-minute pro forma is based on significantly different assumptions regarding the non-historic preservation alternative without any basis for the departure from the assumptions in the previous pro formas for the same items. For instance, although both pro formas state that "the elevated levels of finishes are expected to support residential and retail pricing at the highest end of current offering in the Los Angeles area," (AR029876 & AR059423), the Alternative 9 pro forma predicts significantly higher rental and sale prices for the project's residential units compared to the historic preservation alternatives (AR059427 (condominium sales totaling over $89 million for 30 units;

annual rental apartment income of $7 million for 219 units); AR029878 (condominium sales totaling close to $68 million for 28 units; annual rental apartment income of $6 million for 263 units)). The sale prices of condominium units are estimated to be 24 percent lower for the historic preservation alternative, with only two fewer condominiums than the project, and rental rates per unit are 28 percent lower in the historic preservation alternative than projected for the project. There is no explanation for these changes in the pro forma data, nor does the EIR or record contain any information suggesting that the residential construction for preservation alternatives 5 or 6 will be of significantly lesser quality or value than those proposed for the project.

In fact, replacing the condominium sales pricing from the Alternative 9 approved project pro forma into the historic preservation alternative pro forma significantly increases the developer profit margin. Using the same development costs and operating income (which may also be understated) in the calculations at the bottom of AR029878 but replacing the $67,825,000 in condominium sales with $83,000,000 (to account for the two fewer condominium units in the historic preservation alternatives) results in a developer profit margin of $35,929,134 and percentage return of 12.46%.

Given that the rental rates in the historic preservation pro forma are also significantly lower than the rental rates in either of the previously

submitted pro formas (AR029878 (average rental rate of $3,611 for non-affordable units in historic preservation alternative); AR059427 (average rental rate of $4,891 for non-affordable units in project); AR057493 (average rental rate of $4,625 for non-affordable units in original project proposal)), it is easily to see how an uptick in the rental assumption for the historic preservation pro forma would quickly tip the historic preservation project over the developer's selected threshold of financial feasibility. Assumptions regarding the sale price of the condominium units and the rental value of the non-affordable housing play a significant role in both the return on cost and profit margin figures that are central to the pro forma's analysis, which was not subject to peer review or any independent analysis.

Of course, ***residential rental rates and condominium sale prices have nothing to do with the cost of preserving the Lytton Building.*** In fact, the historic preservation pro forma states that "***[c]osts for the substantial reconstruction of the Chase Bank building to comply with current building codes are assumed to equal those of new construction***." (AR029878.) In fact, the construction costs for the historic preservation alternatives are *ten percent less* than the construction costs for the approved project. (AR029877 (construction costs of $147,890,876 and total development cost of $252,371,088 for historic preservation alternative); AR059426 (construction costs of $165,150,949 and total development cost of $276,526,966 for project).)

It is clear from an examination of the last-minute pro forma for the historic preservation alternatives that the cost of preserving the Lytton Building was *not* among the reasons that the preservation alternatives were purportedly not economically feasible.[3] Moreover, the historic preservation alternative pro forma does not reflect any of the possible economic *benefits* of historic preservation, including tax incentives under the Mills Act (Gov. Code, §§ 50280 et seq; Los Angeles Administrative Code, § 19.140 et seq) or federal rehabilitation tax credits (26 U.S.C. § 47; 36 CFR Part 67). The last-minute pro forma is not substantial evidence that the historic preservation alternatives are economically infeasible, because the pro forma does not address all relevant factors, reaches conclusions based upon factors entirely distinct from the cost of restoring and preserving the Lytton Building, and departs from assumptions establishing the income potential for the project without any explanation for the significant departure.[4]

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[3] A legitimate difference between the historic preservation alternatives and the project would be the commercial income for the Lytton Building. The historic preservation alternatives show a commercial income of $3,095,683 (AR029878) while the project has commercial income of $3,953,235 (AR059427), a difference of approximately $900,000 out of overall annual income in the $9 to $11 million range. There has been no independent verification of this figure, which is based on data provided by Townscape Partners, the developer. (AR029878.)

[4] Respondents assert that there is no contradictory evidence in the record. (AOB, p. 54.) Of course as explained above, there is no evidence rebutting the October 31 submission because the public had no opportunity to examine it before the hearing on the morning of November 1. However, Councilmember David Ryu retained Terri Dickerhoff of CGR Development

The record here is in stark contrast to that considered in *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656. There, a developer contracted with a consulting firm to analyze the cost of preserving an historic structure, developing construction cost estimates with input from a construction management firm, and consulting with an independent expert retained by the city, the city architect, and the planning department. (*Id.* at p. 671.) The result of the developer's analysis in *San Franciscans* was that the historic structure "would cost more to rehabilitate than it would thereafter be worth on the market, and that the Building therefore had a *negative* market value." (*Ibid.* (emphasis in original).) This estimate was independently reviewed by the city's expert who concurred that the building "had no substantial remaining market value; all the preservation alternatives would be financially infeasible without public assistance." (*Ibid.*)

The developer's analysis took into account "all projected costs of rehabilitation, the probable future revenue scheme from the completed

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to prepare pro formas comparing returns on development at different density levels. (AR030999-31000.) The CGR pro formas utilize the same condominium sale values and residential rental rates as the pro forma for the approved project. (AR030598-030606.) The fact that multiple reviewers accepted the condominium sales and rental rates in the pro forma for the project is contradictory evidence to the rates used in the historic preservation alternative pro forma, which were not reviewed by any independent reviewers, and which, as set forth above, were significant factors in the economic analysis that the project would not "pencil out."

development, and the available monetary incentives for historic restoration and preservation, including potential historic tax credits. . . .” (*Id.* at p. 680.) The analysis showed that in that case, preservation alternatives “would all have significantly less square footage of commercial space than the proposed Project, with consequent reductions in the amount of commercial income and profit, tax revenues, and job opportunities for the community,” and that preservation alternative could require as much as “$82.1 million in public investment to close the financial shortfall between private investment and the cost of rehabilitation and development.” (*Id.* at p. 693.) The city’s independent analysis concurred in this finding. (*Id.* at p. 694.)

The *San Franciscans* Court concluded that the evidence supported the determination that the preservation alternatives were “infeasible, in that the additional costs and lost profitability they would entail were sufficiently severe as to render them impractical.” (*Id.* at p. 695; see also *SPRAWLDEF v. San Francisco Bay Conservation and Development Commission* (2014) 172 Cal.App.4th 905, 919-920 [evidence demonstrated that reduced size landfill would reduce capacity by 30 percent and revenue by 45 percent, with only 10 percent reduction in project cost; applicants’ assertion supported by report prepared for Army Corps of Engineers demonstrating reduced capacities and reduced lifespan for alternatives]; *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App4th 1383,

1399-1400 [substantial evidence supported finding that reduced herd alternative is economically infeasible based upon "economic analysis demonstrating a negative economic return on the reduced-herd size alternative" and "a letter from the lending institution that was financing construction of the dairy" stating that it would not finance a reduce herd size dairy because it would not "generate enough cash flow to service debt on the startup operation."].)

Compared to *San Franciscans* (and other cases on economic infeasibility), there are several missing pieces in the economic analysis in the record here: (1) no independent review of the analysis of the historic preservation alternative; (2) no analysis that includes the potential economic benefits of historic preservation; and (3) no evidence that the cost of *preservation* of the Lytton Building is significant enough that a reasonably prudent investor would not proceed with the project. This case is far more like *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336 ("*PAC*"), than *San Franciscans.*

PAC reviewed a claim by a corporation, Lowe's, that a reduced-size store, which would permit the preservation of an historic resource, would be infeasible because the smaller store would not serve the needs of the larger market. (*Id.* at p. 1356.) The City Council made no specific finding that the reduced size alternative would be infeasible. (*Ibid*.) The Court concluded that "the administrative record contains no acts, independent

analysis, or 'meaningful detail' to support Lowe's' claim that 'San Jose market demands of product selection/variety' and the need to 'stock the appropriate amount of inventory' rendered a reduced-size store . . . infeasible." (*Id.* at p. 1357.) The Court explained that *the applicant's reasons for rejecting the smaller store could not be determinative of the feasibility of that proposal.* (*Ibid.*) Likewise, the record here depends entirely on a single economic analysis, submitted by the developer so late in time that the public and decision makers were unable to critically examine it. The City made no independent determination that an alternative project that preserved the Lytton Building would be financially infeasible.

In *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, the Court reviewed a finding of economic infeasibility regarding the restoration of an historic residence that Steve Jobs proposed to demolish and replace with a smaller structure. (*Id.* at p. 591.) The Court of Appeal faulted the town for rejecting that the preservation alternatives as infeasible. The record contained no evidence of the cost for the construction of the new residence, only estimates of the cost of historic restoration. (*Id.* p. 598.) With historic preservation projects, the *comparative cost* of rehabilitation compared with the proposed project is the relevant metric: "if the cost of renovation exceeds the cost of new

construction, it is the magnitude of the difference that will determine the feasibility of this alternative." (*Id.* at p. 599.)

Here, the record before the City Council demonstrates that the *cost* of renovation of the Lytton Building is *less* than or at least *no more than equal to* the cost of the project. The proffered evidence of lost profitability is premised on unexplained assumptions regarding the sale and rental price of the project's residential components. The record lacks substantial evidence that the City independently evaluated the economic feasibility of the preservation alternatives to fairly conclude that any lost profit or additional cost would be "sufficiently severe" such that a reasonably prudent person would not proceed with the preservation alternatives.

ii. Gehry's Unsubstantiated Opinion on Aesthetic Issues and Pedestrian Access Is Not Substantial Evidence of Infeasibility or Proper Basis for an Infeasibility Finding

The findings rely upon City staff's "concurrence" in Frank Gehry's March 24, 2016 letter that addresses aesthetic and pedestrian access. There are two significant deficiencies with Mr. Gehry's letter: (1) it consists of unsubstantiated opinion; and (2) the aesthetic and pedestrian concerns are not proper bases for an infeasibility finding under Public Resources Code section 21081.

First, the Gehry letter, and the City's subsequent findings that re-iterate Mr. Gehry's comments verbatim, are simply opinions without

factual substantiation. The letter makes conclusory statements regarding: (a) the future potential use of the bank building; (b) the size of the bank building relative to the available property; (c) the failure of the building to engage the street front or Havenhurst; and (d) the building's supposed impediments to pedestrian access. No facts support these statements, not the square footage of the building, not a floor plan showing potential future use, not a diagram of pedestrian access, or even a comparison of the street views along Sunset or Havenhurst with the bank building restored versus the proposed project. There are no examples provided of the models Mr. Gehry purports to have developed that include the bank building. The letter is unadorned, unabashed, opinion, and does not meet CEQA's standard for substantial evidence. (*Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928 ["[M]ere argument, speculation, and unsubstantiated opinion, even expert opinion, is not substantial evidence for a fair argument."].)

Moreover, Mr. Gehry's unsupported opinion conflicts with the *actual* objective evidence in the record. The EIR contains detailed analysis of the preservation alternatives that contradicts virtually every one of Mr. Gehry's opinions. The EIR explains that, as with original project, "the Bank Preservation Alternative would feature high quality architectural design" (AR952; see also AR990.) Mr. Gehry states that he "does not believe" that the Lytton Building has "the flexibility to adapt to a new

usage," (AR027795) but the EIR proposed adding a second floor to the building, replacing false clerestory windows with real windows to bring light to the second floor and to expose the distinctive folded roof plates, and repurpose the building for new commercial use. (AR000951; see also AR000985 & AR000989.) Mr. Gehry stated that the building "does not provide street-front engagement along Sunset Boulevard," (AR057731) but the EIR stated that the preservation alternatives would improve "Sunset Boulevard frontage . . . with compatible landscaping in keeping with the original Mid-Century Modern design intent." (AR000951, see also AR000989). While Mr. Gehry complained that the bank occupied "a sizeable portion of the available property," the EIR stated that the preservation alternatives "would also provide aesthetic benefits similar to the Project, including an approximately 34,050-square-foot Central Plaza and the conversion of the adjacent City-owned traffic island to provide a 9,134 square-foot public space." (AR000952; see also AR000990).

Mr. Gehry opined that the bank "impedes pedestrian access to the project from Havenhurst and Sunset" (AR057731), but the EIR stated that the preservation alternatives would provide "streetscape, a landscaped public plaza, and landscaped Central Plaza with direct sidewalk access that would be inviting to nearby residents and pedestrians along Sunset Boulevard." (AR000965; see also AR001004.) The EIR also found that the preservation alternatives were "consistent with the City's Walkability

Checklist," because of the links for pedestrians to the landscaped plaza, and "numerous design features to enhance the neighborhood character and pedestrian environment." (AR000966; see also AR001004.) Such features included "ground floor retail with glass frontages along Sunset Boulevard, preservation of existing glazed street front along the existing Bank building, wider sidewalks than under existing conditions, off-street parking and driveways, reduced signage and lighting and ease of pedestrian movement through the reconfiguration of one of the two traffic islands in the Sunset Boulevard/Crescent Heights Boulevard intersection into a landscaped public open space." (AR000966; see also AR001004.)

The City and Developer contend that, because Alternative 9 did not exist when the EIR analysis of the preservation alternatives was prepared, the EIR does not reflect the superiority of Alternative 9. (AOB, p.40.) The legal question is not whether the City or Developer may find the design of Alternative 9 preferable, but whether there is substantial evidence in the record demonstrating that the preservation alternatives are *infeasible*. This is the legal error in the City's reliance on the Gehry letter.

A fair reading of Mr. Gehry's opinion, even aside from its factual unsubstantiation, is that the preservation alternatives are ***undesirable***, not that the preservation alternatives are ***infeasible***. While "'feasibility' under CEQA encompasses 'desirability' to the extent that desirability is based on a reasonable balancing of the relevant economic, environmental, social, and

technological factors," the factors presented by Mr. Gehry's letter are not the metrics by which feasibility is properly determined under CEQA. (*City of Del Mar v. City of San Diego* (1982) 133 Cal.App.3d 401, 417.)

As already noted, the term "feasible" is defined as capable of being achieved in a reasonable period of time, in light of economic, environmental, social, legal, and technological factors. (Pub. Resources Code, § 21661.1; Cal. Code Regs., tit 14, § 15364.) Mr. Gehry's letter does not address whether the preservation alternatives are *capable* of being achieved. Mr. Gehry provides an opinion that the preservation alternatives are *less desirable* than his design. This is a tautology. A project proponent *always* believes that alternative designs are less desirable than the project that the proponent advocates. For that reason, "the circumstances that led the applicant in the planning stage to select the project for which approval is sought and to reject alternatives cannot be determinative of their feasibility." (*Kings County*, *supra*, 221 Cal.App3d at p. 736.) Together, the March 24 Gehry letter, and Mr. Gehry's subsequent October 24 letter (AR029886), does not provide substantial evidence of infeasibility.

Mr. Gehry does not support a project design that incorporates the Lytton Bank building. But the EIR confirms that the adaptive reuse of the historic building is feasible.

iii. Post-Facto List of Planning and Policy Goals Identified in Legal Briefing Is Not Substantial Evidence of Infeasibility of the Preservation Alternatives

For the first time in their Opening Brief on Appeal, the City and Developer identify a number of existing City policies which they contend serve as substantial evidence to support the City's finding of infeasibility. (AOB, pp. 56-59.) The City and Developer waived this argument by failing to raise it in the Superior Court. (*North Coast Business Park v. Neilsen Construction Co.* (1993) 17 Cal.App.4th 22, 28-29 [party that fails to raise defense in trial court may not raise it on appeal, nor may party adopt a new and different theory on appeal].) This Court need not further consider this post-facto, post-judgment theory.

Nevertheless, there is not substantial evidence in the record to support a finding that the preservation alternatives are infeasible based on any failure to satisfy these planning objectives. To the contrary, the only discussion of preservation alternative's compliance with the City's existing land use planning objectives confirms that these alternatives *satisfy* the existing land use objectives. (AR000965-968, AR001004-1006.) The City and Developer do not provide any substantive discussion as to how the preservation alternatives are inconsistent with a single one of the listed policies. In fact, the preservation alternatives meet the policies, providing commercial and residential development with high-quality architectural

design and including the landscaped public open spaces and pedestrian amenities that the City's policies require. (*Ibid.*) The supposed non-conformance with the listed policies is not a basis for an infeasibility finding because there is no substantial evidence of such non-conformance.

iv. The Objections by Certain Commenters to the Original Project's Design Are Not "Social Conditions" that Justify a Finding of Infeasibility

The City and Developer advance a novel, and legally unsupported, contention that the City could conclude that the preservation alternatives are *infeasible* because members of the public commented negatively about the aesthetics of a different (but, according to the City and Developer, similar looking) proposal. (AOB, p. 59.) The Superior Court correctly rejected this approach to infeasibility under Public Resources Code section 21801. No reported decision that stretches the concept of "social conditions" so broadly as to find that negative comments by some members of the public renders the construction of an alternative that avoid or reduces significant environmental impacts incapable of completion in a timely and successful manner.[5] Given the statutory language and its interpretation in the Guidelines, allowing a local government to rely on public comment as

[5] Indeed, the Legislature has expressly forbidden reliance upon public controversy to determine whether a project has significant environmental effects, which counsels against reliance upon such controversy as a factor to determine the feasibility of a project alternative. (Pub. Resources Code, § 21082.2, subd. (b).)

the basis for a finding of infeasibility would stretch the concept beyond recognition.

The City and Developer point to what they contend were comments critical of the original design for its height, uninspired design, and potential to block views, focusing particularly on one commenter who changed his opinion on the project as a result of the design in Alternative 9.[6] (AOB, pp. 59-60.) Although these commenters were discussing the original proposal, The City and Developer contend that the same concerns would have applied to the preservation alternatives. (*Id.*, p. 60.) Of course, the City and Developer ignore the many, many commenters that viewed Alternative 9 in an extremely negative manner (and some who felt that all of the proposed development was too high or too large). (See, e.g. AR015013-15 [Hollywood Hills West Neighborhood Council stating that Alternative 9 is too massive]; AR005906; AR006071 [Gehry design does not make the massive development and height acceptable]; AR006290; AR006532 [while design by Gehry is acceptable, impacts from driveway location are concerning to neighboring resident]; AR006543 ["This is even uglier than the 'green' one you tried to force down our throats before. Just because Frank Gehry is involved does not mean it is attractive. This awful design looks like a prison."]; AR006548 ["It's just an awful monstrosity, just

[6] It is worth noting in this regard that Alternative 6, the "Reduced Height and Bank Preservation Alternative" proposed a 178-foot tower, which is the same height as the final Project. (AR000985.)

because it's design by Gehry doesn't mean it's good for the area. I live opposite and I do not want to look at this big white wedding cake while I'm having breakfast."]; AR006575 ["The building looks like a nasty ugly cheap copy of Disney Concert Hall. The high walls on the sidewalk keep the neighborhood out."]; AR006579; AR006765; AR006766 [design will "ruin the elegant, historic nature of Havenhurst"]; AR6844.) The City could have equally concluded on the basis of these comments that Alternative 9 was "infeasible," due to "social conditions." But nothing about the public's aesthetic opinions actually makes either Alternative 9 or the preservation alternatives incapable of successful construction.

The City and Developer will argue that it was their policy prerogative to conclude that the negative opinions of its constituents were "social conditions" that rendered infeasible the preservation alternatives, and that the other negative opinions about the chosen alternative were not "social conditions" that made the project infeasible. The City and Developer do not cite a single analogous case to support the idea that negative opinions constitute a "social condition" rendering an alternative "infeasible." Cases invoking social conditions that render alternatives "infeasible" do not involve a comparative weighing of the merits of various alternatives, but rather an assessment of external social conditions that make it infeasible to proceed in a manner that would avoid the significant environmental impacts. For instance, in *Concerned Citizens of South*

Central L.A. v. Los Angeles Unified School Dist. (1994) 24 Cal.App.4th 826, the Court of Appeal concurred that alternatives to constructing a school at a site where residents would be displaced were infeasible due to "region-wide housing problem in South Central Los Angeles, the low vacancy rate, and the host of economic and social problems confronting this low-income, minority neighborhood."] (*Id.* at p. 848.) Similarly, in *City of Del Mar*, the Court agreed that, in light of the social and economic reality that the area's population would continue to grow, alternatives that would accommodate significantly less population were infeasible. (133 Cal.App.3d at pp. 416-417.) The City and Developer cite *Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco* (2002) 106 Cal.App.3d 893, 913, for the proposition that a preservation alternative was not feasible because it "would not meet 'the needs of the City's many constituencies,'" (AOB, p. 56) but that quote is essentially an aside, without *any* additional elaboration, in a clear finding of economic infeasibility due to cost of restoration, reduced tax revenues and decreased job creation. (See 106 Cal.App.3d at p. 913.) The case does not involve a city using negative comments about a different project to conclude that it is *infeasible* to construct an alternative that would avoid a significant environmental impact.

C. The Preservation Alternatives Were Not Infeasible Because of Their Supposed Inability to Achieve Certain Project Objectives

The City's findings were significantly premised on the unsupported contention that the preservation alternatives were infeasible because they did not satisfy six of the fifteen project objectives. The City and Developer concede, as they must, that the EIR determined that the preservation alternatives met those objectives. (AOB, p. 40.) They contend that the City's 180 degree turn on the question of whether the preservation alternatives could satisfy the project objectives was justified because the EIR had been evaluating a different project, and once the City learned of the manifest benefits of Alternative 9, its opinion of whether the preservation alternatives could satisfy the project objectives had changed. This contention highlights the fundamental legal error that underlies all of the City's findings: The City was focused on the comparative *benefits* of Alternative 9, and not the *feasibility* of the preservation alternatives. While the City and Developer argue at length that agencies are entitled to deference to make policy determinations, those determinations must be based on the proper factors, and CEQA makes clear that the proper consideration under section 21081, subdivision (a)(3) is the feasibility of alternatives, *not* the benefits of the project. The City and Developer cannot identify substantial evidence in the record that the preservation alternatives do not meet the project objectives.

i. The Issue of Objectives Was Properly Before the Superior Court

For the first time on appeal, the City and Developer raise an issue exhaustion argument, contending that no party had argued that before the City that it had failed to identify a basic objective, and that the Superior Court was therefore prohibited from making its own statutory analysis of this issue. (AOB, p. 36.) This argument errs for three reasons.

First, these parties did not raise this argument below, and have therefore waived it. The City and Developer suggest that they had no opportunity to raise exhaustion because the issue was first introduced in the Superior Court's decision. (AOB, p. 37.) This is inaccurate. The Superior Court prepared a tentative ruling that included its observations on the failure to identify a "basic" objective that the parties had an opportunity to review prior to the hearing on the merits, which was held over a two-day period. The City and Developer could have raised their concerns about exhaustion at the hearing and did not. Because they did not do so, their exhaustion arguments are waived. (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 133-134 [defense of exhaustion of remedies is waived if not raised in trial court].)

Moreover, this argument assumes that the Superior Court was not permitted to draw its own *legal* conclusions regarding the requirements of CEQA. A court may address legal issues on its own motion even when the

issues are not raised by the parties. (*San Mateo Union High School Dist. v. County of San Mateo* (2013) 213 Cal.App.4th 418, 436 [appellate court may consider argument raised for first time on appeal as long as issue is pure question of law].)

Finally, the issue of objectives was exhausted by commenters. The Los Angeles Conservancy submitted analysis objecting to the findings that noted that the preservation alternatives could achieve the majority of the project objectives. (AR027138.) Raising the issue of objectives in this manner – focusing on the fact that most of the objectives were satisfied by preservation alternatives – sufficiently raised the issue of the impropriety of cherry-picking certain collateral objectives to claim infeasibility.

ii. CEQA Does Not Permit the Rejection of an Alternative as Infeasible Solely on the Basis of Inability to Achieve Collateral Project Objectives

As discussed in section (a), above, the Superior Court properly construed CEQA and the governing caselaw when it concluded that an alternative that does not comply with the basic project objectives is "unreasonable," as opposed to "infeasible." In its findings, the City identified six objectives that it claimed the preservation alternatives did not meet, and at trial, professed that these were, in fact, basic project objectives. (April 19, 2017 Transcript at p. 25:25-26:17.)

Although "CEQA does not restrict an agency's discretion to identify and pursue a particular project design to meet a particular set of objectives,"

it does not authorize a public agency to use that set of objectives as a checklist to determine feasibility. (*California Oak Found. v. Regents of University of California* (2010) 188 Cal.App.4th 227, 276-277.) "Although a lead agency may not give a project's purpose an artificially narrow definition, a lead agency may structure its EIR alternative analysis around a reasonable definition of underlying purpose and need not study alternatives that cannot achieve that basic goal." (*In re Bay-Delta*, *supra*, 43 Cal.4th at p. 1166.)

The EIR in this case never identified an "underlying purpose" or basic objectives. (See AR00264-265.) The City professed at oral argument that the six objectives that the findings contended were not satisfied by the preservation alternatives were, in fact, "basic objectives," obviously because the City had included these objectives in its findings. (AOB, p. 35.) That argument is belied by the findings themselves, which, for each alternative, list all of the project objectives and identify those which the City determined the alternative would satisfy, would not satisfy, or would only partially satisfy. (See AR027820-21; AR27826-27.) There is no analysis in the record suggesting that the six objectives that the City contends the preservation alternatives do not satisfy are central objectives to the project, or that in any way distinguishes these six objectives from the nine objectives that are satisfied or partially satisfied by the preservation alternatives.

This argument infers to a rule that the Court must defer to any agency's after-the-fact pronouncement as to the "basic objectives" of a project, without prior identification or analysis. Even though an agency's determination may be entitled to deference, "judicial deference is not judicial abdication." (*California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 456.) Here nothing in the City's project approval findings establishes that the now-touted objectives are the "basic" objectives of the proposed project.

This argument is particularly troubling because that the EIR does, in fact, identify the project's "core objectives," of the project, in multiple responses to comments on the Draft EIR. In response to a proposal from a commenter that the EIR should have analyzed a smaller mixed-use development, the Final EIR stated "[t]his amount of development would not achieve many of the ***core objectives*** of the Project, including those related to the provision of affordable housing, concentration of density and housing in activity areas near transit, enhancing pedestrian activity and neighborhood commercial street life (Corner Plaza), and providing additional employment opportunities." (AR005715 (emphasis added).) The Final EIR made the same assertion in response to a comment requesting study of a 1:1 FAR mixed-use project. (AR005830.)

The Final EIR, in its statement regarding *core objectives*, recognized that there are a set of objectives that characterize the fundamental, or basic,

purposes of constructing the project. Instead of the fifteen item list, the FEIR distilled the objectives to a set of four items: providing affordable housing, adding density near transit, enhancing pedestrian activity with specific reference to the Corner Plaza, and providing jobs. The infeasibility findings conclude that the preservation alternatives are infeasible without reference to these core objectives.

The Superior Court correctly rejected the City's reliance upon "non-basic" objectives to make a feasibility determination (or a determination that the preservation alternatives were "unreasonable"). The caselaw is full of examples of agencies evaluating alternatives to see whether they meet "basic," "key," or "primary" project objectives. *CNPS, supra*, 177 Cal.App.4th 957, is one such example. In *CNPS*, the Court of Appeal evaluated an EIR for a plan to manage a natural area and construct trails for the public to access the area. (*Id.* at p. 968.) Prior to preparation of the EIR, the city council directed that the plan for the area should include, among other things, "a trail system that includes an east-west multi-use trail." (*Id.* at p. 969.)

The Draft EIR included 10 project objectives, including six related to public use, one of which was to "provide multi-use trail connections that comply with Americans with Disabilities Act (ADA) requirements and provide pedestrian, wheelchair, and bicycle access." (*Id.* at p. 971.) While the DEIR analyzed some alternatives that did not provide a paved, multi-

use trail, when the decisionmaking body reviewed the EIR and the project, it concluded that the alternatives that lacked a paved multi-use trail "would not meet a key objective of the Project." (*Id.* at pp. 988 & 997, fn. 11.) Rejecting the argument that the inclusion of the non-multi-use alternatives in the EIR meant that they were de facto "feasible," the Court of Appeal explained that the issue of feasibility is presented at two times: first, when the EIR is drafted, and again when the decision makers issue findings under Pubic Resources Code section 21081. (*Id.* at p. 999.) The Court of Appeal explained that the rejected alternatives "failed to achieve what the Council regarded as primary objectives of the Master Plan." (*Id.* at p. 1000.) There was no dispute that the city council's plan at the outset included multi-use trails, and that the rejected alternatives did not have multi-use trails. Even the challengers in the case commented on the EIR that "ADA compliant multiuse trails . . . 'are assumed to be an essential part of the Project.'" (*Id.* at p. 973.)

Other cases line up with *CNPS*, requiring a determination that a given objective is a key, primary, or basic part of a project to permit the rejection of an otherwise feasible alternative on that basis. (See, e.g. *Sequoyah Hills Homeowners Assn v. City of Oakland* (1993) 23 Cal.App.4th 704, 715 [lead agency need not consider lower density housing that would defeat the underlying purpose of providing affordable housing]; *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1501

[upholding infeasibility finding based on failure of alternative that would avoid wetlands impact to achieve centralized facility objectives for winery]; *In re Bay-Delta*, 43 Cal.4th at p. 1165 ["feasibility is strongly linked to achievement of each of the primary program objectives."]; *PAC*, 141 Cal.App.4th at p. 1355 [alternative that would meet all of the basic objectives but would not satisfy objective relating to square footage of store must be studied in EIR]; *San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1, 18 [alternative that would defeat core objective of encouraging growth of agriculture and wine industry by streamlining approval process is infeasible].)

CEQA is concerned with the feasibility of alternatives. An alternative that avoids a significant environmental impact is not rendered infeasible because it does not comply with a set of objectives that are unrelated to the core purpose of the project.

iii. There Is Not Substantial Evidence Supporting the Conclusion that the Preservation Alternatives Do Not Meet Project Objectives

Finally, even if the six objectives touted in the opening brief could serve as a basis for a finding of infeasibility, no substantial evidence supports a finding that the preservation alternatives do not meet these objectives. Even though the determination of feasibility is made at two distinct stages in the approval process, the City and Developer provide no examples where an EIR determined that an alternative satisfied project

objectives, and then arrived at the exact opposite conclusion in feasibility findings, without relying upon something extrinsic to the EIR like economic or social conditions. Certainly, in such a case the determination would necessarily be based on some evidence outside the EIR. In this case, there is no such substantial evidence regarding the preservation alternatives' supposed inability to meet the six objectives.

The EIR refutes the claim that the preservation alternatives do satisfy each of the six objectives:

"Provide an attractive retail face along street frontages": The street level and second story of bank building will have windows installed to improve the streetscape near Lytton Building. (AR000948, 000951, AR000989.)

"Redevelop and revitalize an aging, and underutilized commercial site": The preservation alternatives include over 222,000 (and up to 271,000) square feet of new residential square footage and 62,000 square feet of commercial square footage, compared to 80,000 square feet of development presently at the site. (AR000948, AR000986)

"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": The preservation alternatives all include significant residential and commercial component, in the same location as the Project. (*Ibid.*)

"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": Both preservation alternatives and the project include retail space, a grocery store and a health club, a bank, restaurants... (AR000948, AR000986.)

"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": The EIR and the pro formas provided by RPI all assert that the preservation alternatives will include "high quality architectural design and detail." (AR000952, AR000990.) The preservation alternatives include a significant residential component. (AR000948, AR000986, AR029876, AR059423.)

"Enhance pedestrian activity and neighborhood commercial street life in the westernmost area of Hollywood": The preservation alternatives satisfy the walkability checklist, include a Central Plaza and a Corner Plaza, as well as improvements along Sunset to improve pedestrian street experience.

Again, City and Developer rely on Mr. Gehry's opinions about the aesthetics of bank building and its effect on the site layout. But these are simply opinions. The City and Developer rely on a statement in the

findings regarding the presence of a three-story parking structure in preservation alternatives, but it is unclear which, if any, of the project objectives are not satisfied by the three-story parking structure. (AOB, p. 43.) The contention that one can simply draw the conclusions "logically" from "a comparison of the professionally produced project layouts for the preservation alternatives (AR000949, AR000987) and Alternative 9 (AR004648)," (AOB, p. 43) is nearly risible, as the project objectives are maddeningly vague and the one dimensional plans reveal very little about the visual context of the projects. What conclusions is one to draw from these layouts regarding the "vitality," of the projects, the "visual character of western Hollywood," or the "enhancement of the character of the area?" The findings make these assertions about the objectives as if in a vacuum, but the assertions are contradicted by any objective metric, including the analysis in the EIR that guides judicial review. The record contains no substantial evidence that the preservation alternatives do not meet the project objectives.

D. The Benefits of the Project Are Not a Basis for Rejecting an Otherwise Feasible Alternative

A key defect in the City's findings is their focus on the irrelevant claimed comparative *benefits* of Alternative 9 over the preservation alternatives. (AR27795 ["Alternative 9 …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;" see also AR027818 ["Alternative 5 would result in a disjointed design to sidewalks, project accessibility and would not be as visually appealing or pedestrian friendly compared to Alternative 9. . . . Alternative 9 incorporates strong pedestrian scale elements . . . [and] an active street front with direct access from the sidewalks of all three adjoining streets, and would also incorporate a Central Plaza]; AR27824 [same].)

The question before the City was not, however, whether Alternative 9 might have comparative merits, but whether the preservation alternatives were *infeasible* due to specific social, economic, technological or other considerations. (Pub. Resources Code, § 21801, subd. (a)(3).)

The Supreme Court has made clear that it is the finding of infeasibility, and *not* a discussion of project benefits, that is necessary for an agency to approve a project with significant and unmitigated environmental effects.

> "CEQA does not authorize an agency to proceed with a project that will have significant, unmitigated effects on the environment, based simply on a weighing of those effects against the project's benefits, unless the measures necessary to mitigate those effects are truly infeasible. Such a rule, even were it not wholly inconsistent with the relevant statute ([Pub. Resources Code, § 21081, subd. (b)), would tend to displace the fundamental obligation of '[e]ach public agency

> [to] mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so' (*id.*, § 21002.1, subd. (b))."

City of Marina v. Bd. of Trustees of the Calif. State University (2006) 39 Cal.4th 341, 368-369.) The City cannot rely upon findings discussing the benefits of Alternative 9 in lieu of separately-mandated findings as to the feasibility of the preservation alternatives that would avoid the significant environmental impact from the demolition of a recognized Historic and Cultural Monument. (*Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1030, fn. 11 [cannot simply make finding that benefits of project outweigh impacts; must also make findings regarding feasibility of mitigation measures].)

The City's findings of infeasibility of the preservation alternatives are unsupported, and the Superior Court's judgment in this regard must be affirmed.

II. CROSS-APPEAL: THE APPROVAL DOES NOT COMPLY WITH CEQA REQUIREMENTS BECAUSE THE EIR FAILED TO DISCLOSE RELEVANT BASELINE INFORMATION

CEQA is, at its heart, a statutory scheme of disclosure. "There is a sort of grand design in CEQA: Projects which significantly affect the environment can go forward, but only after the elected decision makers have their noses rubbed in those environmental effects, and vote to go forward anyway." (*Vedanta Society of So. California. v. California*

Quartet, Ltd. (2000) 84 Cal.App.4th 517, 530.) The City's EIR fails to fully rub the Project's significant effects on land use in noses of the decision makers.

A critical failure of the EIR is its failure to accurately describe the current conditions on the project site, the prior planning approval, CPC 86-209 PC, and its 45-foot height limit, 80,000 square foot total buildable area limit, and restrictions on the Havenhurst driveway. The EIR also did not disclose that RAS is a corresponding zone for mixed-use development at the site (see AR19752 and AR000295-296), failed to identify the site's location nearly two miles from the Regional Center (see AR19752 and AR00295), that the Hollywood Community Plan EIR requires a 45-foot height limit on development in Neighborhood Office Commercial (see AR027044), and that a 3:1 FAR is not available for Neighborhood Office Commercial sites outside of the Centers Study Area according to the General Plan Land Use Map footnote 11 (AR019752).

Nor did the EIR discuss that the EIR for the 1988 Hollywood Community Plan eliminated high density residential development outside of the Regional Center, stating that "the permitted density could not exceed the predominant existing use." (AR026988, AR027041, AR029230, AR026753, AR026967.) All of these limitations were imposed as mitigation measure in the 1988 Hollywood Community Plan EIR to assure adequate infrastructure, public services, and traffic capacity. (AR026773,

AR026967, AR026988.) The restrictions, which were known or should have been known to Planning staff, were required to have been disclosed in the EIR so that the public and decision makers were fully informed of the project's deviations from current conditions and the manner in which the project's approval would alter the currently-applicable limitations.

The City presented and approved the project based on two major points, both of which are incorrect: unlimited height and entitlement to high density residential development. The failure to disclose the above-listed restrictions that apply to the site rendered the EIR's land use impacts discussion completely deficient. This non-disclosure was prejudicial. CEQA Guidelines Appendix G makes clear that a project that "conflict[s] with any applicable land use plan, policy, or regulation of an agency with jurisdiction over the project . . . adopted for the purpose of avoiding or mitigating an environmental effect," can be a significant impact. By failing to disclose the restrictions imposed by CPC 86-209 PC and the resultant covenant, the City failed to disclose an agency regulation for the site that was adopted to mitigate land use impacts (by height and intensity of development) for the neighboring community. The project's inconsistency with these regulations was a potentially significant impact that was not disclosed or analyzed in the EIR.[7]

[7] Nor did the EIR disclose that, under the Alquist-Priolo Act, the 50-foot exclusion zone from a surface fault included all structures for human

Most significantly, the EIR nowhere mentioned the covenant mandated by CPC 86-209 that was recorded as a condition of the approval of the currently existing shopping center on the site, which runs with land and limits future development in height and size. As Petitioner learned – only after it obtained a preliminary title report because of remarks in internal City emails that were part of the certified administrative record – a covenant exists on the Project site limiting height to 45 feet and new development to 80,000 square feet, while imposing significant additional restrictions on future development of the property. (See AJA248, AJA255-258.) This covenant, which appears on the property's current title information, was recorded as a condition of a 1986 approval to construct the present day improvements at the site. (See AJA255-258, AJA294.)

CPC 86-209 PC was a General Plan consistency case (part of the City's compliance with AB283 that mandated that Los Angeles bring its zoning into consistency with its General Plan, see Gov. Code, § 65860, subd. (d)). To obtain a building permit for the retail mall currently at the site, the developer sought a determination that the project was consistent with both the zoning and the General Plan. That determination was

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occupancy, as opposed to structures intended for residential use. (AR000488, AR000493, AR000495.) The EIR also omitted the fact that a partial street vacation would be required for the conversion of the Crescent Heights Boulevard turn lane (discussed in detail, *infra*). (AR000293-294.) The City denied that a street vacation was required on several occasions. (AR062325 & AR062304.)

appealed to the City Planning Commission by neighbors who objected to the height and scale of the proposed project, just as neighbors objected to RPI's proposal on the same site. (See AJA293.) Under the requirements of Ordinance 159,748,[8] the Planning Commission determined that the 1986 shopping center should be limited to 45 feet in height, and 80,000 square feet total buildable area, and that the driveway on Havenhurst would be limited to right turn ingress and egress. (AJA294.) CPC 86-209 imposed a total of nine conditions on the site. Those nine conditions should have been disclosed as existing conditions under CEQA, but were not, despite the fact that CPC 86-209 PC was listed as an on-site case on the radius map for public notices as an on-site zoning case (AR057386, AR056469, AR056634), and in the Parcel Profile (AR055893-044903, AR056637, AR056640).

No documents were available online, nor was the case disclosed in the Master Land Use Application (AR063898-063899) or Tract Map Application (AR056557, AR056560-056561, AR056569-056570), or Request for Revised Tentative Tract Map (AR065227), despite the clear

[8] Ordinance 159,748 defines General Plan consistency as follows: "'Consistency with the General Plan' shall mean that the density, intensity (i.e., floor area), height and use of a development, for which a building, change of occupancy or use of land permit has been requested, is permitted by the use, density, intensity, height or range of uses, densities, intensities or heights as set forth for the property on the land use map of the Community or District Plan within which the property is located and as further explained by any footnotes on the map and the text of such Plan." (Sec. 1. Definitions., p. 4.)

instructions for the tract map application: "A statement regarding existing and proposed zoning. City plan case or zone variance case number is required." (AR0056651). The entire application and approval process was devoid of information about the zoning case that most impacted the project's entitlements (AJA255-258, 294).[9]

The Planning Commission's approval required the recordation of a covenant documenting its conditions of approval. The covenant makes very clear that it runs with the land, binds future owners, and applies not only to the project that was constructed, but to future projects on the site, unless the City Council or Planning Commission makes specific findings regarding a project's compatibility with the General Plan and the Hollywood Community Plan. (AJA258) Merely proposing a new project did not eliminate the covenant, as the City and Developer argued. These conditions are recorded in a covenant that was included in a preliminary title report that Petitioner obtained, and are also included in the City's archived files for planning case CPC-1986-209-PC. (AJA256-259; see also AR055682.) The Staff Report for CPC 86-209 makes clear that the CPC

[9] Although the nine conditions were never disclosed by RPI or the City, Charles Rausch, Jr., *the senior Planner who signed the approval for recording the 1986 Covenant* (AJA256), *also signed the 2016 report to PLUM for the new project*. His PLUM report stated that the Havenhurst driveway was limited to right-hand ingress and egress, but did not explained that the origin of that limitation w*as Condition 2 of CPC 86-209 PC*, which Rausch apparently deemed still in effect.

adopted these conditions in response to environmental or neighborhood concerns.

In spite of RPI's presumed knowledge of the covenant as a recent purchaser of the site (AR055446-055448), and the City's inclusion of CPC-1986-209-PC on the parcel profile report in the administrative record (AR055682-055694) there is not a single mention of the covenant or the 1986 approval in the EIR, other than listing the case. The Planning staff report to the PLUM Committee acknowledges that restrictions were imposed on the Havenhurst driveway, but does not connect these restrictions to the 1986 approval, even though the same planner who wrote the PLUM report approved the covenant for recording in 1986. (AR027182, AJA256.) The EIR explains that the project site contains 80,000 square feet of retail use constructed in 1960 and 1988, and describes the zoning as C4-1D, subject to a 1:1 limitation on floor to area ratio ("FAR"). (AR000295-296.)

RPI's land use application purports to present a list of "[p]revious and relevant zoning-related actions affecting the Property," but does not mention the 1986 approval. (AR055709.) The failure to discuss this approval in any public document is especially notable given that members of the public repeatedly expressed concern that there was a 45-foot height limit that applied to the site. (AR005832, AR005847, AR008700, AR006303-006304, AR006021.) The City answered these inquiries by

discussing the lack of a height limit in the C4 zone and the inapplicability of the Commercial Corner Ordinance to mixed-use projects. (AR00587-005588.) The failure to disclose the 45-foot height limit, the 80,000 square foot new construction limit, and the other restrictions in the CPC 86-209 and the covenant meant that the EIR did not fully disclose the impacts of developing the Project: *the true baseline conditions that limited site development were never set forth, so decision makers were not informed that their approval was freeing the site from previously covenanted restrictions.*

The Superior Court's order did not address the covenant, but during the hearing the issue was raised by FTC and discussed by the Court. The Court appeared to grant FTC's request for judicial notice, but stated that it did not think that the omission of the covenant was relevant, because the Court did not think the covenant applied to the property any longer. The Court stated:

> "If that height limit was on this property, value of this property would be impacted forever. I can't believe parties would freely agree to put a 45-foot height limit on a commercials piece of property in Hollywood. That's why to me it makes perfect sense that this ran with the land to the extent that it applied to that project built back in the day."

(April 20, 2017 Transcript, p. 36:23-37:1.)

Of course, the covenant was not "freely" entered. The covenant was a City Planning Commission condition of approval imposed in order to resolve an appeal regarding the prior project constructed at the site, based on environmental and neighborhood concerns. (AJA256-259.)

The Superior Court's determination ignored the express language of the covenant, providing that it "runs with the land," applies to future owners, and contains express conditions that apply to the filing of a new or different project. (AJA255) The covenant ceases to apply if

> "a new or different project is filed with the City, and the Planning Commission or City Council determine that such new or different project is consistent with the General Plan, including the Hollywood Community Plan, and the intent of both without such conditions."

(AJA258) There is no evidence that these findings were made by the Planning Commission.

Given the centrality of the Project's height and square footage in the panoply of public concerns about the Project, the non-disclosure was prejudicial. The City and Developer contended below that the EIR disclosed both the size of existing buildings on the site, and the fact that an ordinance passed in 1995, the Commercial Corner Ordinance, contained an inapplicable 45 foot height limit, meant that there was adequate disclosure. However, disclosing the size of a building doesn't disclose that future construction was limited to a building of equal size, and stating that a height limit in an ordinance *did not apply* to the project is the precise

opposite of disclosing to decision makers that a height limit *applied*. There is nothing in the EIR that told decision makers that a 45-foot height limit applied to the site, both based on CPC 86-209 and its covenant, as well as the height and density mitigations for the 1988 Hollywood Community Plan EIR.

> "Failure to comply with the information disclosure requirements constitutes a prejudicial abuse of discretion when the omission of relevant information has precluded informed decisionmaking and informed public participation, regardless whether a different outcome would have resulted if the public agency had complied with the disclosure requirements."

(*Bakersfield Citizens for Local Control, supra*, 124 Cal.App.4th at p. 1198.)

Councilmember Ryu made clear that height was a major issue for him in light of the 45-foot height limit that applied to adjacent parcels. (AR027122.) In his letter to the PLUM Committee, the councilmember stated that the single most important community concern about the project was its height. (AR029280.) Had Councilmember Ryu been made aware of the covenant, would he have approached height in the same way?

The lack of information prejudicially affected the public's and decision makers' understanding of the deviation from previous entitlements sought by this Project, and the nondisclosure was a prejudicial violation of CEQA. Coupled with the failure to include the Hollywood Community Plan's EIR mitigation measure of a 45-foot height restriction on properties

designated Neighborhood Oriented Commercial, the public and decision makers were misled into believing that there was no height limit on the site. The public was entitled to know that development limitations were imposed as protective measures and that specific findings were required in order to relieve the owner of those commitments. The failure to disclose this information was a prejudicial violation of CEQA.

III. CROSS-APPEAL: THE APPROVAL OF THE PROJECT WAS INCONSISTENT WITH THE GENERAL PLAN, ZONING, AND THE PROVISIONS OF THE LOS ANGELES AFFORDABLE HOUSING ORDINANCES

The ability to build this massive, 17-story project in an otherwise low- to mid-rise neighborhood relies entirely on the City granting what is known as a "density bonus" to the Project because the Project agreed to set aside 11 percent of its 229 units for affordable housing for very low income residents. FTC supports the inclusion of affordable housing in this project and acknowledges that under the density bonus program, projects are permitted to exceed the normally applicable density limitation. What FTC challenges here is the 50 percent inflation of the baseline density to which the bonus was applied, based on a false claim that the Project site was located within the high density Regional Center (AR000260, AR005318), because the City did not begin with a baseline density that reflected the site's General Plan density outside the Regional Center, as required by Government Code section 65915. Because the density bonus was premised

on a falsely inflated zoning baseline that far exceeds the General Plan designation's density for this site, the density bonus was improper, and resulted in a project that far exceeded the 35 percent permissible density bonus, *even under the density bonus law*, and thus required a Conditional Use Permit under Municipal Code section 12.24 U.26. Additionally, the failure to acknowledge applicable height limits resulted in a project that massively exceeded those limits, without the necessary legislative approvals and without seeking a waiver of those standards under the density bonus law. For these reasons, the approval of the project was an abuse of discretion and must be rescinded.

A. The Superior Court Correctly Determined that Challenges to the Density Bonus Were Timely

First, the Superior Court correctly rejected the City's attempt to invoke the 90-day statute of limitations of Government Code section 65009, subdivision (c)(1) as a bar to FTC's challenges to the City's award of a density bonus for the project. As the Court correctly ruled, the density bonus was awarded pursuant to Los Angeles Municipal Code section 12.22.A.25 (g)(3)(ii). (AJA926-927.) The City relied upon a different provision, Los Angeles Municipal Code section 12.22A.25 (g)(3)(i)(b) to argue that the City Planning Commission's decision on an off-menu incentive is "final," citing LAMC § 12.22.A.25 (g)(3)(i)(b). As the Superior Court correctly ruled, that provision does not apply to the Project,

because it *only* applies to requests "that are not subject to other discretionary applications." (LAMC § 12.22.A.25 (g)(3)(i).) The Project *was* subject to other discretionary applications, including Site Plan Review a tract map, and a Conditional Use Permit. Because the Project required other entitlements, LAMC § 12.22.A.25 (g)(3)(*ii*) governed the consideration of the off-menu incentive. This provision does not contain language that the decision of the City Planning Commission is final, but rather states that "[t]he applicable procedures set forth in Section 12.36 of this Code shall apply." Under Los Angeles Municipal Code section 12.36, the initial decision maker for this Project was the City Planning Commission, so "[t]he City Council shall decide all appeals of the City Planning Commission's decisions or recommendations as the initial decision maker on projects requiring multiple approvals." (LAMC § 12.36 C.1(b).) Under LAMC 12.22 A.25 (g)(3)(ii) and 12.36 C.1 (b), the City Planning Commission's determinations were reviewable by the City Council.[10] While the City contended that section 12.36, subdivision (e) provides that the provision does not create any "new" appeal rights (April

[10] This interpretation is consistent with principles of judicial efficiency and the concerns animating the 90-day statute of limitations in Government Code section 65009. A project requiring *only* the approval of an off-menu incentive would be final after the incentive was granted or denied by the Planning Commission, so any legal challenge to that determination would be ripe once the Planning Commission's decision was final. By contrast, a project requiring multiple approvals, like 8150 Sunset, is not finally approved until the appeal process for all approvals is concluded.

20, 2017 Transcript, pp. 13-14), the Superior Court correctly observed that the municipal code provision stating that the decision of the City Planning Commission is "final" was not applicable to the Project, so no new appeal right was created by the application of the procedures in section 12.36 (AJA926). For that reason, the decision on the density bonus was not final until the City Council had resolved the appeals of the Project's entitlements, and FTC's challenge was timely filed.

B. A Density Bonus Must Use the General Plan or Zoning as the Baseline for the Bonus

The Superior Court's analysis of the substance of FTC's challenges to the density bonus failed to correctly apply governing state law and to afford proper deference to the City's General Plan. Most significantly, the Superior Court failed to properly apply the long-established density limitations in the Hollywood Community Plan to the project as required by Government Code 65915, subdivision (o)(2), resulting in a total unit count *double* what should have been awarded using the proper baseline density, effectively granting not a 22 percent density increase as claimed, but a 72 percent increase over the permissible baseline.

The City's affordable housing provisions are an implementation of the state density bonus law, which requires local governments to grant a certain "density increase" "over the otherwise maximum allowable residential density ..." (Gov. Code, § 65915, subd. (f).) A project that

qualifies for a density bonus under the City's affordable housing provisions is entitled to select "incentives" either from a menu of incentives or "off-menu" incentives, but it is limited to a total of three such incentives. (See AJA316-318 [LAMC 12.22.A.25(f)].) *The legal issue in this appeal is the calculation of the baseline density from which the City calculated the "bonus" to which RPI was entitled, as well as the City's failure to require RPI to obtain additional necessary entitlements under City law.*

Under the state law, 'maximum allowable residential density' in turn means 'the density allowed under the zoning ordinance and land use element of the general plan, or if a range of density is permitted, means the maximum allowable density for the specific zoning range and land use element of the general plan applicable to the project. Where the density allowed under the zoning ordinance is inconsistent with the density allowed under the land use element of the general plan, the general plan density shall prevail.' (*Id.*, subd. (o)(2), italics added.)

> "This statute recognizes that there may be inconsistencies between the density permitted under a zoning ordinance as opposed to what is permitted under the land use element of a general plan, in which case the latter prevails."

(*Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1345.)

However, the City ignored the residential density limitations in the Hollywood Community Plan, erroneously contending that the project was entitled to high density residential development that is permitted only in the

Regional Center, which *doubled* the density actually authorized under the plan because the site was not located in the Regional Center. (AR019752.) It is the General Plan density for the project site which takes precedence over the zoning provisions in the event of a conflict.

i. The General Plan Limits Residential Density to Medium Density and Limits Height to 45 Feet

In response to numerous objections to both the height and density of the project, the City repeatedly asserted that the site was zoned for high density residential development with unlimited height, claiming that the General Plan allowed high density residential development on the site, while ignoring the Plan's limitation of such density to the Hollywood Regional Center. (AR028229-028230.) Similarly, the City ignored the height limitations that are imposed by the General Plan and CPC 86-209, and grossly over-inflated the base residential density to which the Project would be entitled absent a bonus, even though the law is clear that the General Plan density is the baseline against which a density bonus is to be granted.

A number of incorrect presumptions were stated throughout the approval to perpetuate the fiction that the site was entitled for Regional Center high density residential housing and unlimited height. In reality, RPI purchased a site that was designated for medium density residential and limited to 45-feet height by the General Plan (as well as by CPC 86-

209 and a 1986 covenant). The record before the City demonstrates that at the time of RPI's application, the by-right entitlements were far different than the City asserted during the approval process.

First, the site is not, as claimed in the EIR, within the Hollywood Regional Center. (AR000260 [EIR stating that project is located in "more active regional center of Hollywood with . . . high density residential uses"]; AR005318.) The boundary of the Regional Center is clearly shown on the General Plan Land Use Map as being almost two miles away from the project site. (AR019752.) The Land Use Map shows the areas in which high density residential development is permitted in *brown*. These areas are located *only* within the boundaries of the Regional Center, east of La Brea Avenue. The area surrounding the project site, by comparison, is designated in the General Plan for medium density residential development, as shown by the orange color coding on the map (R3 medium density). (*Ibid.*) Adjacent to the project, the properties are zoned, consistent with the medium density designation, R2-1XL. (AR026204.)

These land use designations and their clear pattern on the Land Use Map reflect the determinations made when the Hollywood Community Plan was adopted. The 1988 Hollywood Community Plan EIR explains that the plan was adopted "to mitigate the adverse effects on transportation, public services and infrastructure that have resulted from development that has occurred" under the 1973 plan. (AR026967.) The EIR also made clear that

the residential density limits included in the plan were important mitigations to protect threatened components of infrastructure: "the permitted density could not exceed the predominant existing use, since that would permit too many additional units and would overtax streets and other public facilities." (AR026773.) Some of the EIR's mitigation measures included imposing a 45-foot height limit for properties, like the Project site, designated Neighborhood Oriented Commercial (AR027044), and limiting high and high medium density to areas within the central Hollywood redevelopment area (AR027458-027459). The Land Use Map, the Hollywood Community Plan, and the EIR for the Plan demonstrate a clear intent to confine increased density to a specific, core area of Hollywood.

Because the Hollywood Community Plan permits a maximum Medium/R3 density outside of the central redevelopment area (AR026984), under the plan the corresponding zone for residential development on a commercial property outside of the central redevelopment area is not a high-density zone like RAS4, but rather medium-density RAS3. The City stated that such

> "[c]orresponding zones . . . are prescriptive in terms of their permitted residential densities and other development standards specified in the LAMC," like "mandatory development standards codified by a site's zoning."

(AR026213-026214.) The permissible residential density for the site is not, as the City claimed, 80 units per acre, but rather a maximum of 40 dwelling units per acre. (AR019747).

RPI and the City acknowledged that there is a conflict between the General Plan density and the zoning. Under C4 zoning, the RPI contended, the base density would be calculated at R4, high density residential, and would result in a baseline density of 278 units. (AR37627.) At this density, of course, RPI would not have needed a density bonus to construct 229 units, and moreover, R4 density is not permitted anywhere in the Hollywood Community Plan area (AR019747), where the highest permitted density is 80 dwelling units/gross acre (compared to R4 density of 1 dwelling unit/ 400 square feet lot area) (AR063903, AR026207, AR062304). RPI did not request a density bonus from the C4 "baseline," but rather from the Community Plan regional center high density zoning, calculated at 80 units per acre with a result of 204 units. (AR037262-037627). This is an admission that the General Plan, and not C4 zoning, determines the entitlements for the project.

However, the high density zoning was not the proper General Plan residential density because the Project is not located within the Regional Center. As the Land Use Map and the 1988 EIR for the Hollywood Community Plan make clear, the Plan permits no high density housing in this area. At 40 units per acre, the proper baseline density was 102 units,

which, after application of a 35 percent density bonus, would permit construction of an additional 36 units, allowing a total of 138 units, far less than the 229 units that the City approved.

Moreover, the approved 178-foot high project also vastly exceeds the General Plan's 45-foot height limit for Neighborhood Office Commercial, and RPI did not seek an incentive for relief from the height limit. The FEIR for the 1988 Hollywood Community Plan provides that "[n]o building shall exceed 45 feet in height or three stories" on properties designated, like the Project, Neighborhood Office Commercial. (AR27044.) In addition, the Los Angeles Municipal Code limits the height of R3 residential – the residential density permitted by the General Plan – to 45 feet. (See LAMC § 12.21.1.) RPI did not obtain a waiver of the height standard under the City's density bonus ordinance (which would not have permitted 178-feet in any event). (LAMC § 12.22.A.25 (f)(5).)

By ignoring the General Plan's limitations on height and density in calculating what the Project was entitled to without a bonus, the City approved a project that vastly exceeded by-right entitlements, without granting the necessary waivers on height and density. Moreover, the Project's approval could not be justified by the available density bonus waivers. The City relied on "unlimited" height to approve a 178-foot tower, but height limits were imposed in the Hollywood Community Plan – they were not disclosed to the decision makers. RPI did not seek an

incentive to exceed that height limit, and used all of the incentives to which it was entitled to relax other development standards. (AR058478.)

Below, the City and Developer argued that the court was required to defer to the City's interpretation of its General Plan. Here, there was no evidence that the City had even made an interpretation of the General Plan's housing density requirements. The boundaries of the Regional Center are not, of course, a matter of interpretation, but rather are as set forth on the map.

Moreover, courts are not bound to ignore plain language in a City's general plan. In *Orange Citizens for Parks and Recreation v. Superior Court* (2016) 2 Cal.5th 141, the Supreme Court reviewed a city council's determination that a particular property had erroneously been mis-designated in the general plan due to a failure to record a prior city resolution. (*Id.* at pp. 151-152.) The Court of Appeal stated that "uncertainty counseled in favor of deferring to the City Council's judgment." (*Id.* at p. 152.) The Supreme Court reversed, noting that "deference has limits." (*Id.* at p. 146.) The Court concluded that "the text and maps in the publically available version" of the plan reflected the property's designation, even if the city council had intended for a different designation. (*Id.* at p. 154.) "A general plan . . . [has] been described as a "yardstick"; one should be able to 'take an individual parcel and check it

against the plan and then know which uses would be permissible.'" (*Id.* at p. 159.)

The General Plan Land Use map confines high density development to central Hollywood (AR019752), and the General Plan EIR explains the reasons for limiting height and density in that manner to protect surrounding neighborhoods from the adverse impacts of high density development on available infrastructure (AR026773, AR026967).

This project was approved by hiding a covenant, ignoring the General Plan's density limitation as well as CEQA mitigations limiting height, density and FAR. It went beyond off-menu, it went rogue. It ignored the proper base density and the height limits imposed by the General Plan, the General Plan EIR, CPC 86-209, and the recorded covenant. The entirety of the project was approved at improper heights and density, so the approval must be rescinded as a prejudicial abuse of discretion.

IV. CROSS-APPEAL: CONVERSION OF TRAFFIC LANES TO NON-AUTOMOTIVE USE REQUIRED A STREET VACATION AND THIS ISSUE IS RIPE FOR REVIEW

The Superior Court ruled against FTC's challenge to the Respondent's decision, in the approval of the project, to convert a lane of traffic that permits free right turns from vehicles traveling east on Sunset Boulevard onto southbound Crescent Heights Boulevard, into a non-vehicular lane to be used as part of a "public" plaza. The Superior Court

ruled that the closure of the free right turn lane without a street vacation was not "ripe," because the City has not yet issued a "B Permit" for the work. (AJA938.) The Court also stated that "as a matter of law, the vacation procedures do not apply to the situation at hand. . . . [because] the project does not terminate the public's right of access to the area, it merely transforms the nature of the access from vehicular to pedestrian." (*Ibid.*) Of course, that is the very definition of a partial street vacation.

Every version of the project description and the alternatives that were analyzed in the EIR included paving over a busy city street and "merging" or "incorporating" a 9,134 SF city-owned parcel (8118 Sunset Boulevard). (See AR000271, AR000887, AR000915, AR000949, AR000987, AR001021, AR001057, AR004648.) Members of the public, the City Councilmember, and the City of West Hollywood opposed this action. (AR065184, AR150001-10; AR038224.) According to Los Angeles Department of Transportation studies, without removing the free right turn lane from Sunset the project's access driveways on Crescent Heights would be right-turn only for exits. (AR061716.) By blocking the flow of traffic around this corner, left turns exiting the property onto Crescent Heights were feasible, a significant benefit to the developer.

The City continually represented to the public that the removal of the free right turn lane did not require any particular public process by the City because it was simply a "reconfiguration." (AR029327; see also

AR056626 [project "does not propose vacating any streets"].) Yet all the while, the City's chief planner was consulting with the City's engineers, who consistently advised her that 8118 Sunset could not be incorporated into the project in the manner proposed, that abandonment or vacation of the portion of Crescent Heights was implicated by the proposal, and that the planned approach of issuing a "B" permit was inappropriate. (AR036028-036029 [internal emails from City staff stating that street would have to be vacated], AR037244 [City engineering staff stating that it cannot issue a B permit for the proposed improvements on Crescent Heights unless property is dedicated or relinquished by City]; see also AR032176-032178 [email communication from City Engineer Edmond Yew confirming to Petitioner that a street vacation should be a required condition on the tract map].) Internal emails from transportation staff stated that the City's objective was to identify capacity neutral road improvements, and that closing the dedicated turn lane on Crescent Heights would reduce capacity. (AR031773.)

The City disregarded its own engineers' advice and ignored the comments from the public that it was not proceeding according to law (e.g., AR037136-037138; AR058796; AR029423), and approved the project including the removal of the free right turn lane, without the procedural steps to remove a portion of Crescent Heights, a public street, from use by vehicular traffic.

The City does not have exclusive authority over the public streets within the municipality's boundaries.

> "The streets of a city belong to the people of the state, and every citizen of the state has a right to the use thereof, subject to legislative control.... The right of control over street traffic is an exercise of a part of the sovereign power of the state.... While it is true that the regulation of traffic upon a public street is of special interest to the people of a municipality, it does not follow that such regulation is a municipal affair, and if there is a doubt as to whether or not such regulation is a municipal affair, that doubt must be resolved in favor of the legislative authority of the state."

(*City of Lafayette v. County of Contra Costa* (1979) 91 Cal.App.3d 749, 753.)

The street which the City has "reconfigured" to remove lanes from vehicular use is not the City's property, but rather property of all people in the State.

Because streets are a statewide interest, California law sets forth specific procedures that must be followed prior to the vacation of a public street. "[A] legislative body of a local agency proposing 'the complete or partial abandonment or termination of the public right to use a street, highway, or public service easement' (Sts. & Hy.Code, § 8309)" must follow procedures including a public hearing and posting notice of the vacation (*id.*, §§ 8320-8323). (*Zack's, Inc. v. City of Sausalito* (2008) 165

Cal.App.4th 1163, 1184 ("*Zack's*").) The legislative body must make a finding that "the street, highway or public easement described in the notice ... is unnecessary for present or prospective use," and only then may the legislative body adopt a resolution vacating the street. (Sts. & Hy. Code, §§ 8324, 8325.)

As the Court of Appeal explained to the City of Los Angeles over 20 years ago, the City must follow mandatory state procedures when it removes streets from vehicular use: "What the City cannot do is wave the magic wand and declare a public street not to be a public street." (C*itizens Against Gated Enclaves v. Whitley Heights Civic Assn.* (1994) 23 Cal.App.4th 812, 821) Courts have found that public streets were improperly vacated in a variety of circumstances where far less interference with a public street occurred than here. (See, e.g, *Zack's*, supra, 165 Cal.App.4th at pp. 1170-1171, 1186-1187 [lease of use of portion of street for boat storage required vacation of street]; *Ratchford v. County of Sonoma* (1972) 22 Cal.App.3d 1056 [vacation of twenty-foot segment of street partially encroached upon by residence was not supported by finding that street was not needed for prospective public use]; *Bowles v. Antonetti* (1966) 241 Cal.App.2d 283 [removal of ten-foot strip from right-of-way for 60-foot street required city determination that ten-foot strip was unnecessary for street purposes].)

The failure to follow procedures for vacating a public street was ripe for review. The EIR and the Project approvals included the "reconfiguration" of the Sunset and Crescent Heights intersection to create the "Corner Plaza," that merges 8118 Sunset with the project site by closing traffic lanes to vehicular use. (See AR000087 [consistent with "walkability checklist" due to "reconfiguration of one of the two traffic islands in the Sunset Boulevard/Crescent Heights Boulevard intersection into a landscaped public open space"], AR000124 (lane closures for "development of the island at the southwest corner of the Sunset Boulevard/Crescent Heights Boulevard intersection for the Corner Plaza"); AR000131 ["the project also includes a 9,134-square-foot Corner Plaza"].) To circumvent the vacation process and its required findings (that the portion of the street is not required now or in the foreseeable future when in fact it is heavily used and congested), the City contended that the reconfiguration was not a part of the project. The EIR and the Project approvals permit RPI to move forward with this "improvement," subject to obtaining necessary additional approvals. This is no different than the approval of the Project permitting construction of the building, but still requiring issuance of a building permit. The EIR does not address the street vacation process at all.[11]

[11] Following the procedures for street vacation would permit the resolution of certain issues that emerged during the approval process, most notably the

Petitioner does not need to await the conclusion of the essentially ministerial B-Permit process to challenge this deficiency. (See generally *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 134 [approval under CEQA takes place at agency's "earliest commitment" to project, not necessarily its final approval in sequence of approvals].) The various City departments treated the approval of the project's entitlements as final, including a cover letter on the vesting tentative tract map that stated that "NO additional requirements can be placed upon the project once the Advisory Agency has issued the letter of decision." (AR056657.) Therefore any conditions that applied to the tract map needed to be placed on the project before its approval, including those relating to a street vacation.

It is undisputed that the City did not follow the procedures for vacating a public street, contending that these procedures did not apply to "reconfiguration" of an intersection. Simply maintaining a pedestrian route through the intersection, as the Superior Court found the City had done, is not the same as permitting vehicular access to a street, and the Court's ruling is inconsistent with the precedent outlined above. The City tried to shortcut the legal requirements, including public notice and specific

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relocation of the Metro bus stop from the east side of the Sunset/Crescent Heights intersection to the west side (AR015166), as well as permit LADOT staff the opportunity to address concerns that the changes to the intersection would increase safety concerns (AR031773).

findings, for the vacation of a street for automotive use. It cannot do so, and the entirety of the project approvals — all of which include upon the vacation of the free right turn lane for the project — must be rescinded.

V. CROSS-APPEAL: THE CITY'S APPROVAL PERMITS CONSTRUCTION IN VIOLATION OF REQUIRED 50-FOOT SETBACK FOR SEISMIC SAFETY IN VIOLATION OF THE ALQUIST-PRIOLO ACT

No party disputes that the Project lies within a mapped Earthquake Fault Zone, subject to the prohibitions and requirements of the Alquist-Priolo Act ("Alquist-Priolo"), yet the City approved the project to be constructed within fifty feet of an area presumed to be underlain by traces of an active surface fault in the absence of a 50-foot off-site investigation. The Superior Court framed the issue as whether the City abused its discretion by not requiring off-site investigation prior to approving the project (see AJA933), but Petitioner never contended that this was the issue. Rather, the question before this Court is, in the admitted absence of an off-site investigation for a project in a surface fault rupture hazard area, can a structure for human occupancy be constructed within 50 feet of property boundary? Because the law presumes that surface faults exist in the mapped areas in absence of investigation, and imposes a 50-foot setback requirement from any fault, the absence of off-site investigation means that the fault is presumed to be immediately off the site, and a 50-

foot setback therefore applies. The project approvals permitting construction in this zone are therefore in error.

Alquist-Priolo is a state law that is intended to avoid the significant risk to life and loss of property from surface fault ruptures. Public Resources Code section 2621.5 provides that the purpose of the Act is

> "to provide policies and criteria to assist cities, counties, and state agencies in the exercise of their responsibility to prohibit the location of development and structures for human occupancy across the trace of active faults."

While local jurisdictions can impose more stringent standards, they are not permitted to impose weaker earthquake safety regulations.

Alquist-Priolo applies to "any project . . . which is located within a delineated earthquake fault zone, upon issuance of the official earthquake fault zones maps to affected local jurisdictions." (Pub. Resources Code, § 2621.5.) The City agrees that a fault zone map was issued by the State Mining and Geology Board showing a fault zone through the project site. "Project" includes "structures for human occupancy," (Pub. Resources Code, § 2621.6, subd. (2)), which State Mining and Geology Board regulations define as "any structure used or intended for supporting or sheltering any use or occupancy, which is expected to have a human occupancy rate of more than 2,000 person-hours per year," (Cal. Code. Reg., tit. 14, § 3601, subd. (e)). Accordingly, all of the structures built as

part of the Project – not just the residential component – are subject to Alquist-Priolo prohibitions.

The State Mining and Geology Board regulations also establish a presumption of faulting in the absence of further off-site study, and prohibit construction in areas where faults are presumed:

> "No structure for human occupancy . . . shall be permitted to be placed across the trace of an active fault. Furthermore, *as the area within fifty (50) feet of such active faults shall be presumed to be underlain by active branches of that fault unless proven otherwise by an appropriate geologic investigation and report . . . no such structures shall be permitted in this area*."

(Cal. Code Reg., tit. 14, § 3603, subd. (a) (emphasis added).)

The regulation presumes that fault traces are present in the area 50 feet from a fault. Because it is unknown whether the fault or its traces are immediately off-site, even if there is not a fault on the site, the risk of off-fault deformation requires a setback. As RPI's Surface Fault Investigation Report admits, the law requires, "a structure for human occupancy cannot be constructed over the trace of the fault and must be set back from the fault trace (generally 50 feet) to avoid the fault rupture hazard." (AR002561.) There is a presumption that a surface fault trace exists when an area has not been investigated, so construction is not permitted within 50 feet of the site boundary in the direction of the fault zone.

Off-site investigation is appropriate and necessary to eliminate the possibility that a surface fault is located immediately off-site. As explained by the State Mining and Geology Board, the expert agency on the subject of seismic safety, requires that "[d]ata should be obtained both from the site and outside the site area," (AR027296) and that a report's conclusion should address the "[l]ocation and existence (or absence) of hazardous faults on or adjacent to the site," (AR027298).

The area northwest of the Project site is in the fault zone, and has had no investigation to determine the presence of faulting immediately off-site. The precise location of the main Hollywood fault trace is only ***estimated*** on the map. (AR027186 ["The mapped trace of the Hollywood Fault is located approximately 100 feet to the northwest, and not within, the project site."].) That is why the Alquist-Priolo Act and Note 49 require empirical off-site investigation in lieu of a setback. As RPI's own Surface Fault Investigation report stated, "It is possible . . . that the fault is located closer to the Site than indicated on the 2014 earthquake fault zone map." (AR002578-2579.) The City admits that "[t]he required 50-foot setback from the nearest mapped fault applies if no geologic report has been conducted." (AR027186.) There was no geologic report off-site nearest the estimate fault map, only on-site studies. The 50-foot setback therefore applies.

RPI did not conduct any investigation of the area immediately off-site under Sunset Boulevard. (AR000483, AR005143.) Under City of Los Angeles policies, in an Earthquake Fault Zone, surface faulting is presumed to exist within the fifty feet beyond the property boundary, if no geologic investigation is conducted off-site. (AR005143.) A senior city geotechnical engineer who reviewed RPI's geologic study informed the Los Angeles Department of Building and Safety that "[t]he Department policy is that the presence of an active fault must be considered to exist just beyond the property line." (AR056755.)

The engineer additionally criticized the report's conclusion that a setback from the property line was not necessary as it relied upon studies of surface faults unlike the Hollywood Fault, which is overlain by significant alluvium. The engineer concluded that "[T]here are too many epistemic and aleatory uncertainties regarding the Hollywood fault to warrant disregarding the required set-back." (*Ibid.*)

In spite of this clear instruction, and in disregard of the requirements of Alquist-Priolo and its administrative regulations, as well as the City's own policies, the City approved the 8150 Sunset Project without the required setback. No study was ever conducted in the area 50 feet northwest of the site. There is no evidence in the record that RPI was denied the ability to investigate under Sunset: it simply asserted that it could not do so due to traffic. The City approved the project with a

"reinforced foundation zone," in the area fifty feet from the site boundary toward the mapped Hollywood Fault, under the Lytton Building. The City acknowledged that the 50-foot setback applied to the project, but the Planning Department's staff report to the City Planning Commission claimed that moving the habitable structure back 50 feet brought the project into compliance with the 50-foot setback requirement. (AR059980.) As set forth above, the Alquist-Priolo Act requires protection for all human occupancy, not just residential use. Significantly, the residential portion of the project is part of a unitary structure with a single foundation, so simply placing the residential section in a different part of the site does not avoid the 50-foot setback requirement.

Moreover, the reliance upon a "reinforced foundation" was not supported by the statute, its regulations, or the interpretive guidance of the state agency that implements the Alquist-Priolo Act, the State Mining and Geology Board. Alquist-Priolo and its regulations do not exempt structures with a reinforced foundation. The State Mining and Geology Board is clear that a reinforced foundation may be an *additional* mitigation, but not a substitute for a setback. (AR027298.) The City ignored state law by approving the Project's construction within 50 feet of an area presumed to be underlain by surface faults. A writ of mandate should issue to enforce this protective policy.

VI. CROSS-APPEAL: THE APPROVAL VIOLATES MANDATORY POLICIES IN THE HOLLYWOOD COMMUNITY PLAN REGARDING DENSITY INCREASES BY SUBDIVISION

The approval of the Project is inconsistent with mandatory policies of the Hollywood Community Plan, which contains policies prohibiting increases in density if public services and transportation infrastructure are inadequate to support the new project. The City failed to make a mandatory finding under the Hollywood Community Plan regarding the sufficiency of the infrastructure to support the increased density associated with the project. Although Petitioner raised this issue below, the Superior Court did not directly rule on it. (See AJA231, AJA930-931.)

The Hollywood Community Plan provides, in its section on "Service Systems," that "the full residential, commercial, and industrial densities and intensities proposed by the Plan are predicated upon the provision of adequate public service facilities." (AR19748.) Therefore, "[n]o increase in density shall be effected by zone change or subdivision unless it is determined that such [public] facilities are adequate to serve the proposed development." (*Ibid.*) These policies apply to the approval of the 8150 Sunset Project because the project resulted in an increase in density by subdivision. (AR027653.)[12] The "Subdivider's Statement" clearly states

[12]Respondents argued below that this finding was inapplicable because the project was not effectuating an increase in density by subdivision. This argument ignores the reality of RPI's application: RPI sought a tract map,

that the Vesting Tentative Tract Map would construct (110,445 square feet of commercial uses . . . and 220,693 square feet of residential uses (AR056661) for a property limited to 111,339 square feet of development (AR056659). The subdivision effects an increase in density and therefore requires the Hollywood Community Plan's mandatory findings for public service and traffic serving the project.

Petitioner demonstrated that the public services in the area are inadequate. The project is located in a sensitive area for fire, a city-designated Mountain Fire District (AR000063), as well as within the Hollywood Fault Zone, which also poses potential demand for emergency services (AR005646).

While the Project approval was pending, FTC utilized publicly available LAFD data to calculate average response times for the first-, second- and third-in responders to the project site. (AR029903.) The average response time in 2016 was 5:43 seconds for emergency medical services and 6:21 seconds for non-EMS services. (*Ibid.*) Petitioner noted that although it had calculated the average, an average response time is not the metric used by LAFD to determine whether service is adequate, as stated by Assistant Chief Patrick Butler in 2012:

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which subdivided its property, in order to facilitate the construction of its project, which *tripled* the permissible density for the site and increase the number of dwelling units over the baseline by 72 percent.

> "This is an issue with using averages because they overlook outlier. . . If you are an outlier you want to make sure your response is on time. That is why we use the 90% figure." (AR029903.)

However, even using an average, the response time is inadequate because these response times are below the NFPA standard (which the City has adopted) of 5:00 minutes. NFPA requires a response within 5:00 minutes 90% of the time, and over five minutes for each of the stations, the average response time already exceeds the standard. (AR029903.) Fix the City provided current statistics showing response times for the stations that serve as first, second, and third in for the Project (Stations 41, 27, and 97). (AR029921-029922). Station 41 meets the response within the five-minute standard just 53 percent of the time. (AR029921.) Station 27 is at 63 percent, and station 97 is at 35 percent. (AR029921-029922.) ***Not one of the stations meets the performance standards 90 percent of the time, and even the average response time is below the acceptable performance standard.*** Until these basic life safety services are adequate, the General Plan does not permit an increase in density.

Moreover, the EIR contained findings by the LAFD that the project would impact services. The LAFD wrote that

> "the development of this proposed project, along with other approved and planned projects in the immediate area, may result in the need for the following: 1. Increased staffing for existing

> facilities. 2. Additional fire protection facilities. 3. Relocation of present fire protection facilities."

(AR002991.) The Fire Department also stated that

> "[t]he proposed project would have a cumulative impact on fire protection services. Project implementation will increase the need for fire protection and emergency medical services in this area."

(AR002988.) The City ignored these concerns and approved the project, including its tract map with its tripled density, without making any findings regarding the adequacy of public services.

The Hollywood Community Plan also provides in its discussion of circulation that "the full residential, commercial, and industrial densities and intensities proposed by the Plan are predicated upon the development of the designated major and secondary highways and freeways." (AR19748.) As such,

> "[n]o increase in density shall be effected by zone change or subdivision unless it is determined that the local streets, major and secondary highways, freeways, and public transportation available in the area of the property involved, are adequate to serve the traffic generated." (*Ibid*.)

The record before the City contained substantial evidence demonstrating that the transportation system in the area of the project is inadequate to serve the traffic generated by the 8150 Sunset Project. First, the project will have significant and unmitigated impacts on traffic on local streets. (AR000770.) Second, the EIR demonstrated that the traffic in the

vicinity of the project is already at failing levels. (AR004686) If service is already inadequate, the General Plan does not permit an increase in density. Closure of the right-hand turn lane would further reduce the capacity of the street system. (AR031773.)

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

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

The approval of the Vesting Tentative Tract Map, issued in order for the Project to contain legal subdivisions, violated the state Subdivision Map Act, as well as the municipal code provisions required for the approval of a tentative tract map, in several respects. Government Code section 66474.61 prohibits the City from approving a project requiring a tentative map if it finds that, inter alia, the proposed map or design of the subdivision is not consistent with applicable general and specific plans, or the site is not physically suitable for the type of development. In its application for the vesting tentative tract map, RPI did not disclose "other pertinent zoning information" for the Project site, such as CPC 86-209 (AR063901,

AR036996) and failed to disclose "related or pending case numbers relating to this site" (AR063899, AR055696, AR063898). On the "Request for Revised Tentative Tract Map," RPI answered "NO" to the question, "Will revised tentative tract map request affect any covenants and agreements already recorded?" (AR065227.) The application failed to disclose these significant and required aspects of the existing land use regulations that governed the site.

Substantial evidence does not support the determination to approve the Vesting Tentative Tract Map. The approval's conclusions that the unit count is well below the units permitted by right, and that the entitlements are consistent with the zoning and General Plan designation of high density residential that is permitted only in the Regional Center, are unsupported as set forth in section III(B) above. (AR026207, AR059076.) The Project is also not consistent with the limitation in Land Use Map Footnote 11, limiting 3:1 FAR only to projects in the Centers Study Area. (AR019752.) The density approved for the subdivision triples the density cap imposed by the D limitation as a protective mitigation measure, so the density is not appropriate for the site. Finally, the proximity of the site to the Hollywood Fault and the failure to study the immediate off-site area for surface fault traces establishes that the site is not physically suitable for the proposed development. The Vesting Tentative Tract Map approval should be reversed.

CONCLUSION

The Superior Court's thoughtful analysis of the feasibility findings is well-supported and consistent with the statutory requirements and years of caselaw. The Court's judgment invalidating the City's infeasibility findings should be upheld.

However, the Superior Court failed to devote significant attention to the errors identified by FTC, which permeate the entire approval. These errors and irregularities in the approval of the Project are significant and prejudicial, and the City's ignorance of public safety concerns such as fire department capacity and fault zones puts lives at risk. As a result of non-disclosures and inaccurate descriptions of baseline General Plan restrictions, planners and RPI lead decision makers and the public to believe that a much higher and denser project could be approved than was legally permissible. The approval ignored state law and City policy to avoid construction where the risk of surface fault rupture is greatest. The approval skirted numerous procedural protections when it removed a street from vehicular use. The approvals cannot stand, and a writ of mandate should issue to direct that the remaining approvals be vacated.

//

DATED: September 20, 2017

Respectfully submitted,

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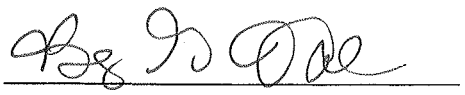
By: 

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

I certify that, pursuant to Cal. App. Rule 8.204(c)(4), the attached Cross-Appellant's Opposition and Opening Brief is proportionately spaced, has a typeface of 13 points or more and contains 24,982 words, as determined by a computer word processor word count function.

DATED: September 20, 2017

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Re: *Fix the City, Inc. v. City of Los Angeles et al.*
Court of Appeal Case No. B284093
Superior Court Case No. BS166484

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

On **September 20, 2017** I served the document described as **CROSS-APPELLANT'S OPPOSITION AND OPENING BRIEF** on all appropriate parties in this action, as listed on the attached Service List, by the method stated.

☒ If electronic-mail service is indicated, by causing a true copy to be sent via electronic transmission from Strumwasser & Woocher LLP's computer network in Portable Document Format (PDF) this date to the email address(es) stated, to the attention of the person(s) named.

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

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

Executed on **September 20, 2017**, at Los Angeles, California.

/s/ Mindy Lu
Mindy Lu

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