CASE NO. C079614

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

EAST SACRAMENTO PARTNERSHIPS FOR A LIVABLE CITY,
Appellant,

v.

THE CITY OF SACRAMENTO,
Respondent,

and

ENCORE McKINLEY VILLAGE, LLC,
Real Party in Interest and Respondent.

On Appeal From the Superior Court for the State of California,
County of Sacramento, Case No. 34-2014-80001851
The Honorable Timothy M. Frawley

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The Joint Opposition Brief filed by Respondents and Real Party in Interest ("Opposition")[1] effectively concedes and acknowledges that the City failed to comply with mandatory provisions of CEQA when it approved the McKinley Village Project. The superficial environmental review of the Project undertaken by the City was incomplete, misleading, deficient as a matter of law, and unsupported by substantial evidence. The Project also violated fundamental principles underlying the City's General Plan, rendering the City's approval of the Project void as a matter of law.

The City's contention that Appellant somehow waived its arguments on appeal by not addressing certain conclusions reached by the trial court is meritless. It is well settled that on appeal in a CEQA case, the appellate court reviews the challenged agency action and not the trial court's subsequent decision. Upon its *de novo* review, this Court should conclude that the City failed to comply with CEQA when it approved the Project by (1) failing to adequately describe the Project in the EIR; (2) illegally separating or "piecemealing" the Project to avoid environmental analysis of approvals integral to the Project; (3) failing to analyze or address significant health risks that would result from the Project; (4) ignoring the

[1] Capitalized terms not defined herein shall have the same meanings assigned to them in Appellant's Opening Brief ("AOB").

Project's significant and unavoidable traffic impacts; and (5) failing to disclose or to mitigate significant impacts relating to methane migration.

The City failed to describe accurately the true nature and scope of the Project in the EIR by omitting, *inter alia*, numerous City approvals required for the Project. This failure undermines the core CEQA principle that "[a]n accurate, stable, and finite project description is the *sine qua non* of an informative and legally sufficient EIR."

CEQA requires that an EIR study all of a Project's significant impacts on the environment, including impacts occurring within the Project site itself. Citing to the Supreme Court's recent decision in *California Building Industry Association v. Bay Area Air Quality Management District* (2015) 62 Cal.4th 369 ("CBIA"), the City contends that it was not required to analyze impacts of existing environmental conditions on future residents at the Project site, and that its EIR analysis of health risks, hazards, and noise was done merely for informational purposes. But the *CBIA* decision *does* require the City to evaluate impacts of the Project on existing health-related conditions, and to consider the cumulative impact of those conditions. The City failed to do so.

Additionally, the notion advanced by the City that somehow it can avoid its obligations to evaluate these impacts by including information in its EIR for "informational purposes only" is at odds with CEQA's core principles and values. It also flies in the face of the City's own policies and

standards, as well as guidance from government agencies with regulatory jurisdiction over the impacted resources.

Finally, in approving the Project, the City violated the requirements and policies of its own General Plan. Specifically, the Project conflicted with a number of key General Plan policies, including those with respect to certain mobility, housing, education, recreation, and culture elements. These inconsistencies between the Project and the General Plan render approval of the Project unlawful.

Because the City violated fundamental CEQA principles as well as mandatory provisions of its own General Plan, the Court should vacate the order of the trial court, and order the City to rescind its certification of the EIR and its approval of the Project.

II. LEGAL ARGUMENT

A. ESPLC Met Its Evidentiary Burden And Did Not "Forfeit" Its Appeal

The City's contention that ESPLC somehow "waived its claims of error" by "failing to address relevant evidence considered by the trial court" is meritless. (Opposition, at 15.) On appeal in a CEQA case, the Court reviews the "agency's action" and not "the trial court's subsequent decision." *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 187-88. Specifically, in reviewing ESPLC's claim that the City abused its discretion, the Court must independently determine "whether the administrative record demonstrates any legal error by the

[City] and whether it contains substantial evidence to support the [City's] factual determinations." *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007), 40 Cal.4th 412, 427, as modified (Apr. 18, 2007). The trial court's conclusions are thus immaterial to this Court's review. *See Cummings v. Civil Service Com.* (1995) 40 Cal.App.4th 1643, 1652 ("The trial court's determination of abuse or nonabuse of discretion by the administrative agency is of no concern to the appellate court."); *Simons v. City of Los Angeles* (1977) 72 Cal.App.3d 924, 930 (under the substantial evidence test, the appellate court "can ignore the trial court's independent findings and limit [its] review to the question of whether the agency's findings were supported by substantial evidence.").

Not one of the cases cited by the City provides support for a finding of waiver. For example, the City cites *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875 ("*Foreman & Clark*") for the proposition that Appellant has waived its appeal by allegedly omitting or misstating "substantial evidence that supports the trial court's rulings." (Opposition, at 14-15.) However, in *Foreman & Clark*, the *subject of the appellate court's review* was the trial court's own evidentiary findings. 3 Cal.3d at 881; Opposition, at 14-15 (citing *In re Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 505; *Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368; *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 836 (relating to trial court's factual finding that

petitioners failed to exhaust administrative remedies). Here, the trial court made no independent findings of fact in its review of the City's actions. (JA 1073-1100, at Tab 59.) *See also Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 590 ("[T]he standard of review [in CEQA cases] does not permit the reviewing court to make its own factual findings . . . ."). The trial court's conclusions, though erroneous, relied exclusively on the Administrative Record, which Appellant has fully and adequately presented to this Court.

The City's reliance on *Markley v. City Council* (1982) 131 Cal.App.3d 656 (*Markley*) further underscores the irrelevance of *Foreman & Clark* to the instant situation. In *Markley*, the appellate court was required, as here, to review the actions of a city pursuant to CEQA. However, contrary to the City's assertion, *Markley* stands for the proposition that a petitioner in an appeal from a mandamus action must "set forth all evidence which might have a bearing on the ***administrative*** decisions." (131 Cal.App.3d at 673) (emphasis added). Notably, *Markley* does not mention forfeiture or waiver of claims on appeal based on the deficiencies in an appellant's brief. In fact, the *Markley* court reviewed the appellant's claims despite her failure to adequately brief the administrative record. *Id.* In any event, the City asserts no claims of omissions or misstatements relating to ESPLC's presentation of facts in the Administrative Record.

For the foregoing reasons, the Court should reject the City's waiver argument as meritless.

B. The City Violated CEQA When It Approved The Project

1. The Project Description Is Fatally Defective

Despite its acknowledgment that "[a]n accurate, stable, and finite project description is the *sine qua non* of an informative and legally sufficient EIR," the trial court erroneously concluded that the EIR—which omitted from its description numerous City approvals necessary for the Project—was adequate. As set forth in ESPLC's Opening Brief, the omitted approvals concerned a development agreement, an expanded rezoning request to allow multi-family residential uses, an increase in the number of residential units from 328 to 336, and variances for driveway widths. (AOB, at 24.) Because these Project components were omitted from the Project description in the EIR, and were not subject to any analysis in the EIR, the City failed to proceed in accordance with CEQA, and the trial court erred by concluding to the contrary.

The City does not dispute that the Development Agreement was not identified in the Project description section of the EIR, nor that the Development Agreement's terms and potential impacts were not analyzed elsewhere in the EIR. Instead, the City incorrectly contends that "CEQA analysis does not require analysis of the specific Development Agreement terms." (Opposition, at 19.) The cases cited by the City do not support that

conclusion. In *Native Son/Lyon Communities v. City of Escondido* (1993) 15 Cal.App.4th 892, the challenging party admitted that the development agreement at issue was "a part of the project description." *Id*. at 909. Here, on the other hand, the terms of the Development Agreement were not analyzed anywhere in the EIR and, thus, were not subjected to CEQA review. Similarly inapposite is *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, in which petitioner failed to show that the development agreement required any improvements beyond those studied in the EIR. *Id*. at 927.

Here, however, on the night that it approved the Project, the City Council voted to modify the Development Agreement to require that more than $2 million in funds previously set aside for a bicycle/pedestrian tunnel be used instead for a third vehicular access to be constructed at the current terminus of Alhambra Boulevard at B Street (the "Alhambra Tunnel"). (AR 584-586, 16015-19, 16208.)

The sole purpose of the Alhambra Tunnel is to provide another access route to the Project. Plainly, it is a part of the Project and was included within the Development Agreement. Nevertheless, and despite the potentially significant impacts that it will have on the environment, the Alhambra Tunnel *was not studied in the EIR*. The City violated CEQA by failing to evaluate those impacts in the EIR. *See Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th

1214, 1231 (“Therefore, we conclude the two acts are part of a single project for purposes of CEQA. City violated CEQA by treating them as separate projects subject to separate environmental reviews”).

2. The City Engaged In Illegal Piecemealing

Under CEQA, the City was required to review the “whole of the action” being approved, including development activities that could result from the approval. *Friends of Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 312. Dividing a project into smaller pieces is impermissible under CEQA because piecemealed review creates environmental “reviews” that do not adequately account for the project’s overall, cumulative impacts. *Paulek v. Department of Water Resources* (2014) 231 Cal.App.4th 35, 45 (CEQA mandates “that environmental considerations do not become submerged by chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences.”); *Planning and Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 235 (same). The City concedes that CEQA does not permit it to divide a single project into smaller parts in order to avoid addressing cumulative project impacts as part of its CEQA analysis. (Opposition, at 21.) Nevertheless, the City did just that.

First, the City approved and then amended the Development Agreement, which included a new vehicular access to the Project site that was not analyzed in the EIR—the Alhambra Tunnel—notwithstanding that the access tunnel would require, among other things, boring through a railroad embankment and building a permanent vehicular bridge over the Alhambra Boulevard extension. (AOB 25-26.) The sole purpose of the Alhambra Boulevard bridge is to connect the Project site with the rest of the City and, consequently, without the Project, there would be no need for either the underpass or the bridge. Instead of treating this crossing as a part of the Project EIR, the City illegally segmented Project approval by improperly deferring the tunnel/bridge analysis until a later date, a clear violation of CEQA.

In an effort to defend its failure to analyze the impacts of such construction in the EIR, the City contends that the Alhambra Tunnel was not a part of the Project, that the City never committed to building the tunnel, and that it instead proposed considering such a tunnel as a separate capital improvement project. (Opposition, at 21-23.) Moreover, according to the City, substantial evidence demonstrates that the Alhambra Tunnel is infeasible and is, thus, not a "reasonably foreseeable project" that would require CEQA analysis. (Opposition, at 23.)

The City's position is not supported by substantial evidence. In fact, the weight of the evidence demonstrates that the City's claim that the

Alhambra Tunnel was a "potential" or "future" project is at odds with the express action taken by the City. Indeed, the City earmarked funds for creation of the tunnel and voted to direct staff to create a capital improvement program for the "Alhambra Tunnel Project," thereby enabling the City to solicit and/or collect additional funds for the tunnel. (AR 584-586, 16015-19, 16208, 15954.) Thus, the City cannot credibly maintain that the Alhambra Tunnel was not a reasonably foreseeable project that required EIR analysis, and the trial court's conclusion that the underpass was "not a reasonably foreseeable consequence of the Project" was erroneous. *See San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 733 (EIR for residential project invalid for, among other reasons, failing to assess the impacts of necessary sewer treatment plant expansion); *see also*, Cal. Pub. Resources Code § 21083, subd. (b) and Government Code § 15130. While claiming that the additional vehicular tunnel at Alhambra Boulevard is infeasible, the City entered into a Development Agreement specifically contemplating the funding and construction of the Alhambra Tunnel. (AR 16015-19, 16208.)

Second, also without CEQA review, the City approved a half-street closure at the intersection of 28th Street and C Street, which closure was not studied in the DEIR. The City's attempt to justify its failure to analyze the 28th Street closure in the DEIR is unavailing. Specifically, the City argues that the closure was not a separate project subject to independent

review, and that the EIR determined that the closure would result in lower traffic southbound volumes on 28th Street. (Opposition, at 24.) The City's position disregards the fact that the FEIR acknowledges that the half-street closure may result in adverse traffic impacts. (AR 5265.) Likewise, the City's assertion that the closure would result in reduced traffic on 28th Street ignores the reality that it also necessarily would increase traffic on C Street and 29th Street.

Notably, even if the City could reasonably contend that the Alhambra Tunnel and 28th Street half-closure were severable from the Project, CEQA would have required that the EIR review the cumulative impacts of these two proposals. *See* Pub. Resources Code § 21083, subd. (b) (CEQA review required "in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects."); *see also* Government Code § 15130; *San Joaquin Raptor*, 27 Cal.App.4th at 733. The City failed to conduct that review.

The City's failure to subject the Alhambra Tunnel and the half-street closure on 28th Street to CEQA review is particularly troubling in light of the City Council's eleventh-hour decision to remove the nearby Sutter's Landing Parkway from the General Plan, thus increasing traffic levels on neighborhood streets. (AR 15954, 1350). The City argues that no CEQA review was needed with respect to Sutter's Landing Parkway because the City did not formally remove Sutter's Landing Parkway from the General

Plan at the hearing on the Project. Instead, the City states that the City Council "merely directed staff to consider removing that facility from the General Plan during a future General Plan update process." (Opposition, at 25.)

Once an agency has taken the first step toward committing to a project, a promise to undertake future CEQA review—as the City did here—is too late to influence the action and amounts to nothing more than a post hoc rationalization for a decision already made. *See Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 134 (environmental review must occur before an agency approves a project, which approval must be based upon the project description formed at the time the public agency first exercises its discretion over an activity); *Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 590-595 (airport must conduct new CEQA review before committing to development of new facilities). Moreover, any future review of the removal of Sutter's Landing Parkway cannot and will not obviate the fact that the Project EIR assumed the existence of Sutter's Landing Parkway in its cumulative impact analysis. (AR 1337.) Thus, to the extent that the City is planning for the removal of the Sutter's Landing Parkway, its EIR analysis is fundamentally flawed. (AR 15954, 1350.) Accordingly, the trial court erred by concluding that there was substantial evidence that removal of Sutter's

Landing Parkway "is not a reasonably foreseeable consequence of this Project."

Finally, the EIR did not study or review the variances necessary to reduce driveway widths. The City dismisses this argument as though a change of driveway widths is a petty and inconsequential omission from the EIR. (Opposition, at 20-21.) However, this argument is directly at odds with the City's own planning laws, as the City previously determined that the width of driveways is a significant enough issue that it is subject to specific requirements in the City's Municipal Code. *See* Sacramento City Municipal Code §18.08.050 ("SMC"). Thus, if a builder wants to construct smaller driveways than those permitted by the Municipal Code, the City requires the builder to apply for and to obtain a variance to allow construction that would otherwise be inconsistent with the Code. In the present case, the EIR is only valid to the extent that it is consistent with all of the City's planning and zoning requirements. Without obtaining a variance to permit the construction of smaller driveways at the Project site, the entire EIR would be defective as inconsistent with the City's planning and zoning laws. By failing to provide the public with adequate information and analysis of this variance process, the City violated CEQA.

3. The City Failed To Analyze Or To Address Significant Health Risks

The trial court declined to consider the impacts of existing conditions on the health of future Project residents, concluding that although CEQA requires a city to analyze the impacts of a project on the environment, "CEQA does not require an EIR to analyze the effects of the environment on the future occupants of a project." (JA 1084, at Tab 59.) As discussed in ESPLC's Opening Brief, after the trial court entered its order, the California Supreme Court addressed this issue in *CBIA*. In *CBIA*, although the Supreme Court agreed that a city need not examine the impact of existing conditions on a project's future residents, it also made clear that "[w]hat CEQA does mandate… is an analysis of how a project might exacerbate existing environmental conditions." *CBIA*, 62 Cal.4th at 392-393. Therefore, notwithstanding the City's position that it "was not required to analyze the potential impacts of toxic air contaminants (TACs), noise, and methane gas on future residents" (Opposition, at 25-27), it cannot be disputed that the City *was* required to analyze the impacts of the Project on existing levels of TACs, noise, and methane gas, and to consider the significance of those *cumulative* impacts.

The Project at issue will significantly exacerbate and amplify a number of existing environmental conditions. For example, the Project will add 1,700 vehicles, 3,500 vehicle trips per day, and all of the accompanying

air quality, traffic, and public safety concerns that such vehicles create. (AR 1315, 1317, 5393). Nevertheless, the City failed to analyze adequately the impact of these additional vehicles on environmental conditions at the Project site. In light of the Supreme Court's clarification of this issue in the *CBIA* decision, on appeal, this Court must consider, *de novo*, whether the City adequately analyzed the cumulative impacts of the Project on existing health-related conditions to determine whether those conditions will be worsened by the Project. For the reasons explained below, this Court should find that the City failed to do so.

As a procedural matter, the City's assertion that ESPLC somehow waived this argument by not raising it in the trial court, or including it under a "separate heading" in its Opening Brief, is wrong. (Opposition, at 40.) ESPLC did argue to the trial court that, *inter alia*, "the EIR fails to analyze the cumulative health risks posed by current and reasonably foreseeable increases in both freeway and rail traffic." (JA 0470-0471, at Tab 35.) Moreover, even if ESPLC had not made that argument below, the *CBIA* opinion was issued by the California Supreme Court after the trial issued its decision, but before briefing on this appeal. Due to *CBIA*'s impact on the law, it was proper for ESPLC to explain the impact of that intervening decision by the Supreme Court on this appeal.

ESPLC also properly raised this argument in its Opening Brief on appeal under the heading "The City Failed to Analyze Or Address

Significant Health Risks." (AOB, at 33.) Contrary to the City's contention, this argument did not require a "separate heading" in ESPLC's brief, as it is not a new or separate argument. Rather, ESPLC simply explained that its position that the City failed to evaluate health impacts adequately is supported by the Supreme Court's decision in *CBIA*, which was issued after the trial court's decision in the underlying action.

As a substantive matter, while maintaining that it was "not required by CEQA," the City contends that "for disclosure purposes," the EIR "fully analyzed the potential health, safety, and noise impacts associated with the Project's proximity to the existing freeway, rail lines, and closed landfill," and that "all impacts were determined to be less than significant." (Opposition, at 27.) The City's conclusions, however, were not supported by substantial evidence.

(a) The City Applied An Incorrect Threshold Of Significance

The City claims that substantial evidence supports its determination that the impact from exposure to TACs was less than significant. (Opposition, at 28.) However, the City specifically labeled this analysis "for informational purposes," effectively excluding this analysis from CEQA scrutiny. (AR, 940-941) The City cannot label sections of its EIR analysis as "for informational purposes"—which is tantamount to informing the public that "there is nothing to see here, move along"—and still expect the public to review that information with the necessary level of

scrutiny. Therefore, if the TAC analysis is "for informational purposes" only, the City cannot be permitted to rely upon that analysis as substantial evidence supporting approval of the Project.

Even if the City somehow is entitled to rely on an analysis that is characterized as merely informational, the City adopted an incorrect standard that was not supported by substantial evidence. Specifically, according to the City, it voluntarily prepared an HRA that concluded that the maximum cancer risk at the Project site was 120 in 1 million, and the EIR found this to be less than significant. (Opposition, at 29.) However, the standard metric used by every major California air district to assess the significance of cancer risk is whether a project would result in an increased cancer risk of 10 in 1 million or more. (AR 15838, 15909-10, 15912, 8031, 8053.) SMAQMD itself uses this standard in permitting stationary sources, and the City has employed this standard for other projects. (AR 34987, 9240, 25691.) The EIR admits that the Project would expose residents to an increased cancer risk at least 5 times—and as high as 12 times—the universally accepted 10 in 1 million standard. But the EIR neglects to disclose this impact as significant.

Moreover, the 10 in 1 million standard, a threshold of significance, is not additive to background risk. Instead, as is typical with any CEQA impact, the project impact is compared to the existing or background conditions to determine whether the project's impact is significant. *See*

Government Code § 15126.2(a) (in assessing impacts of a project, agency should focus on changes to the existing physical conditions in the affected area). CAPCOA's guidance document specifically states that "[i]n cases where project specific risk is compared to other risks or expressed as a percentage of the existing background, it should be made clear that the project specific risk is in addition to the existing background risk." (AR 8065; *see also* Protocol, at AR 29562.)

Nevertheless, the City claims that it has discretion to choose the appropriate standard and that the qualitative threshold it used, which asks whether the Project would increase cancer risk substantially, was appropriate. (Opposition, at 30.) Because this standard reflects neither industry norms nor the best practice guidance from all of the major air districts in the State, including SMAQMD, the City failed to proceed in the manner required by law. The cases relied on by the City for the proposition that it had discretion to employ its qualitative standard do not support its position, and actually refute it.

In *National Parks & Conservation Ass'n v. County of Riverside* (1999) 71 Cal.App.4th 1341 ("*National Parks*"), a county used its residential noise standard as a threshold for assessing noise impacts near a park, concluding that impacts would be less than significant with mitigation. *Id.* at 1358. The court upheld the agency's conclusion in this regard, noting that "absent more closely applicable standards, it appears the

County had a substantial basis for accepting the EIR's use of county residential noise standards for specific reasons." *Id.* Unlike the circumstances in *National Parks*, the City here had no basis to deviate from a more closely applicable standard.

In *North Coast Rivers Alliance v. Marin Municipal Water District Board of Directors* (2013) 216 Cal.App.4th 614, in finding that the aesthetic impacts of the water storage tank at issue were less than significant, the court stated that agencies have discretion to classify impacts as significant depending upon the nature of the area impacted, and that they must distinguish between significant and insignificant impacts based, in part, on the setting. 216 Cal.App.4th at 627. Here, the nature of the area affected is degraded and the City failed to consider the setting in reaching its significance conclusion. (Opposition, at 25.) *North Coast Rivers Alliance*, therefore, does not support the City's position.

The third case relied on by the City, *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327, involves a challenge to use of a threshold for greenhouse gas emissions ("GHG"). The agency used one standard, and project opponents claimed that it should have used a different one. Ruling in the agency's favor, the court reasoned that the agency had discretion in choosing its threshold since there was no universally accepted significance standard. *Id.* at 335. The court also cited a later-enacted guideline,

Government Code § 15064.4, which confers discretion on agencies to set standards for evaluating the significance of GHG emissions. Here, there is a universally accepted threshold and no provision of the statute or CEQA Guidelines provides the City with discretion to deviate from it. *See, e.g., Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 371-72 (court upheld noise analysis where the agency used industry standard approach to assess noise levels); *National Parks*, 71 Cal.App.4th at 1341 (court observed that the agency should use more closely applicable standard to the extent it exists). Therefore, the City's contention that this Court "must defer to the City's selected threshold of significance" is false. (Opposition, at 30.)

Notwithstanding the City's contention that the Air District specifically advised the City not to use the standard 10 in 1 million threshold, the FEIR merely states that "at the advice of SMAQMD staff, a 10 in 1 million standard was not used." (AR 5376.) This statement provides no explanation or rationale as to why the City should not use the 10 in 1 million threshold typically used by the SMAQMD. Nor does the statement include any details about the identity of the agency staff person with whom the EIR consultant communicated, nor any information about the timing of such communication. Moreover, Larry Greene, SMAQMD's Executive Director, specifically testified that the Air District did not provide guidance on the threshold used in the EIR. (AR 16024.)

Also, there is no evidence to support the City's position that its selected threshold was in accordance with the Air District's Recommended Protocol for Evaluating the Location of Sensitive Land Uses Adjacent to Major Roadways (the "Protocol"). The only cited provision of the Protocol states that the document does not provide a regulatory threshold. (AR 29554.) SMAQMD's CEQA Guide, also cited by the City, simply requires a discussion of whether the project would locate sensitive receptors in close proximity to an existing or future planned source of TAC emissions, thereby resulting in significant impacts. (AR 34983.) None of these documents supports the City's position, let alone constitutes substantial evidence that the correct standard was used, especially when viewed in light of the evidence in the record as a whole.

(b) The City's Conclusion That The Project's TACs Impacts Were Insignificant Was Not Supported By Substantial Evidence

Even if the deviant standard used by the City to evaluate the significance of the Project's impacts on TACs could be deemed proper, the City reached the wrong conclusion. Once built, the Project will substantially increase cancer risk, and there is no evidence—substantial or otherwise—to the contrary. Because no sensitive receptors currently occupy the site, the current risk is zero. The Project will add 336 homes and 672 residents to the site (AR 5143), thereby increasing the cancer risk

from zero to as high as 120 in a million. This increase can only be viewed as substantial. While the City portrays the cancer risk as less than significant, the City's own expert never reached that conclusion in its HRA. Instead, the HRA simply lists the maximum cancer risk of 120 in 1 million and states that the health impacts are not expected to be higher than those estimated in the assessment. (AR 6459, 6464.) By comparison, the HRA concludes that the non-cancer risk is less than significant. (AR 6463, 6464.)

Not only did the City use an inappropriate standard to evaluate the impact of toxic air contaminants, but the methodology employed by the City to analyze that impact was fundamentally flawed, and its conclusions were, therefore, not supported by substantial evidence. For example, as explained in ESPLC's Opening Brief, the HRA improperly focused solely on truck traffic rather than automobile traffic. (AOB at 30.) In defense of this methodological flaw, the City argues that its actions were consistent with the Air District's Protocol, as DPMs are primarily associated with trucks. (Opposition, at 31-32.) Thus, despite this Court's ruling in the *Stone Lakes* case,[2] ordering the City to consider non-DPM TACs, the City continues to argue that somehow it is excused from doing so. While it is true that DPMs from trucks can pose a relatively larger cancer risk than

[2] *See* Notice of Entry of Judgment in *Stone Lakes National Wildlife Refuge Assn. v. City of Sacramento*, Sacramento Superior Court Case No. 34-2009-80000166 ,at AR 9200-9243.

cars, cars also emit TACS that pose a cancer risk and make up approximately 96% of the traffic on nearby Business 80. (AR 5709, 6433, 16026.)

Although the City maintains that its actions were consistent with the Protocol, the Protocol provides no justification for omitting these emissions from the EIR's analysis. Instead, it acknowledges that "[s]ignificant health risks" are associated with TACs in vehicle emissions, and notes that the same methodology used for DPMs can be used to assess them. (AR 29564.) SMAQMD's CEQA Guide likewise requires that "lead agencies . . . analyze all sources of TACs that could potentially affect the proposed development location." (AR 34988.)

Nor is there any substantial evidence in the record to support the City's use of 30 trains per day in the HRA. (Opposition, at 32; AR 6449-50.) This number reflects the partial results of a random survey taken by the City's noise consultant, who observed even higher train counts than those used in the HRA or noise analysis. (AR 3398) Citing the Federal Railroad Administration's website, the DEIR states that *41 trains per day* pass the site. (AR 1150, 15787.) This is nearly a 37% increase over the number assumed in the HRA. (AR 1150, 15787.) Had the HRA analysis been based upon the actual volume of existing rail traffic reported in the DEIR, the maximum cancer risk would have increased from 120 in 1 million to 130 in 1 million. (AR 15930.) Had the contribution from

benzene and 1,3-butadiene also been factored in, the cancer risk would increase up to 140 in 1 million. (AR 5280.)

Also unsupported by substantial evidence is the City's contention that the Project is located upwind of the freeway. (Opposition, at 32.) Indeed, to support this position, the City cites meteorological data from the airport located approximately 10.5 miles northwest of the site. In letters provided to the City, however, experts wrote that use of airport data was inadequate because it assumes wind direction from the south, as is the case at the airport, when wind direction at the site is most likely from the southwest, making the site downwind of the freeway. (AR 15817, 15914, 15925.)

Finally, although mandated by CEQA, the EIR fails to analyze the cumulative health risks posed by current and reasonably foreseeable increases in both freeway and rail traffic. The City asks for a reprieve from CEQA's mandate by claiming that it is "not reasonably feasible or scientifically accurate to conduct an analysis of cumulative conditions, as that analysis would include yet-to-be realized emissions reductions and speculative traffic levels." (Opposition, at 33.) There was no evidence in the record to support the City's position. If, as the City contends, the traffic levels are "speculative," then the entire traffic analysis is defective and the EIR fails.

In any case, the City had data on future traffic and rail levels (AR 34318-19, 1197) and the EIR could have used the same methodology it used to analyze GHG emissions to assess cumulative health risk. SMAQMD's CEQA Guide specifically requires such an analysis where the project-level impact has not been reduced to a less-than significant level (AR 35029), as is the case here. The City's failure to comply with the law is not inconsequential. The Project alone would exceed the cumulative health risk threshold established by BAAQMD, which asks whether the project would be subject to a cancer risk from all cumulative sources of more than 100 in a million. (AR 15861.)

(c) The City Failed To Implement Adequate Mitigation Measures

Although the City argues that TAC impacts were deemed insignificant, and thus no mitigation was required (Opposition, at 33), the City's last-minute decision to impose a condition of approval to require that air filters be installed on Project homes demonstrates the need for mitigation to address an admittedly significant impact. Indeed, SMAQMD refers to the filters as mitigation. (AR 16023-27.) The City's assertion that the measure was "voluntarily" provided by the applicant is directly contradicted by the testimony of SMAQMD's Executive Director. (AR 16159-60.)

(d) The City's Conclusion That Methane Migration Impacts Are Less Than Significant Is Unsupported By Substantial Evidence

Also unsupported by substantial evidence is the City's conclusion that the impacts of methane migration on the Project would be less than significant. (Opposition, at 34.) Indeed, both CalRecycle and the County EMD provided expert opinions that the Project should be required to implement six specific mitigation measures to reduce potential impacts related to methane migration from the adjacent landfill site. (AR 5317, 5319, 5335.) These two independent expert agencies explained that such mitigation is necessary to ensure the safety of occupants of homes within 1,000 feet of a landfill, even where a landfill gas control and monitoring system is in place, because such a system is not "fully effective in detecting and/or controlling landfill gas migration." (AR 5316-17.) The City rejected all six of the mitigation measures recommended by CalRecycle.

In order to fulfill its purpose as a public notice document, an EIR must fully disclose and respond in detail to concerns raised by other agencies. *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3d 348, 357 ("Only by requiring [the agency] to fully comply with the letter of the law can a subversion of the important public purposes of CEQA be avoided."). Thus, "where comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the

agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored. There must be good faith, reasoned analysis in response." *Id*. at 357; *see also*, *Berkeley Keep Jets Over the Bay Committee v. Board of Port Com'rs* (2001) 91 Cal.App.4th 1344 (quoting same). An EIR that fails "to acknowledge the opinions of responsible agencies and experts who cast substantial doubt on the adequacy of the EIR's analysis" is invalid. *Berkeley Keep Jets* at 1371.

The City claims that it relied on "extensive evidence that contradicted CalRecycle and [the Solid Waste Local Enforcement Agency's] comments and supported the EIR's conclusion of no significant impact." (Opposition, at 38.) Specifically, the City relies on a January 14, 2014 report by SCS Engineers, prepared in response to the concerns expressed by CalRecycle, which report found "no evidence that combustible gas concentrations . . . exceed regulatory standards . . . ." (Opposition, at 36.) But the City fails to note that CalRecycle was not satisfied with the SCS report.

In fact, CalRecycle determined "that the report is generally inadequate for the purpose of determining" whether the gas monitoring system "can be relied upon to provide accurate gas migration information," and provided eight specific reasons for that conclusion. (AR 15830.) Thus, data from the non-functioning monitoring wells clearly is not substantial evidence that no significant risks from methane migration exist. And even

if it were, the mitigation recommendation was made "regardless of the current effectiveness of any landfill gas control and/or monitoring system." (AR 5317.) The City's decision to reject that recommendation was unsupported by substantial evidence.

4. The City's Conclusion That Traffic Impacts Would Be Less Than Significant Is Not Supported By Substantial Evidence

The City contends that it properly relied on its traffic experts in concluding that traffic impacts would be less than significant. (Opposition, at 43.) But there is no evidence—let alone substantial evidence—that the City or its experts examined the traffic impacts of all Project components. The EIR failed to adequately study the proposed Alhambra Tunnel, the removal of the Sutter's Landing Parkway, and the half-street closure at 28th Street and C Street. Indeed, the EIR assumed the continued existence of Sutter's Landing Parkway in its cumulative traffic analysis. (AR 1337.) Moreover, the City and its experts failed to study impacts on roadway segments and freeways, and instead focused exclusively on intersections.

(a) The City Failed To Analyze Impacts On Roadway Segments

The City's obligation—and failure—to study roadway segments involves a question of law because it involves interpreting the City's Traffic Impact Guidelines. *See, e.g., Meyers v. Board of Administration for the Federate City Employees Retirement Fund* (2014) 224 Cal.App.4th 250, 256 ("We review questions of law, such as the interpretation of local

ordinances and municipal codes, de novo."). Those guidelines state unambiguously that roadways should be studied along with intersections where traffic volumes will change substantially in the future. (AR 17621-17636.) The EIR itself demonstrates that traffic volumes will change substantially, that under existing plus Project conditions, three roadway segments will operate at LOS F conditions (AR 1348, 5167-8), and that the level of service on two of these segments—28th Street (between C and E) and C Street (west of 28th)—will get even worse in light of the City's concurrent action to remove the Sutter's Landing Parkway from its General Plan. (AR 1350.) The record is replete with substantial evidence that LOS E and LOS F conditions constitute adverse traffic impacts. (AR 1295, 5294-95, 5731-33, 5739, 26667-73, 36811-12.)

Nevertheless, the City claims that it may exercise its "professional judgment" to ignore its guidelines, past practices, and its own General Plan. (Opposition, at 46.) This is not, and cannot be, true when the Project will result in significant unacknowledged traffic impacts. (AR 1348, 5167-8.) As a result of the City's failure to assess roadway segments, significant impacts to three roadway segments were not disclosed by the EIR, in violation of CEQA.

(b) The City Failed To Analyze Impacts On State Highways

The City argues that it properly defined the scope of its traffic analysis by focusing on roadway intersections and excluding any analysis

of state highway impacts. (Opposition, at 43.) Although the City criticizes ESPLC for "not assert[ing] the trial court erred in its Ruling" on these issues, the question of whether the City was required to study freeway segments presents a pure issue of law because it involves the interpretation of Public Resources Code § 21159.28. Accordingly, neither the City nor the trial court is entitled to deference on this issue. *See Picayune Rancheria of Chukchansi Indians v. Brown* (2014) 229 Cal.App.4th 1416, 1422-23 (interpretation of CEQA is a question of law). And notwithstanding the City's attempts to downplay the Project's contribution to freeway traffic, the Project will have a significant impact on freeway segments. (AR 1307, 1360, 5294, 26637, 26649, 26665, 26674-75.)

Public Resources Code § 21159.28 allows certain infill projects to avoid examination of impacts on the State highway system, but only "if the project incorporates the mitigation measures required by an applicable prior environmental document." Pub. Resources Code § 21159.28(a). The General Plan EIR contains a mitigation measure requiring the City to provide CalTrans with fair share funding of "intelligent transportation system improvements" to Business 80. (AR 26642, 26675.) Notwithstanding this mandatory mitigation measure, the City did not require the Project to provide fair share funding toward this improvement, despite CalTrans's plea for similar mitigation. (AR 5299-5300.) Because

the City did not impose this mitigation on the Project, the exemption afforded by Public Resources Code § 21159.28 does not apply.

Under the City's reading of the statute, the mitigation requirement would be entirely superfluous, contrary to standard rules of statutory construction. *See O.W.L. Foundation v. City of Rohnert Park* (2008) 168 Cal.App.4th 568, 590 ("Such a result violates the rule of construction that a statute is to be interpreted to avoid rendering terms meaningless or superfluous"). The Legislature included this provision to ensure that adverse impacts to freeways are mitigated even though they need not be studied in a project EIR. Pub. Resources Code § 21159.28(a). The City admits that it has no regional traffic impact fee, and no relevant transportation mitigation measures were included in the General Plan EIR or related documents. (AR 5798, 6603, 26681.) Therefore, the City failed to act in compliance with CEQA.

(c) The City Cannot Cure Its CEQA Failures By Including Information In The EIR "For Informational Purposes"

The City cannot cure its failures to adequately analyze traffic impacts by including information about those impacts in the EIR merely for "informational purposes" without subjecting that information to CEQA scrutiny. (Opposition, at 44, 46.) The cases cited by the City do not support its position. *See Marin Mun. Water Dist. v. KG Land California Corp.* (1991) 235 Cal.App.3d 1652 (noting in background section that

information about certain conditions was included in EIR "not because those conditions would result in significant environmental effects, but 'for informational purposes,'" but not analyzing the legal significance of the phrase); *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729 (future projects *not being approved by EIR* described "for informational purposes"); *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036 (cleanup of hazardous substances discussed in EIR "for informational purposes" where, at the time EIR was prepared, cleanup was sole responsibility of the Navy). None of these cases stands for the proposition that environmental impacts of the project being studied in an EIR need not be subjected to CEQA review, and may instead be discussed merely "for informational purposes." Rather, in the cases cited by the City, the data that was supplied for "informational purposes only" was not required to be reviewed under CEQA because it would have had no impact on the project being studied (*Citizens for a Sustainable Treasure Island*), was not the focus of the court's discussion (*Marin Municipal Water Dist.*), or was subject to scrutiny under laws other than CEQA and which are not applicable here (*Citizens for a Sustainable Treasure Island).* None of the agencies in the foregoing cases labeled data "for informational purposes" in an EIR, and then attempted to use merely "informational" data as substantial evidence justifying its actions. In the present case, the City is

attempting to avoid scrutiny of three key areas of environmental impacts analysis while simultaneously using that same analysis as "substantial evidence" to support the EIR and approval of the Project. This is a clear violation of CEQA

(d) The City Applied An Incorrect Threshold of Significance

In addition to its failures to study all necessary traffic impacts, the City used an inappropriate standard to measure the significance of the intersections that it did study. Specifically, the City applied LOS E and LOS F standards without explaining why the resulting impacts would be less than significant. As a result, the EIR fails to identify significant impacts to 4 of 5 intersections/roadway segments under existing plus project conditions, and to 11 of 14 intersections and roadway segments under cumulative plus project conditions.

The City claims that regardless of how much traffic a project adds to certain intersections already operating at LOS E or LOS F, there is no significant impact based on General Plan Policy M.1.2.2, which "encourages the City to employ flexible LOS standards . . . ." (Opposition, at 47.) But LOS F is the epitome of a significant traffic impact, as the City itself acknowledged when it adopted its General Plan and found traffic to be a significant unavoidable impact, notwithstanding Mobility Policy M.1.2.2. (AR 26667-73.) Thus, the City's use of this threshold is not supported by substantial evidence and is not entitled to deference. To the

contrary, the record is replete with substantial evidence that LOS E and LOS F constitute adverse traffic impacts. (AR 1295, 5294-95, 5731-33, 5739, 26667-73, 36811-12.)

(e) The City Failed to Implement Adequate Traffic Mitigation Measures

Finally, the City failed to impose feasible mitigation measures for the few significant traffic impacts that it did identify. The City claims that there is a reasonable plan for mitigation, citing a response in the FEIR that monies will be collected and put into a special fund. (Opposition, at 50.) However, payment of fair share fees, as required by Mitigation Measures 4.9-6(a) through 4.9-6(c), is legally sufficient only when tied to a reasonable plan of mitigation that the agency commits to implementing. *See Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1188 ("Fee-based mitigation programs for cumulative traffic impacts . . . have been found to be adequate mitigation measures under CEQA . . . . To be adequate, these mitigation fees, in line with the principle discussed above, must be part of a reasonable plan of actual mitigation that the relevant agency commits itself to implementing"). In its FEIR, the City admits to having no such plan. This so-called "mitigation measure" is, therefore, inadequate. (AR 5798.)

Moreover, Mitigation Measure 4.9-6(a) is not feasible because it will result in the elimination of a dedicated bike lane. The mitigation measure

calls for removing/prohibiting on-street parking on H Street, between 30th Street and Alhambra Boulevard. (AR 1364.) This section of H Street contains a dedicated bike lane, known as a Class II lane. (AR 5740, 30071.) The roadway width is not wide enough to encompass both four travel lanes and the dedicated bike lane. (AR 5740.) The City does not dispute this, admitting that bicyclists will have to "share the road" with cars as a result of this measure. (AR5805, 5819.) But the City refuses to admit that bicyclists will lose a dedicated bike lane due to this measure. (Opposition, at 50.) Because these measures are not legally feasible, the City was required to (but did not) adopt a Statement of Overriding Considerations.

C. The City's Approval Of The Project Is Inconsistent With Its General Plan

In addition to all of the foregoing CEQA violations that render approval of the Project unlawful, approval of the Project must also be reversed for the independent reason that it is inconsistent with the City's General Plan. *See* Gov. Code, §§ 65860, subd. (a) and 66473.5. The City's violations of General Plan policies cannot be excused or judicially sanctioned by the City's pleas for "deference." (Opposition, at 51.) "Deference is not abdication" of the court's duty to exercise critical judicial scrutiny of general plan consistency, as the Third Appellate District emphasized in *California Native Plant Soc. v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 642 (affirming the trial court's finding of

general plan inconsistency, explaining that when "the City's interpretation . . . is unreasonable, deference to the City's interpretation of its general plan . . . is unwarranted"). For all of the foregoing reasons, this Court should conclude that the City unlawfully approved a Project that was inconsistent with its governing General Plan.

1. The Project Is Inconsistent With General Plan Noise Policies

The City admits that "[p]ursuant to General Plan Policy EC 3.1.1, exterior noise levels for residential land uses are considered significant if they exceed 60 dB Ldn." (Opposition, at 53; AR 1158-1159.) Both common sense and the City's SMC require that in determining whether outside noise levels exceed that standard, noise levels must be measured at the part of the receiver's property that is most impacted by noise. *See* SMC § 8.68.060(B) (in determining whether the standards are exceeded, "[t]he location selected for measuring exterior noise levels shall be at any point on the receiver's affected property."); *see also* General Plan, p. 2-337, Policy EC 3.1.1 ("The City shall require noise mitigation for all development where the projected exterior noise levels exceed [the standard] to the extent feasible.").

In order to avoid admitting the Project's true noise impacts, however, the City approached the problem backwards. Rather than analyzing noise levels at the most impacted parts of the future residential lots, the City looked only at the most noise-sheltered portion (which the

City calls “private yards”), and ignored the fact that noise levels will significantly exceed 60 dB Ldn in other outdoor areas. Indeed, the EIR concedes that even with a proposed berm and wall, exterior noise levels in the private backyards of units near the railroad tracks will be 65-68 dB. (AR, at 01188.) Instead, the City simply dismisses that fact as irrelevant and absurdly characterizes such backyards—which are approximately 700 square feet in size, and thus take up nearly one quarter of the small, 2,870 square foot lots—as mere “trash can storage areas.” (Opposition, at 54-55.) The only reason why such a significant portion of the lot might not be used for outdoor activities is that noise levels will be unbearably loud for many people.

Similarly, while both the EIR and the City’s Opposition talk about the homes’ “outdoor rooms” as features that will help to reduce noise in the “private yards,” the City failed to analyze noise levels in the outdoor rooms themselves. (Opposition, at 57; AR 4473.) These rooms are very close to two existing (and four potential future) rail lines, and thus, likely exceed the 60 dB Ldn noise standard, yet there is no analysis of the noise levels in these areas. (AR 432, 1185, 4473.) By cherry-picking one small and relatively sheltered portion of the yard in which to analyze outdoor noise impacts, rather than analyzing impacts in all outdoor areas, the City has concealed the Project’s true and significant noise impacts and failed to proceed in the manner required by law.

2. The Project Is Inconsistent With General Plan Mobility Policies

The City argues that the Project is consistent with General Plan Mobility Policies, and that "[n]either the Project nor any mitigation measures would result in elimination of bike lanes." (Opposition, at 52.) But as discussed above, Mitigation Measure 4.9-6(a) proposed by the City will result in the elimination of a dedicated bike lane on H Street between 30th Street and Alhambra Boulevard. (AR 1364.) Elimination of this bike lane violates Mobility Policy M 5.1.1, requiring all new developments to be consistent with provisions of the Bikeway Master Plan. The City's determination that the Project is consistent with this policy is not supported by substantial evidence.[3]

3. The Project Is Inconsistent With General Plan Transportation And Land Use Policies

In addition to the foregoing inconsistencies between the Project and the General Plan, as detailed in ESPLC's Opening Brief, the Project is also inconsistent with the General Plan because (i) it violates Land Use Policy

[3] As discussed in Appellant's Opening Brief, the Project also is inconsistent with General Plan Environmental Policies requiring the City to promote the health and well-being of the community. (AOB at 60-61.) Notwithstanding the City's contention that it "considered General Plan policies protecting the public" from certain adverse impacts (Opposition, at 52), "a project's consistency with some general plan policies will not overcome inconsistencies with a policy that is fundamental, mandatory and clear." *Ideal Boat & Camper Storage v. County of Alameda* (2012) 208 Cal.App.4th 301, 312.

4.5.6, which requires new neighborhoods to include transit stops within one-half mile walking distance of all dwellings, and (ii) it violates Mobility Element Policy M.1.2.2 by accepting failing traffic conditions in parts of the City without requiring improvements to the Citywide transportation system. (AOB at 60-61.) In its Opposition, the City argues that these inconsistencies have been rendered moot by an amendment to the General Plan that occurred *after* the Project was approved, and *after* the trial in this matter. (Opposition, at 16.) In addition, the City contends that even if ESPLC's arguments are not moot, the Project was consistent with the General Plan's Land Use and Transportation policies. (*Id.* at 17.) The City is incorrect.

(a) Adoption Of The 2035 General Plan After Approval Of The Project Does Not Cure Inconsistencies Between The Project And The 2030 General Plan

It is undisputed that at the time the Project was approved, and during the entire pendency of this case in the trial court, the 2030 General Plan was the planning document applicable to the Project. Following the trial in the Superior Court, the City adopted the 2035 General Plan.[4] Nevertheless, the City asks this Court to ignore the fatal inconsistencies between the 2030 General Plan and the Project, essentially conceding that the Project is

[4] The validity of the 2035 General Plan is currently subject to challenge in *Citizens for Positive Growth & Preservation v. City of Sacramento, et al.*, Sacramento Superior Court Case No. 34-2015-80002058.

inconsistent with the 2030 General Plan. (Opposition, at 16.) Instead, the City asks this Court to examine a question that was not subject to review by the trial court—and for which no administrative record is before this Court—namely, whether the Project is consistent with the City's *2035 General Plan*. That is not the question on this appeal, in which ESPLC seeks a judicial determination as to whether, *at the time of its approval*, the Project was consistent with the terms of the City's existing planning laws. The simple answer to that question is "No."

None of the cases cited by the City supports its contention that a project, invalid at the time of adoption, can be resurrected by a subsequent legislative act outside of the CEQA review of the project itself. The cases cited by the City for the general proposition that courts do not adjudicate "purely academic" issues (Opposition, at 17) are inapplicable to the facts of this case. Upon disapproval of the Project based on this Court's order, the City may elect to analyze the Project's compliance with the 2035 General Plan, assuming the new general plan survives the pending legal challenge to its validity. The sole issue before this Court is whether the Project, as approved, was consistent with the City's 2030 General Plan. For the reasons set forth herein and in ESPLC's Opening Brief, this Court should conclude that it was not.[5]

[5] But as discussed above, even if the 2035 General Plan is upheld as CEQA-compliant, and somehow is deemed relevant to ESPLC's case, the

(b) The Project Is Inconsistent With General Plan Transportation Policies

For the foregoing reasons, ESPLC's argument that the Project is inconsistent with Mobility Element Policy M.1.2.2 of the General Plan is not moot. That Policy requires that where, as here, a project will accept failing traffic conditions in parts of the city, the project proponent must make improvements to the citywide transportation system. (JA 0275-0278 at Tab 23.) The City contends that it made numerous such improvements "within the Project vicinity." (Opposition, at 17.) But if those features provide any benefit at all, they are to the Project itself, not to the citywide system and, therefore, fail to satisfy the requirements of Policy M.1.2.2.

(c) The Project is Inconsistent with General Plan Land Use Policies

General Plan Land Use Policy 4.5.6 requires all new neighborhoods to include transit stops that connect to a citywide transit system, and that are within a one-half mile walking distance of all dwellings. The City's assertion that the Project's 40th Street access connects residents "via an approximately 1/2 mile walk to the nearest transit route" does not satisfy this requirement. As admitted in the FEIR, that is just the distance to the entrance to the Project site. (AR 5164; *see also*, AR 8017, 8028.) The

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Project would remain inconsistent with General Plan Noise, Mobility, and Environmental Policies. *Supra*, at 44-46.

actual homes within the site will be up to 0.75 miles away from the nearest bus stop for southbound travel and up to 1.25 miles away for northbound travel. (AR 8017, 8028, 15800.) There can be no evidentiary dispute that the requirement that transit stops be provided within one-half mile of "all dwellings" is not satisfied. (AR 5822 (acknowledging inconsistency with Policy LU 4.5.6, but arguing that "general plan consistency is only one factor to consider when evaluating potential impacts to the environment").)

Notably, the City cites no justification for deviating from Policy LU 4.5.6, notwithstanding that it could have substantially complied by providing a shuttle service from the Project site to existing transit sites, as suggested by the Sacramento Regional Transit District and others. (AR 1890, 5742, 7314.) Instead of accepting this recommendation, the City made a deliberate decision to disregard not only the letter, but the spirit, of Policy LU 4.5.6, apparently for no reason other than to avoid the cost of a shuttle service.

III. CONCLUSION

Based upon the foregoing and Appellant's Opening Brief, ESPLC respectfully requests that the Court vacate the trial court's judgment, and order the City to rescind its certification of the EIR and its approval of the Project.

Dated: May 17, 2016

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

The text of this brief consists of 9,856 words as counted by the Microsoft Word version 2010 word-processing program used to generate the Brief.

Dated: May 17, 2016

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA,

COUNTY OF ORANGE

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Orange, State of California. My business address is 2211 Michelson Drive, Seventh Floor, Irvine, CA 92612.

On May 17, 2016, I served true copies of the following document(s) described as **APPELLANT'S REPLY BRIEF** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY ELECTRONIC DELIVERY: I caused the foregoing document to be electronically filed with the Court of Appeal, Third Appellate District through TrueFiling's Electronic Filing System and Notice of this filing will be sent to those on the Service List who are registered with the Court's e-filing system.

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

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

Executed on May 17, 2016, at Irvine, California.

Michelle L. LaClair

SERVICE LIST
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