SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
HALL OF JUSTICE

TENTATIVE RULINGS - August 20, 2007

EVENT DATE: 08/23/2007 EVENT TIME: 09:00:00 AM DEPT.: C-74
JUDICIAL OFFICER: Linda B. Quinn

CASE NO.: GIC874140
CASE TITLE: FRIENDS OF SAN DIEGO INC VS CITY OF SAN DIEGO

CASE CATEGORY: Civil - Unlimited CASE TYPE: Misc Complaints - Other

EVENT TYPE: Hearing on Petition
CAUSAL DOCUMENT/DATE FILED:

Petitioner's Petition for Writ of Mandate is granted in part and denied in part, for the reasons stated below.

A. Petitioner's First Cause of Action for Violation of CEQA

Petitioner's Petition for Writ of mandate is granted in part and denied in part as to Petitioner's first cause of action for violation of CEQA based on an inadequate Final Mitigated Negative Declaration ("MND").

In its first cause of action for violation of CEQA, Petitioner challenges the City's adoption of the Final MND on the following grounds: (1) the City improperly used draft CEQA Thresholds that were never adopted in accordance with CEQA; (2) the circulated and adopted Initial Study of the MND fails to properly analyze the potential environmental impacts from all phases of the project; (3) the finding that the project will not result in a potential adverse impact to community character and aesthetics is not supported; (4) the finding that the project will not result in a potential adverse impact to traffic is unsupported; (5) the finding that the project will not result in a potential adverse impact to park facilities and schools is unsupported; (6) the finding that the project will not result in a potential adverse impact from construction is unsupported; (7) the project description is "improper and unstable"; (8) the cumulative impact analysis is improper and unsupported; and (9) the City failed to recirculate the MND and Initial Checklist. The Court addresses these issues in the order set forth in Petitioner's brief:

1. The circulation of the MND and Initial Checklist. Petitioner first seeks to set aside the approval of the project on the ground that the project was constantly changing and, thus, information about the project that was actually approved was never properly circulated.

A negative declaration is a written statement by the lead agency describing the reasons a proposed project will not have a significant effect on the environment and therefore does not require the preparation of an Environmental Impact Report ("EIR"). 14 CCR § 15371. All proposed negative declarations must be circulated for public comment (14 CCR § 15073), and the lead agency's decision-making body must consider any comments received during the review period when making its decision on the negative declaration. 14 CCR § 15074(b). The lead agency must also provide "a notice of intent to adopt a negative declaration or mitigated negative declaration to the public, responsible agencies, trustee agencies, and the county clerk of each county within which the proposed project is located." 14 CCR § 15072(a). The notice of intent must include the following:

(1) A brief description of the proposed project and its location.

(2) The starting and ending dates for the review period during which the lead agency will receive comments on the proposed negative declaration or mitigated negative declaration. This shall include starting and ending dates for the

review period. If the review period has been is shortened pursuant to Section 15105, the notice shall include a statement to that effect.

(3) The date, time, and place of any scheduled public meetings or hearings to be held by the lead agency on the proposed project, when known to the lead agency at the time of notice.

(4) The address or addresses where copies of the proposed negative declaration or mitigated negative declaration including the revisions developed under Section 15070(b) and all documents referenced in the proposed negative declaration or mitigated negative declaration are available for review. This location or locations shall be readily accessible to the public during the lead agency's normal working hours. . . .

14 CCR § 15072(g). A copy of the negative declaration or MND and the Initial Study must be attached to the notice of intent to adopt the proposed declaration. 14 CCR § 15073(c).

In this case, the proposed project went through several transformations. It was originally proposed as a 10-story mixed-use development, with 34 residential condominiums. AR 1:1, 110. In April 2004, Real Parties in Interest (hereinafter "LJP") revised the project and proposed a 14-story mixed-use development with 51 residential condominiums. AR 1:199. In September 2004, LJP revised the project again, deciding to incorporate an adjacent parcel on University Avenue and develop the project in two phases: the first phase would consist of 51 condos and 5,485 square feet of retail uses; the second phase would involve 29 condos and 3,795 square feet of retail uses. AR 1:290. In August 2005, the project was revised yet again and conceived as a one-phase, one-building project, with 96 condo units and the same amount of retail space and requiring that an alley between the two parcels be vacated and closed to through traffic. AR 1:361-362.

As to the MND, a draft MND was released on 3/8/05 for the two-phase project proposed at that time. AR 3:1714-1715. A "Public Notice of Draft Mitigated Negative Declaration" dated 3/2/06 reflected the revised one-phase, one-building project. AR 3:1712. The Draft MND addressing the one-building project was also published at that time. AR 3:1800-1861. However, the Draft MND published in March 2006 included a January 2005 version of the Initial Study Checklist – a version that related to the two-phase, two-building project. AR 3:1942. The City therefore published a "Second Update" to the MND dated 7/7/06, which stated:

In addition, an earlier version (January 2005) of the Initial Study Checklist was erroneously incorporated into the Draft and Final MND. Attached to this Revised Final MND is the correct, updated version of the Initial Study Checklist reflective of the redesigned Third and University Project which clarifies information already contained within the document.

AR 3:1942. This revised MND with the proper checklist was not recirculated. Id.

It appears to the Court that this failure to include a proper Initial Study Checklist with the draft MND circulated to the public constitutes a violation of CEQA. As noted above, a copy of the MND and the Initial Study must be attached to the notice of intent to adopt the proposed MND. 14 CCR § 15073(c). Certainly, the requirement that the Initial Study be attached presumes that the correct Initial Study is attached/circulated.[1] In order for the public and decision-makers to properly consider a project, they must have an accurate view of the project. See, e.g., County of Inyo v. City of Los Angeles (1977) 71 Cal.App.3d 185, 192-193 ("Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, and assess the advantage of terminating the proposal (i.e., the 'no project' alternative) and weigh other alternatives in the balance. An accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR."). Respondent's failure to provide the public with an accurate view of the project by way of an accurate Initial Study Checklist violates the requirements of CEQA.

LJP argues that Petitioner has waived any claims based on a legally insufficient Initial Study or on a failure to recirculate the MND and Initial Study Checklist, because it did not address these arguments in its opening brief. However, Petitioner's opening brief refers to Respondent's failure to circulate a proper Initial Study Checklist. See Opening Brief at

4:1-3 ("Not only was the MND not circulated and misdated, but it contained an outdated prior project's Initial Study Checklist and had no discussion about the new Project."); at 4:6-8 ("Again, this now 'final' MND had an earlier and outdated Initial Study Checklist for the 51-unit project and was not noticed and circulated for a public statutory CEQA review period."); at 5:23-26 ("Despite the complete redesign, no new application was filed and no new CEQA 'Initial Study' was performed. Instead, some new descriptive language was inserted, but the outdated Initial Study was circulated as part of the mandatory CEQA review and comment period."). There was thus no waiver here.

LJP argues that the project evolved, due to input from the community and from staff, and that, despite these revisions, the Draft MND and its notice, the Final MND, the Second Update, and the Third Update contain the proper description of the project. However, this argument ignores the fact that the Initial Study Checklist circulated with the Draft MND was not accurate and that no accurate Initial Study Checklist was ever publicly circulated. LJP does not address the problems with the Initial Study Checklist. The writ petition is granted on this ground.

The Court notes that, while LJP does not argue this point in its brief, the "Second Update" to the MND issued on 7/7/06 states that it is attaching the proper version of the Initial Study Checklist to the Revised Final MND. The Update states, in reliance on 14 CCR § 15073.5(c)(4), that the City is not required to recirculate the MND, because the "modifications within the environmental document do not affect the environmental analysis or the conclusions of the MND." AR 3:1942. Section 15073.5(c)(4) provides that recirculation of an MND is not required where "new information is added to the negative declaration which merely clarifies, amplifies, or makes insignificant modifications to the negative declaration." However, a completely new Initial Study Checklist does more than make "insignificant modifications." Because of this inaccurate Checklist, an accurate Initial Study was never circulated in the first place. Therefore, Section 15073.5 is not applicable.

Petitioner's other arguments on this issue are without merit. It argues that zoning code deviations required by the different versions of the project have appeared and disappeared and, in some cases, have not been disclosed. It argues that the final Site Development Permit findings do not list or discuss any of the requested deviations. However, Petitioner fails to offer any authority for the proposition that any and all deviations must be disclosed in such documents or that the failure to include these deviations somehow constitutes a violation of CEQA. Petitioner argues that LJP promised that 10 percent of the project's units would be sold as affordable housing, while the final MND reduces this number. It argues that LJP promised that public access would be maintained with a street-level corridor, but the final MND approves closing off that alley/corridor. Again, however, Petitioner cites no authority for the proposition that a "promise" made in an initial project proposal must be included in the final MND to comply with CEQA. In fact, this is not the law. See County of Inyo, supra, at 199 ("CEQA reporting process is not designed to freeze the ultimate proposal in the precise mold of the initial project; indeed, new and unforeseen insights may emerge during investigation, evoking revision of the original proposal.").

2. Adverse impacts to community character and aesthetics. Petitioner next argues that the MND violates CEQA by improperly finding that the project will not result in any potentially adverse impact to community character and/or aesthetics.

The City adopted an MND for this project. The determination to adopt an MND is analyzed under the "fair argument" test. Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles (1982) 134 Cal.App.3d 491, 503.

"CEQA requires the preparation of an EIR whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact. Thus, if substantial evidence in the record supports a 'fair argument' significant impacts or effects may occur, an EIR is required and a negative declaration cannot be certified." Quail Botanical Gardens Foundation, Inc. v. City of Encinitas (1994) 29 Cal.App.4th 1597, 1601-1602. "When a challenge is brought to an agency's determination an EIR is not required, the reviewing court's function is to determine whether substantial evidence supported the agency's conclusion as to whether the prescribed 'fair argument' could be made. The 'fair argument' test is derived from Public Resources Code section 21151. This section creates a low threshold requirement for initial preparation of an EIR and reflects a preference for resolving doubts in favor of environmental review when the question is whether any such review is warranted. If there is substantial evidence of a significant

environmental impact, evidence to the contrary does not dispense with the need for an EIR when it still can be 'fairly argued' that the project may have a significant impact." San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus (1996) 42 Cal.App.4th 608, 617. "It is a question of law, not fact, whether a fair argument exists, and the courts owe no deference to the lead agency's determination. Review is de novo, with a preference for resolving doubts in favor of environmental review. . . . Where [factually supported] expert opinions clash, an EIR should be done." Pocket Protectors v. City of Sacramento (2004) 124 Cal.App.4th 903, 928.

Petitioner argues that a "fair argument" can be made that the 12-story project will dramatically change the 1-3–story "community character" and aesthetics of the University-Avenue portion of Hillcrest. The Final MND found that the project's impact on the aesthetics/neighborhood character would not be significant. AR 4:2095. It found that the proposed 12-story building would "contrast with the surrounding neighborhood character with respect to scale," because the area generally consists of 1-3-story commercial and residential buildings and because there are no buildings of a similar size in the immediate vicinity. Id. However, the MND finds no significant impact on the neighborhood character, because the project meets the "City of San Diego's California Environmental Quality Act Significance Determination Thresholds" for determining the significance of potential neighborhood character impacts. Id.

The CEQA Guidelines encourage public agencies to adopt "Thresholds of Significance" for the agency to use in the determination of the significance of environmental effects. "A threshold of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant." 14 CCR § 15064.7(a).

In this case, the City revised "Significance Determination Thresholds" in April 2004. AR 6:3735. With respect to "Visual Effects and Neighborhood Character," the Thresholds provide in pertinent part:

Making the determination of a significant impact on visual quality is highly subjective. Identifying how a proposed development would fit or blend with the existing scale and character of the surrounding developed and natural environment is the key to determining significance. A project may meet all of its height, bulk, scale and zoning requirements and still have a significant visual impact on the environment if it is not in character with the surrounding development and natural landforms.

AR 6:3809. The Thresholds define those projects that meet or exceed the "significance threshold" and thus could require an EIR:

Projects that severely contrast with surrounding neighborhood character. To meet this significance threshold, one or more of the following conditions must apply:

a. The project exceeds the allowed height or bulk regulations and existing patterns of development in the surrounding area by a significant margin. . . .

AR 6:3809-3810. (The words "surrounding area" and "significant margin" are not defined.)

The Final MND states that the proposed buildings would be consistent with existing development patterns in the vicinity within the meaning of this threshold. AR 4:2097. It states that the project is within the Hillcrest neighborhood, "which contains a variety of single- and multi-family residential, commercial and mixed use development." Id. It further states: "The proposed building would be taller than those within the immediate surrounding area, as existing abutting development consists of one- to three-story commercial and residential buildings." Id. It compares the 12-foot height proposed for this building (on the corner of Third and University) with seven other buildings as far as 10 blocks away (e.g., on Laurel and Fifth). See AR 4:2113. It then states that the project lies within the Hillcrest commercial node, which is characterized by high-density, mixed-use, urban development (AR 4:2097). It then concludes that, because other structures with "comparable scale occur in the Hillcrest community, . . . the proposed project would not exceed urbanized development patterns of the project area . . . ." AR 4:2098.

It appears to the Court that, despite the language in the MND to the contrary, a fair argument could be made that the project exceeds by a significant margin the existing patterns of development in the surrounding area. The City Attorney's Office itself noted in a 7/14/06 Memorandum of Law directed to the Mayor and City Council:

There are no projects in the "vicinity" of the project that have a comparable floor area ratio or are as tall as the proposed project. Scripps Clinic located on Fifth Avenue south of Washington Street, is the tallest building (8 stories) in the Hillcrest Commercial Node. Four of the buildings referenced in the Initial Study are not even located in Hillcrest but in other neighborhoods in the Uptown community planning area. Scripps Mercy Hospital [UCSD] and Scripps are located in the Medical Complex neighborhood north of Hillcrest. 3060 6th Avenue and Park Laurel are located in the Park West neighborhood south of Hillcrest. The 1st Avenue Apartments and the 6th Avenue Apartments [Coral Tree Plaza] are located in Hillcrest, but are approximately 1/4 mile and 1/2 mile, respectively, from the proposed project.

. . .

[Pursuant to CEQA Guidelines section 15125(a),] "[a]n EIR must include a description of the physical environment conditions in the vicinity of the project . . . . This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant." The analysis should focus on the surrounding area in the "vicinity" of the project site, which may suggest those buildings and structures located primarily in the Hillcrest neighborhood.

. . .

Unfortunately, there are no guidelines that define "in the vicinity" or "substantial margin." Furthermore, there are no buildings in the surrounding blocks or in the Hillcrest Commercial Node that are as tall as the proposed project. The project is 9 stories higher than any structure in the surrounding blocks and 4 stories higher than the tallest building in the Hillcrest Commercial Node.

AR 5:2658-2659. A "fair argument" could be made that a building that is nine stories higher than any structure in the surrounding blocks and four stories higher than the tallest building in the "Hillcrest Commercial Node" (an even broader surrounding area) exceeds "the existing patterns of development in the surrounding area by a significant margin." San Diego's "Save Our Heritage Organization" agrees:

The setting and ambiance of this area will be destroyed by the intrusion of large and out of scale structures, and also importantly shadow lines. The tall buildings are not in any way compatible with the pedestrian friendly nature of the area. . . . The proposed 12 story, one-block-wide building in the heart of Hillcrest clearly would not fit with the existing character.

AR 5:2851. At a July 2005 meeting, members of the Uptown Community Planning Committee also agreed. See AR 7:4376-4379:

[Comment from Board Member Paul de la Houssaye:] Doesn't fit with Community: Yes, if you want to make Hillcrest look like Downtown. . . . That's the choice.

[Comment from Board Member Steve Satz:] Where to start. It's too big. Gorgeous building, go to LA and build them. Don't use the hospitals to compare. Parking does not justify doing this.

[Comment from Board Member Roy Dahl:] We have this discussion every time we have a big project in front of us. It's a lot taller downtown than this. You should walk and enjoy the store frontage, and not drive. . . .

A motion by the Planning Committee finding that that the project did not conform to the Community Plan passed. AR 7:4379. Again, where the height of the project is significantly higher than others in the neighborhood and where the City Attorney, cultural heritage organizations, and city planners agree that the project is not in character with surrounding

development, a fair argument could be made that the project would have a significant environmental effect on aesthetics and community character. As such, an EIR is required.

LJP seems to suggest that the project meets the City's Thresholds and thus there can be no fair argument that the project could have a significant environmental effect, i.e., a significant effect on aesthetics/ neighborhood character. However, the Threshold itself acknowledges that a project may meet all of its height, bulk, scale and zoning requirements and still have a significant visual impact on the environment if it is not in character with the surrounding development and natural landforms. A fair argument can be made that the project is not in character with the surrounding development, despite the fact that it may meet height, bulk, scale, and zoning requirements.

LJP argues that speculation, complaints, fears, and suspicions do not constitute the "substantial evidence" necessary to meet the fair argument standard. See 14 CCR § 15384 ("'Substantial evidence' as used in these guidelines means 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. Whether a fair argument can be made that the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency. 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."). However, a determination that a building four to nine stories higher than any other building in the vicinity severely contrasts with surrounding neighborhood character is not speculation, fear, or suspicion. It is a conclusion reached by community planners and the City Attorney's office based on facts about the other buildings in the neighborhood.

LJP argues that, instead of bowing to the whims of a few neighbors, the City Council chose to rely on evidence supplied by staff, the MND, and LJP itself. It relies primarily on an Executive Summary provided by the City's Development Services Department ("DSD"). That summary acknowledges that the project would be "significantly taller than any building in the immediate vicinity." AR 7:4384. LJP justifies this deviation on the ground that the Uptown Community Plan anticipated high intensity development in this location and the underlying Mid-City Planned District zones permit both the proposed height and density and that no Community Plan Amendment or rezoning is required for the project. Id. Again, however, the City's own Thresholds indicate that a "project may meet all of its height, bulk, scale and zoning requirements and still have a significant visual impact on the environment if it is not in character with the surrounding development." The fact that the project does not require plan amendment or rezoning does not establish as a matter of law that no fair argument can be made.

LJP cites Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego (2006) 139 Cal.App.4th 249, 280 to suggest that no fair argument can be made regarding a significant environmental impact where the proposed project meets zoning and general plan requirements. In Banker's Hill, the court of appeal was addressing the issue of whether there was a reasonable possibility that a development could have a significant effect on the environment due to "unusual circumstances" under 14 § CCR 15300.2(c) or whether a categorical exemption from CEQA could be invoked. The court found that no fair argument could be made that the community character would be significantly affected by the project. It explained:

Relying on the alleged inconsistency of the Project with the Plan's objectives for development adjacent to Balboa Park, the Preservation Group argues that the Project would "have significant impacts with respect to community character." However, as we have discussed above, the Project is consistent with the Plan. The Preservation Group further argues that the Project would significantly impact community character because it "would be the only building higher than four stories on the east side of [Sixth] Avenue between Elm and University." This argument ignores the fact that the Del Prado, while one lot removed from Sixth Avenue, is substantially higher than four stories, and that the Project will be consistent with the community character already established by the Del Prado.

Id.at 280.

In contrast, a fair argument can be made that the project here is not consistent with the community character already established by the buildings surrounding the project location. Although there is no argument in this case that the project is not consistent with any general plan, this alone does not establish that there will be no impact on community character.

LJP argues that the City Council determined, based on the evidence presented, that the project "will preserve and enhance the pedestrian scale and human orientation" of Hillcrest and will be "compatible with existing and planned land use on adjoining properties." Although there may be evidence in the record to support this conclusion, there is also evidence to suggest that the project is not compatible with the character of the neighborhood (although it might be compatible with some buildings several blocks away). As Pocket Protectors notes, the courts owe no deference to the lead agency's determination. Review is de novo, with a preference for resolving doubts in favor of environmental review. Where factually supported expert opinions clash, an EIR should be done. Here, there are factually supported opinions on both sides of the "neighborhood character" issue. As such, an EIR must be done.

3. Adverse impacts on traffic. With respect to traffic, the MND finds: "No significant traffic or parking impacts would result with project implementation; therefore, no mitigation is required." AR 4:2104.

Petitioner challenges this conclusion on five grounds: (1) the environmental baseline of existing conditions used by the City is flawed; (2) the City refused to count any vehicle trips related to construction and operation of the new 121-space public parking facility; (3) the City improperly applied the CEQA significance threshold; (4) the City adopted no mitigation measures, despite substantial evidence of potential significant effects; and (5) the City improperly relied on a prior statement of overriding considerations to adopt a negative declaration.

(a) *Traffic baselines.* Petitioner first argues that the City and LJP have incorrectly established the "baseline" level of traffic against which the impacts of the project should be measured. It argues that the City did not measure the project's impacts against the physical conditions existing at the time the environmental analysis began, in violation of 14 CCR § 15125(a). Petitioner argues that, at the time the environmental analysis began, the medical building that had operated on the project site was vacant. AR 5:2749 ("Since the 301 University process has taken nearly three years, the building has been vacant for a substantial portion of that time."). It argues that this fact has "artificially reduced the number of new vehicle trips claimed to be generated by the project."

However, assuming 14 CCR § 15125 applies to MNDs (in addition to EIRs), it requires the City to consider the physical conditions of the setting at the time the environmental analysis began. According to the portion of the record cited by Petitioner, the building had been vacant for a substantial part of three years at the time the environmental analysis had begun. Petitioner cites no authority providing that the City must establish a traffic baseline by calculating the amount of traffic that would have been generated if the medical building had not been vacant. Petitioner is asking the City to consider the physical conditions at a time substantially before the environmental analysis began. The regulation does not require this.

Petitioner next argues that the MND analysis is defective because "troubled existing traffic conditions" are not disclosed in any reasonable or meaningful manner. It argues that the failure to properly discuss existing traffic conditions is prejudicial error under CEQA. The cases cited by Petitioner – County of Amador v. El Dorado County Water Agency (1999) 76 Cal.App.4th 931, 955 and Cadiz Land Co., Inc. v. Rail Cycle, L.P. (2000) 83 Cal.App.4th 74, 94 -- relate to the information that must be included in an EIR, not that which must be included in an MND. A negative declaration must include the following: (a) A brief description of the project, including a commonly used name for the project, if any; (b) The location of the project, preferably shown on a map, and the name of the project proponent; (c) A proposed finding that the project will not have a significant effect on the environment; (d) An attached copy of the initial study documenting reasons to support the finding; and (e) Mitigation measures, if any, included in the project to avoid potentially significant effects. 14 CCR § 15071. Petitioner fails to explain how the MND is defective with respect to existing traffic conditions or which of the requirements of Section 15071 the MND fails to meet. As such, the MND cannot be invalidated on this ground.

(b) *Vehicle trips related to construction and operation of the new parking facility.* The proposed project includes a 121-space public parking garage within a six-level parking facility. AR 4:2055. Petitioner argues that, in calculating and

analyzing the number of vehicle trips the project will generate, the City failed to include any trips related to the creation and operation of the parking garage component. The administrative record includes a 1/20/06 report from Urban Systems Associates, Inc., which includes the following analysis on the parking garage:

The project includes a parking structure designed to accommodate parking for the project plus an additional 120 public parking spaces. These additional off-street parking spaces will be a benefit to existing and future traffic conditions. Motorists already on surrounding streets destined for other businesses will no longer continue to circulate on these streets while looking for on-street parking. Motorists will be able to go directly to the public parking entrance thereby reducing multiple vehicle trips caused by circulating traffic. Therefore, these additional parking spaces will not be trip producers, they will be trip reducers.

AR 1:668.

This report does address the trips related to the creation and operation of the parking garage. However, LJP's expert does not point to any factual data or study that supports the conclusion that the additional parking spaces will be "trip reducers." The expert does not state the number of motorists currently circulating on the streets looking for on-street parking and does not state the number of motorists that might actually have to drive farther to reach the parking garage. Further analysis is required. The MND is therefore invalid on this ground.

(c) *Improper reliance on the CEQA significance threshold.* With respect to the number of average daily trips ("ADTs") that would be generated as a result of the project, LJP's traffic expert concluded that the project would generate 1,100 ADTs. AR 1:667. It determined that, because the previous commercial uses on the same lot would have generated 686 ADT, the addition to the ADTs resulting from the project would be 424. AR 1:668. It concluded:

It is our understanding that projects that conform to Community Plan Land Use and Transportation Elements and generate fewer than 1,000 ADT or fewer than 100 trips during the peak hour may not be required to prepare a traffic study. If so, then a traffic study should not be required for this project.

Id. LJP's expert explained to the City Council his understanding that the City's "traffic impact guideline study manual requires traffic studies for projects that have over 1,000 total daily trips added, and if they comply with the community plan, then no traffic study is required, if they comply with the community plan or less than 1,000 trips." AR 9: 5114-5115.

Petitioner first argues that the City cannot rely on this significance threshold. As noted above, the CEQA Guidelines encourage public agencies to adopt "Thresholds of Significance" for the agencies to use in determining the significance of environmental effects. "A threshold of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant." 14 CCR § 15064.7(a). Petitioner argues that "normal" conditions do not exist on one roadway segment, where traffic already backs up more than one block length and signals are almost gridlocked, and thus that the thresholds do not apply. However, Petitioner fails to offer evidence or point to a portion of the administrative record that indicates that such conditions did not exist at the time the thresholds were determined such that the Court could conclude that the thresholds should not apply in this case. The MND cannot be invalidated on this ground.

Petitioner argues that the City did not follow its Significance Thresholds, which required existing roadway segments operating at Level of Service ("LOS") Categories E or F to be analyzed to determine if the impact would be significant. The City's Significance Thresholds provide in relevant part:

The following thresholds have been established to determine significant traffic impacts:

1. If any intersection, roadway segment, or freeway segment affected by a project would operate at LOS E or F under either direct or cumulative conditions, the impact would be significant if the project exceeds the thresholds shown in the table below.

AR 6:3806. The "table below" lists the "Allowable Change Due to Project Impact" for freeways, roadway segments, intersections, and ramp metering.

LJP argues that its experts collected peak hour traffic volumes at the intersections of Fourth Avenue and University and Third Avenue and University and determined that the intersections operated at an LOS of "C" and would continue to operate at an LOS of "C" with project traffic added. It thus argues that the intersection would not operate at LOS E or F such that the impact would be significant under the Thresholds. AR 1:626. However, LJP does not point to any portion of the record that establishes that its experts examined roadway segments in addition to intersections. The Threshold on which LJP relies establishes that roadway segments must be examined. Therefore, the MND did not sufficiently evaluate traffic impacts. LJP cannot simply rely on the service levels at intersections to determine that the impact would not be significant. See Endangered Habitats League, Inc. v. County of Orange (2005) 131 Cal.App.4th 777, 783-784 ("It is clear the project is inconsistent with the general plan's traffic service level policy. The general plan requires LOS C as determined under the HCM method, and the project does not comply. That it does so under the V/C method is of no import, since the general plan is unambiguous in demanding the evaluation be made by the HCM method. The approval of the area plans . . . must be set aside. . . . Rutter's several arguments for consistency are all based on misreadings—and misrepresentations—of the record. It contends the EIR establishes the Santiago Canyon Road 'intersection' will operate at an acceptable level of service. That is misleading. The issue is the level of service on Santiago Canyon Road, not one intersection along it. So this does not show consistency."). The MND is invalid on this ground; further study is required.

(d) *No mitigation measures adopted.* Petitioner argues that, in addition to Respondent's failures to adequately analyze impacts in connection with the MND, the record shows that the project may cause significant impacts and thus Respondent was required to adopt mitigation measures. According to this argument, the Court should not simply order Respondent to re-analyze certain impacts according to the proper standards; it should find that substantial evidence establishes that impacts may be significant, such that Respondent must either adopt mitigation measures in connection with the MND or prepare an EIR.

Petitioner's evidence is not sufficient to require such action by Respondent at this time. Petitioner relies on two photos apparently taken by the City Traffic Engineer that show some vehicles at some unnamed intersection. AR 1:556, 572. These two photos of one unspecified point in time do not establish that this project may cause significant traffic impacts. Petitioner relies on statements by City Council Member Toni Atkins that there is an "existing [traffic] problem there" (AR 9:5157 at lines 18-21) and that "regardless of this project, we have a real problem there, and we need to address it and we need to start now because it takes years to implement some of the outcome of traffic studies and projects." AR 9:5159 at lines 10-13. Again, however, these statements speak only to the traffic problem already on the site, not whether the project will have a significant impact on traffic according to Threshold requirements.

Petitioner relies on a letter, apparently from two residents in the area, urging the City not to approve the project because there is currently gridlock traffic on University Avenue. AR 5:2674. This is not "substantial evidence" of a traffic impact. See Banker's Hill, supra, at 274 ("[A]lthough local residents may testify to their observations regarding existing traffic conditions, "in the absence of a specific factual foundation in the record, dire predictions by nonexperts regarding the consequences of a project do not constitute substantial evidence.").

Petitioner relies on the following statement by a Planning Commissioner at a hearing on 4/13/06:

I just – I just have a concern that if we don't take an explicit action it doesn't necessarily get reported out.

So how do I handle that? Do we give direction that we ensure that the City Council's then informed that we explicitly took no action on the MND? And then the reasons I would propose are our concerns about the adequacy of the traffic analysis in one case, although I definitely agree that this isn't a case – we don't want to be widening the streets and, you know, doing a lot of stuff that gets away from the village concept, but I do think there are issues with the significance threshold, cumulative impacts potentially, exactly your example of project after project after project, it's just not going to work out too

well unless we get something related to transit or mitigation or something.

. . .

So I don't know. Does anybody else want to add – was there something else in the environmental, just the concern about adding off-site park – adding the public parking and the concern about whether or not that adequately affected the additional ADT's.

AR 8:4781-4782.

There are problems with Petitioner's reliance on this part of the record. First, this statement was made in April 2006. The third update to the MND is dated 8/8/06. Petitioner offers no indication that the commissioner's "concerns" were not addressed in the final MND. Second, the commissioner's statement that there are "issues" with the significance threshold and "cumulative impacts potentially" are not specific enough to permit the Court to conclude a fair argument could be made that the project will result in significant impacts to traffic.

In sum, then, there is no basis on which the Court could order Respondent at this time to consider mitigation. It appears, as noted above, that the MND was faulty for numerous reasons. Respondent must prepare a new MND addressing traffic impacts. The issue of what, if any, mitigation will be required as a result of the findings in the new MND will have to be addressed in the new MND. The Court cannot order mitigation be made now without knowing what findings will be made in the new MND. "CEQA does not require mitigation of insignificant effects." Leonoff v. Monterey County Board of Supervisors (1990) 222 Cal.App.3d 1337, 1357. The Court cannot determine that, once Respondents prepare a proper MND, all effects will be significant. That issue will have to be addressed if/when there is a subsequent challenge to any new MND.

(e) *Reliance on Prior Statement of Overriding Considerations.* Petitioner next argues that, in its excuse for not considering or attempting to mitigate existing and cumulative adverse traffic impacts, Respondent impermissibly argues for the re-issuance of a prior Statement of Overriding Considerations adopted in 1988 during CEQA review of the Uptown Community Plan.

Petitioner's argument is not clear. Respondent found that this project would not result in a significant impact to traffic. It did not rely on a previous Statement of Overriding Considerations. The portion of the record on which Petitioner relies is a transcript of a September 2006 City Council meeting in which a City representative talked about the Statement of Overriding Considerations that was made part of the Uptown Community Plan. Neither the speaker nor the City Council indicated the City was adopting this Statement or relying on it to approve the MND in this case.

4. Adverse impact on park facilities.In the January 2005 Initial Study Checklist included with the final MND, Respondent noted the following with respect to the project's effect on parks or other recreational facilities:

The project would result in a minimal population increase within the Hillcrest community. Existing parks and recreational facilities in the project area would be available for project residents. The *Uptown Community Plan*, however, recognizes the lack of neighborhood parks and the need to provide new parks in the community. Because the project would affect the population to parks ratio, payment of park fees would be required as a condition of project approval.

AR 4:2136.

"A fee-based mitigation program is sufficient under CEQA if there is evidence that mitigation will actually occur. But even where a developer's contribution to roadway improvements is reasonable, a fee program is insufficient mitigation where, even with that contribution, a county will not have sufficient funds to mitigate effects on traffic." Endangered Habitats, supra, at 785. Similarly, then, the fee-based mitigation program for parks could only be sufficient in this case if there is evidence the mitigation will actually occur, i.e., that new parks will be built.

The Court is unable to find evidence in the record indicating the City has sufficient funds to mitigate the effects on parks. LJP lodges with its opposition a copy of the "Uptown Public Facilities Financing Plan" (Exhibit 2) in support of its contention that a fee paid toward a park program is sufficient mitigation. It argues that this plan requires residential property owners to pay development impact fees for park and recreation uses at a rate of $6,317 per residential unit. It argues that the plan includes a detailed list of the community's public-facility needs and identifies which funds will be allocated to which needs. The Plan does indeed require an "impact fee" of $6,317 per residential unit. Exhibit 2 at p. 12. However, of the 11 parks or recreation centers listed in the Plan, only one has been completed. In descriptions of the others, the Plan states only, "This project will be scheduled as funding is identified." Exhibit 2 at pp. 43-54. There is no timetable set forth for the identification of funding. Thus, this evidence does not indicate that mitigation – i.e., the construction of new parks – will actually occur. It appears that, like the situation described in Endangered Habitats, the City will not have sufficient funds to mitigate the effects on parks from a new development even with the fees that might be imposed. As such, the fee-based mitigation program identified in the MND is insufficient. If Respondent wishes to rely on an MND with respect to park impacts, it must consider effective mitigation measures in any new MND.

The Court also notes that the language of many documents in the record indicates only that an impact fee "may" be charged, not that it "shall" be charged, as a condition of project approval. Public Resources Code § 21081.6(b) provides in part: "A public agency shall provide that measures to mitigate or avoid significant effects on the environment are fully enforceable through permit conditions, agreements, or other measures." In this case, the conditions for approval of the project's tentative map include the following language: "This development may be subject to payment of a park fee prior to the filing of the Final Map in accordance with San Diego Municipal Code." AR 9:5225. The Site Development Permit includes the following language: "This development may be subject to impact fees at the time of the building/engineering permit issuance." AR 9:5240. LJP points to no portion of the record indicating that fees shall be required. Therefore, the Court cannot conclude that Respondent has complied with PRC § 21081.6(b).

LJP argues that the Municipal Code requires project developers to pay certain park fees. It relies on Municipal Code § 96.0403, which provides:

Prior to the issuance of any building permit, the Building Official shall assure that fees are paid to the City for park and recreational facilities in accordance with the following schedule:

1. Construction of new single-family dwelling units, $100.00 per [unit] including modular housing and mobile homes dwelling unit

2. Construction of new multi-family dwelling units, $75.00 per dwelling unit . . . .

Exhibit 1/Municipal Code §§ 96.0401-96.0406.

Although this code section includes mandatory language regarding some fees, it does not require payment of fees in the amount required by the Uptown Public Facilities Financing Plan, i.e., $6,317 per residential unit. Again, therefore, the Court cannot conclude from these portions of the record that fees shall be required and that the purported mitigation measures are fully enforceable.

5. Adverse short-term impacts from construction. Petitioner argues that construction of the project along an already impaired roadway will create the potential for significant traffic interruptions, delays, and impacts during the construction of the project, due to street or lane closures and loss of on-street parking. It argues that the MND contains no disclosure, discussion, or mitigation measures to address and eliminate short-term construction impacts on traffic.

As noted above, a Negative Declaration is permitted when a proposed project "will not have a significant effect on the environment and therefore does not require the preparation of an EIR." 14 CCR § 15371. When considering whether the effects of a project will be significant, due consideration must be given to both short-term and long-term effects. Cf. 14 CCR § 15126.2(a).

LJP argues that the MND properly considered the short-term construction impacts of the project relative to air quality and noise. It argues that there is no authority for the proposition that an MND must consider traffic interruptions during construction as an environmental impact under CEQA. However, there can be no doubt that a project applicant must generally consider traffic when analyzing whether a project will have a significant effect on the environment. See, e.g., Endangered Habitats, supra, at 796 (traffic increase may be viewed as a significant environmental impact); Mejia v. City of Los Angeles (2005) 130 Cal.App.4th 322, 340-341 (court analyzed whether project would have a significant impact on traffic); Save Our Peninsula Committee v. Monterey County Bd. of Supervisors (2001) 87 Cal.App.4th 99, 141 (analyzing whether a county had adequately ensured the mitigation of traffic congestion effects); County of San Diego v. Grossmont-Cuyamaca Community College Dist. (2006) 141 Cal.App.4th 86, 104 (discussing mitigation of adverse traffic impacts). If, as LJP's argument implies, the MND must consider short-term construction impacts on air quality and noise, it must also consider the short-term impacts on traffic. The final MND says nothing about short-term impacts on traffic. See AR 4:2103-2104 ("Transportation/Circulation" section of MND briefly addresses only long-term impacts on traffic). The Initial Study Checklist also ignores short-term traffic impacts. AR 4:2137-2139. Accordingly, the MND is insufficient with respect to short-term traffic impacts.

LJP argues that, when the short-term traffic issue was raised at a City Council meeting, City staff pointed out that the Municipal Code requires preparation and implementation of a traffic control plan for every development project. See AR 9:5170 (staff member stating, "A traffic control plan would be developed as part of the building permit phase of this project. So it's not in there now, but it's a requirement of every development."); AR 9:5184-5185 (senior planner in Development Services Department stating, "Just to clarify with respect to construction-related impacts, normally those are temporary in nature. We don't include those as mitigation because they are generally taken into consideration as part of traffic control plans. . . . We would suggest, however, if it's amicable to the applicant that you could include that as a permit condition to insure that the construction-related impacts are addressed and that they would be accountable to those, and that's looked at during the plan check phase.").

In the Court's view, this is insufficient. The parties do not indicate that the traffic plan itself is part of the administrative record. Neither party refers to it directly. Therefore, the Court cannot review it to determine that it adequately concludes that implementation of the plan will result in a less-than-significant short-term impact on traffic. To the extent the traffic plan constitutes some sort of mitigation measure, it is also insufficient. "Deferral of the specifics of mitigation is permissible where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan. On the other hand, an agency goes too far when it simply requires a project applicant to obtain a . . . report and then comply with any recommendations that may be made in the report." Defend the Bay v. City of Irvine (2004) 119 Cal.App.4th 1261, 1275. As far as the Court can tell, there is no short-term traffic plan in the record. The Court concludes from the arguments of both parties that the traffic plan – if indeed one has already been created – does not address the issue of whether the short-term traffic impacts will have a significant effect on the environment and does not list alternative mitigation measures to be considered. The City has "gone too far" if it simply required LJP to obtain a report and comply with any recommendations made in the report.

LJP argues that, in light of the fact that the project will not result in any short-term construction impacts, any argument that the City is deferring mitigation is erroneous, as no mitigation is needed. LJP points to no portion of the record indicating that the project will not result in any short-term construction impacts. Therefore, the Court cannot conclude that mitigation is not needed.

LJP argues that certain sections of the Municipal Code contain explicit requirements to address impacts on the public-right-of-way. However, the Municipal Code does not address the specific circumstances of this project or its possible effect on traffic. These code sections do not establish that the construction of the project will only result in insignificant short-term impacts on traffic. The MND is therefore invalid with respect to short-term impacts from construction.

6. Cumulative impact analysis. In its final challenge in its first cause of action, Petitioner argues that the MND is faulty because it used an improper and legally defective definition of cumulative impacts.

An EIR must discuss a cumulative impact if the project's incremental effect, combined with the effects of other projects, is "cumulatively considerable." 14 CCR § 15130(a)(3). This determination is based on an assessment of the project's incremental effects "viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." 14 CCR § 15065(a)(3). "The purpose of this requirement is obvious: consideration of the effects of a project or projects as if no others existed would encourage the piecemeal approval of several projects that, taken together, could overwhelm the natural environment and disastrously overburden the man-made infrastructure and vital community services. This would effectively defeat CEQA's mandate to review the actual effect of the projects upon the environment." Las Virgenes Homeowners Federation, Inc. v. County of Los Angeles (1986) 177 Cal.App.3d 300, 306.

However,

[t]here appears to be a difference between the 'cumulative impacts' analysis required in an EIR and the question of whether a project's impacts are 'cumulatively considerable' for purposes of determining whether an EIR must be prepared at all. For purposes of an EIR, the Guidelines define the 'cumulative impact' from several projects as the change in the environment that results from the incremental impact of a project when added to other past, present, and reasonably foreseeable future projects. 14 Cal Code Regs § 15355. In contrast, under 14 Cal Code Regs § 15065(c), the lead agency decides whether the 'incremental effects' of the project under review are 'considerable.' To do so, the agency considers the effects of other projects, but only as a context for considering whether the incremental effects of the project at issue are considerable. In other words, the agency determines whether the incremental impacts of the project are 'cumulatively considerable' by evaluating them against the backdrop of the environmental effects of other projects. The question is not whether there is a 'significant cumulative impact' but whether the effects of the 'individual project are considerable.' 14 Cal Code Regs § 15065(c). See Leonoff v Monterey County Bd. of Supervisors (1990) 222 CA3d 1337, 1358 (impacts of project are not cumulatively considerable when there is no substantial evidence that any of incremental impacts of project are potentially significant). See also Newberry Springs Water Ass'n v County of San Bernardino (1984) 150 CA3d 740, 750 (county need not consider cumulative effects of other dairies when it determined that dairy in question would have no significant effect).

San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus(1996) 42 Cal.App.4th 608, 623-624.

In this case, the Initial Study Checklist includes the following language with respect to cumulative impacts:

The proposed project could contribute to cumulative impacts related to air quality, noise and traffic. All of these potential impacts would not be cumulatively considerable due to their incremental and/or short term nature. . . .

AR 4:2142, 2177. The Court finds no reference in the MND to "the effects of other projects as a context for considering whether the incremental effects of the project at issue are considerable." The MND only concludes that the effects would not be "cumulatively considerable." It does not explain how it reaches this conclusion. Absent a showing that other projects have been examined in the context required by San Joaquin Raptor, the MND is invalid.

In reliance on 14 CCR § 15183, LJP argues that it was not required to conduct additional environmental review, because the Uptown Community Plan contemplates the proposed land use, and the project is consistent with the allotted density. Section 15183 provides in relevant part:

(a) CEQA mandates that projects which are consistent with the development density established by existing zoning, community plan, or general plan policies for which an EIR was certified shall not require additional environmental review, except as might be necessary to examine whether there are project-specific significant effects which are peculiar to the project or its site. This streamlines the review of such projects and reduces the need to prepare repetitive environmental studies.

(b) In approving a project meeting the requirements of this section, a public agency shall limit its examination of

environmental effects to those which the agency determines, in an initial study or other analysis:

(1) Are peculiar to the project or the parcel on which the project would be located,

(2) Were not analyzed as significant effects in a prior EIR on the zoning action, general plan or community plan with which the project is consistent,

(3) Are potentially significant off-site impacts and cumulative impacts which were not discussed in the prior EIR prepared for the general plan, community plan or zoning action, or

(4) Are previously identified significant effects which, as a result of substantial new information which was not known at the time the EIR was certified, are determined to have a more severe adverse impact than discussed in the prior EIR.

. . .

(j) This section does not affect any requirement to analyze potentially significant offsite or cumulative impacts if those impacts were not adequately discussed in the prior EIR. If a significant offsite or cumulative impact was adequately discussed in the prior EIR, then this section may be used as a basis for excluding further analysis of that offsite or cumulative impact.

In this case, an EIR was prepared for the Uptown Community Plan. AR 6:3441-3510. LJP asserts that its project is consistent with the Plan and therefore that Section 15183 applies. However, a portion of the record to which it refers states:

Density

-- The Uptown Community Plan designates the project site as mixed-use development with very high residential permitted. (Uptown Community Plan, Figure 36, p. 124)

-- Although the Project is consistent with the designation, it does exceed the density limitation. However, an increase in density is permitted because of the 20 percent affordable housing density bonus allowed by SB 1818, which is codified at Government Code § 65915.

AR 4:2630. This document is a letter from LJP's attorney to the City Council. AR 4:2603. It appears to the Court that, when LJP's attorney admits that the project exceeds the density limitation established by the Uptown Community Plan, then it is not, as required by Section 15183, "consistent with the development density established by existing zoning, community plan, or general plan policies." Even if an increase in density is permitted by law, the project, as proposed, is not consistent with the density established in the plan. Therefore, it does not appear that LJP can escape a cumulative-impacts analysis by relying on the Uptown Community Plan.

Additionally, LJP fails to show that the original EIR sufficiently studied cumulative impacts, such that Section 15183(j) is not applicable. It argues that the Uptown Community Plan addressed the environmental impacts of full build-out of Uptown, including more intense development at this site. However, in support of this argument, it cites only to documents its own attorneys sent to the City Council. It makes no reference whatsoever to the EIR for the Uptown Community Plan at AR 6:3441-3509. It therefore fails to show it is entitled to rely on Section 15183(a) to avoid a cumulative-impacts analysis.

7. Other allegations in Petitioner's first cause of action. Although Petitioner's first cause of action separately identifies nine different CEQA violations, its brief is not so organized. Its arguments regarding "improper reliance on draft Thresholds" and an "improper and unstable" project description are sub-parts of broader arguments made by Petitioner regarding the outdated Initial Study and the failure to properly analyze traffic impacts. Additionally, while Petitioner alleges that Respondent made unsupported findings regarding the project's impacts on schools, it offers no argument whatsoever

on schools. The Court therefore does not address the separate categories identified by Petitioner in its complaint. It can only address the arguments made by Petitioner in its briefs.

B. Petitioner's Third Cause of Action for Writ of Mandate

Petitioner's petition for writ of mandate is denied as to Petitioner's third cause of action based on miscalculation of allowable density and project's lack of minimum amount of required commercial square footage.

In its third cause of action for writ of mandate, Petitioner alleges that the City erred in granting LJP the right to construct 96 units on the property, because it improperly calculated the amount of allowable residential density for the project. Petition at ¶ 43. It alleges that the Municipal Code and the "Mid-City Communities PDO" directs that density be determined by the sum number of units permitted in each zone based on the area of the premises in each zone. ¶ 44. It alleges the City has inflated the allowable density for the project by determining the number permitted in each zone based on the area of the entire project site, rather than the area of the premises in each zone. ¶ 45.

Petitioner further alleges that commercial development in certain zones requires a minimum amount of square footage, that 10,540 or 10,840 is required in the zone for this project, and the City improperly approved a project that required only 10,304 feet of ground-floor commercial development. ¶ 48.

1. Residential density. The manner in which allowable density must be calculated is set forth in several Municipal Code sections. Section 113.0222 is at issue here. That section provides:

§ 113.0222 Calculating Density

(a) Multiple Dwelling Unit Development

For *multiple dwelling unit development*, the maximum number of units that may be permitted on any *premises* is determined by dividing the lot area of the *premises* by the number of square feet required for each dwelling unit (maximum permitted density), as prescribed by the applicable base zone.

(1) If the quotient resulting from this calculation exceeds a whole number by 0.50 or more, the number of dwelling units may be increased to the next whole number.

(2) The maximum number of dwelling units permitted on any *premises* that is located in more than one zone shall be the sum of the number of units permitted in each of the zones based on the area of the *premises* in each zone. The dwelling units may be located on the *premises* without regard to zone boundaries.

This Municipal Code section requires that, when determining allowable density of a project large enough to cover two or more zones, the number of units permitted in each zone (based on the area of the premises in each zone) must first be considered. The total per zone is added together to reach the maximum number of units for the entire project. The number of units need not be distributed according to the "per zone" calculation.

According to the "Approved Project Sheets," the two parcels in the CN-1A zone total 27,405 square feet (15,660 in Parcel No. 452-055-32 and 11,745 square feet in Parcel No. 452-055-50). AR 11:5361. The size of the one parcel in the MR-800B zone is 6,750 square feet. Id. Attached to the City's "Project Data Sheet" are Municipal Code tables that set forth the number of units per square foot permitted according to zone. AR 1:127, 1:139. In the CN-1-A zone, for a lot size of less than 30,000 square feet, one unit is permitted for every 600 square feet of lot area. AR 1:139. For a lot size of 30,000 or more square feet, one unit is permitted for every 400 square feet of lot area. Id. In the MR-800B zone, for a lot size of less than 15,000 square feet, one unit is permitted for every 800 square feet of lot area. AR 1:127. For a lot size greater than 15,000 square feet, one unit is permitted for every 600 square feet of lot area. AR 1:128.

The difference in how Petitioner and the City have calculated density lies in the "Lot Size" column of the tables in the

Municipal Code. Petitioner defines "Lot Size" as the portion of the lot in a particular zone. The City defines "Lot Size" as the size of the lot as a whole. According to Petitioner's calculations, 8 units would be permitted in the MR-800B zone (6,750/800[2] = 8.4375) and 45 would be permitted in the CN-1-A zone (27,405/600[3] = 45.675). According to this calculation, the total number of units permitted (before the addition of density bonuses allowed by law) is 53. In its calculations, the City uses the total lot size, which is greater than 30,000 square feet. According to the City's calculations, 11 units would be permitted in the MR-800B zone (6,750/600[4] = 11.25 (11 units) and 69 units would be permitted in the CN-1A zone (27,405/400[5]) for a total of 80 "base units," with 16 more permitted by the affordable housing bonus, for a total of 96 units.

The question, then, is which measurement should be used for "Lot Size." The Municipal Code provides no definitions or answers. The City argues that the definition of "Lot" in the Municipal Code permits it to calculate density in the manner it urges. Section 113.1103 provides the definition of "Lot":

*Lot*means a parcel, tract, or area of land established by plat, *subdivision*, or other legal means to be owned, used or developed. . . .

The City argues that, based on the definition, it is logical to conclude that, when the term, "Lot Size," is used in the calculation tables, it means the entire area to be developed, not just the area within a particular zone. It argues, therefore, that it is permitted to use the entire lot size when calculating the density, not just the area in a particular zone. It argues: "[T]he City's interpretation is the more reasonable interpretation because it takes into account the actual development. The size of the Lot affects feasibility of development. The City's interpretation of Lot Size takes into consideration the possibility for higher density on a per square foot basis based on the flexibility that comes with a larger structure footprint (e.g., the feasibility of a taller structure). As stated at the public hearing, 'The rationale is that you look at the project in the aggregate because it will be built in the aggregate.'" Opposition at 5:16-21.

While the Court does not necessarily agree with the City as to the significance of the "Lot" definition, the Court agrees with the City's conclusion. If the Municipal Code tables on density calculation were intended to refer to a portion of the entire lot, as urged by Petitioner, it seems likely the tables would indicate as much. The tables refer to "Lot Size," not "Portion of Lot Size in Zone." The portion of the lot size in each zone is already used in the calculation, pursuant to SDMC § 113.0222(a)(2) ("The maximum number of dwelling units permitted on any *premises* that is located in more than one zone shall be the sum of the number of units permitted in each of the zones based on the area of the *premises* in each zone."). If this same number was to be used to determine Lot Size, it seems that the Code would state as much or would specifically define "Lot Size" in this manner.

The City's calculation therefore appears to be correct. However, even if the Court were to conclude that Petitioner has offered the proper method of calculation (using for Lot Size the square footage in each particular zone), the writ petition would still be denied. "[T]he contemporaneous construction of a statute by an administrative agency charged with its administration and interpretation, while not necessarily controlling, is entitled to great weight and should be respected by the courts unless it is clearly erroneous or unauthorized." Anderson v. San Francisco Rent Stabilization and Arbitration Bd. (1987) 192 Cal.App.3d 1336, 1343. Because no direction as to the interpretation of "Lot Size" is offered by the language of the Municipal Code and because the City's interpretation of the language is reasonable, one cannot conclude that the City's administration and interpretation of the statute is "clearly erroneous or unauthorized."

Petitioner disagrees. It argues that "the area of the premises in each zone" language of SDMC § 113.0222(a)(2) is unambiguous on its face and not subject to reasonable dispute as to its meaning. While the Court may agree that the language of Section 113.0222(a)(2) is unambiguous, this language only addresses the numerator in the division calculation; it does not address the denominator, i.e., the number found in the "Lot Size" tables. According to Section 113.0222(a)(2), the City is required to (and did) use the area of the premises in each zone as the top number in the dividend calculation. Unfortunately, the SDMC's reference to "Lot Size," i.e., the bottom number in the dividend calculation, is undefined.

Petitioner argues that the City originally calculated the density on this project in the manner urged by Petitioner. See AR

1:127 (handwritten notes show calculation using lot size of less than 15,000 square feet); AR 1:110 (City's Project Data Sheet shows calculation in manner urged by Petitioner, not in manner now urged by City). Petitioner argues, therefore, that deference to the interpretation urged by the City at this point is not required. See Henning v. Industrial Welfare Commission (1988) 46 Cal.3d 1262, 1278 ("[I]n the abstract, a current administrative interpretation would ordinarily be entitled to great weight. But when as here the construction in question is not 'a contemporaneous interpretation' of the relevant statute and in fact flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the . . . statute[,] it cannot command significant deference."). However, Petitioner has not shown that these handwritten calculations constitute a "position enunciated by the agency." It is not clear who performed these calculations or whether that person speaks for the City with respect to its position on density calculations. Therefore, the Court cannot determine that the City is now contradicting an earlier position. Further, even if the City's current interpretation may not command "significant deference," its position is not clearly erroneous. Again, therefore, the writ petition is denied as to density calculations.

Petitioner relies on a statement by a deputy city attorney pointing out that two different, yet reasonable, density calculations may be made. The attorney stated:

If you then go to Subsection 2 under A, it describes that the maximum number of dwelling units permitted on any premises that is located in more than one zone shall be the sum of the number of units permitted in each of the zones based on the area of the premises in each zone.

Now, if you do the calculation the way that DSD is doing it and perhaps properly and perhaps, in fact, based on the legislative intent of this body, I do not know. I do not know and we do not have any dispute with development services. We believe there is an ambiguity here in the municipal code, and we believe that it should be corrected to reflect this body's legislative intent.

But if you go by the calculation of development services, you come up with an allowable density of 96 units. My concern is that the Subsection 2 and reading it just on the face, it says the sum of the allowable density in each of the zones added together, you come up with an allowable density of 66 units.

So, it's 66 versus 96 units, and what our office is simply suggesting, and we have no position which way the Council should go as to support an interpretation of the 66 units or of the 96 units, is simply to clarify the municipal code to capture what is your intent and then approve this project or not approve this project.

But if, in fact, your legislative intent is the lower of those two densities and is based on that Subsection 2, then you would not be able to approve this project as presented to you today. If, in fact, your legislative intent is as DSD made the determination and, in fact, may properly reflect your legislative intent, then 96 units would be allowable and you would go – and if you support this project you may, in fact, approve it because it's for 96 units which is supportable under that interpretation of the municipal code.

So that is our concern. We don't have a position as to which way you should go or how you should interpret the code. We are saying there is a discrepancy. Thank you.

AR 9:5146-5147.

Contrary to Petitioner's argument, the attorney's assertion that there are two ways to interpret the code supports the City's position that its interpretation is not "clearly erroneous."

2. Other arguments. Petitioner argues that the density is being exceeded for another reason. It argues that, because the project site is 0.8 acres, the maximum number of allowed units under the Uptown Community Plan ("UCP") is 59 to 88 dwellings per acre, and the 96 units approved by the City exceeds this number. Petitioner cites to no portion of the administrative record regarding the size of the project site or which portion of the UCP establishes this restriction. The City does not respond to this argument in its opposition, and Petitioner does not mention it again in its reply. Without

more information or citations to specific portions of the record, the Court cannot determine that the density approved violates the UCP. The writ petition is denied on this ground.

Petitioner alleges in its petition that the project does not provide the minimal amount of commercial square feet required by the Municipal Code, but it offers no argument on this point in its brief. This allegation therefore need not be considered.

C. Petitioner's Fourth Cause of Action for Writ of Mandate

Petitioner's petition for writ of mandate in its fourth cause of action is granted as to its claim based on improper findings for abandonment of alley and denied as to its claim based on an improper gift of public funds.

In its fourth cause of action, Petitioner alleges that, in approving the abandonment of an alley between Third and Fourth Avenues, the City violated state and local laws for abandoning public roads and thoroughfares and did not make the findings required to support such an abandonment. Petition at ¶ 51. Petitioner also alleges that "the abandonment and closure of a street or alley, along with giving the public land to a developer for a private development project . . . with no fee or cost charged, is an unlawful gift of public funds." ¶ 54.

1. Findings re: abandonment. Petitioner objects to the City's decision to vacate a public alley so that the developer could "join parcels to develop a seamless block-long building through and above public property."

SDMC § 125.0941 establishes the findings that must be made to vacate a public right-of-way:

A *public right-of-way* may be vacated only if the decision make makes the following *findings*:

(a) There is no present or prospective public use for the *public right-of-way*, either for the facility for which it was originally anticipated or for any other public use of a like nature that can be anticipated;

(b) The public will benefit from the action through improved use of the land made available by the vacation;

(c) The vacation does not adversely affect any applicable *land use plan*; and

(d) The public facility for which the *public right-of-way* was originally acquired will not be detrimentally affected by the vacation.

Petitioner's Exhibit D/SDMC § 125.0941.

In the City's Resolution of 9/12/06 approving LJP's tentative map, the City adopted findings that restate, verbatim, the language from this Municipal Code section. See AR 9:5219 ("There is no present or prospective public use for the public right-of-way, either for the facility for which it was originally acquired or for any other public use of a like nature that can be anticipated."). The Resolution then states: "The above findings are supported by the minutes, maps and exhibits, all of which are herein incorporated by reference." Id.

The Resolution does not refer to any particular "minutes, maps or exhibits" to support the findings. In contrast, Petitioner points to minutes from the 9/12/06 council meeting that indicate the alley will still be available for public use. At that meeting, one of the representatives for LJP explained that the alley, even though it would be vacated, would still be open to the public and would be "turned into pedestrian access." AR 9:5104-5105. If the alley is to be used for pedestrian access, then the City cannot find that there is no present or prospective public use for the right of way.

The City argues that it may close a public street based on a finding that the street is "no longer necessary." However, this is not the standard used by the Municipal Code. The City does not suggest that it is not required to comply with its own Municipal Code requirements for vacating the alley.

The City argues that the Council made an informed decision when it acted to vacate the alley. It relies on portions of the record indicating the alley contributed to traffic circulation problems and that the proposed vacation of the alley would alleviate conflicts between pedestrians and vehicles accessing the alley. It argues that the record shows that the vacated portion of the alley will now be used as a pedestrian promenade, that the alley will still be totally accessible as a service corridor, and that the closure would have a beneficial effect on traffic flow. The City argues that one can infer from this evidence that the alley's present use is unnecessary.

These arguments miss the point. The City must make a supported finding that there is no present or prospective public use for the alley, not that the alley's present use is unnecessary. The fact that a public use of the alley is contemplated suggests that such a finding cannot be made.

The City argues that the use of the alley as a public promenade is only possible if the alley is vacated. Although it never says so directly, it appears to be relying on SDMC § 125.0941(a) to imply that use of the alley as a public promenade is not a public use of a "like nature." However, a City Council policy offers clarification on this "like nature" issue. See Petitioner's Exhibit E/Council Policy 600-15/STREET VACATIONS AND EASEMENT ABANDONMENTS:

Staff investigation of street vacation proposals and subsequent considerations of the matter by the Council and the Planning Commission or the [sic] will give particular attention to a determination of whether the right-of-way can be utilized for any other public purpose such as walkways, bicycle paths, access to public open-space areas, transit facilities, utility lines, etc.

This policy suggests that walkways and bicycle paths may be considered public uses of a "like nature" to an alley/street. The City's finding that there was no present or prospective public use for the public right-of-way is not supported by the record. The writ petition is granted on this ground.

2. Unlawful gift of public funds. Petitioner next argues that the City's decision to transfer the alley to LJP constitutes an unlawful gift of public funds. It argues that, even assuming the City could make the appropriate legal findings to vacate the alley, it would have to convey ownership for reasonable value.

At the 9/12/06 City Council Meeting, a representative of the City's Development Services Department stated the following with respect to the alley:

And lastly, the alley, there was some mention that vacating the alley would be a gift of land. The property [owner] currently owns the underlying fee and the dedication is over that. So they own the underlying fee. If we remove it, we're not gifting them any land. We're just returning it to their use.

AR 9:5143.

Petitioner argues that no prior deed ever showed that LJP had an ownership right in the property. However, one cannot tell from the legal descriptions in the deeds whether the alley is included in the property or not. Petitioner argues that the original subdivision never granted any property rights for the roads to the adjacent lots. It relies on Exhibit C, a subdivision map from 1890. This map offers no information whatsoever as to alley ownership. Petitioner has failed to meet his burden of showing that LJP did not own the alley. Additionally, Civil Code § 831 provides: "An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown." LJP apparently owns the property on both sides of the alley. Therefore, it is presumed to own the alley. Petitioner has failed to rebut this presumption. The writ petition on this ground is denied.

D. Eighth Cause of Action for Writ of Mandate

Petitioner's petition for writ of mandate as to the eighth cause of action based on unlawful deviations and variances is denied.

Although Petitioner alleges in its eighth cause of action numerous "zoning code deviations," Petitioner's brief addresses only three allegedly improper deviations the City granted for the project: (1) The City approved building setbacks as little as two feet, four feet, and eight feet, which are greater than the 20-percent deviation permitted by zoning controls; (2) The City approved a 10-foot front-yard setback, which is greater than the 20-percent deviation permitted; and (3) The City approved a visual setback smaller than that required by zoning regulations.

Petitioner seems to have misread the Municipal Code sections regarding deviations. Those code sections simply heighten the level of review required if a deviation is greater than 20 percent of the standard set by the regulations. See SDMC § 103.1504(g)(1)(A) (providing that the City Manager may review new construction resulting in a finished project deviating 20 percent or less from applicable development regulations); SDMC § 103.1504(h) (requiring a Mid-City Communities Development Permit (as allowed by a hearing officer) for projects which deviate from development regulations of the Mid-City Communities Planned District and are not eligible for the Administrative Review described in Section 103.1504(g) and for mixed residential/commercial projects in which a portion of the commercial use is located in a residential ("MR") zone). These sections indicate that deviations from zoning regulations are permitted, but only if the developer obtains a Mid-City Communities Development Permit. LJP obtained a Site Development Permit in this case. AR 9:5229. The City made findings with regard to the project's compliance with the Land Development Code. AR 9: 5228-5232. Petitioner does not challenge these findings. Its only argument is that the deviations were 20 percent greater than the zoning controls. Because such greater deviations are permitted as long as a Mid-City Communities Development Permit is obtained, Petitioner's argument is without merit, and the writ petition is denied on this ground.

In its reply, Petitioner argues that Municipal Code deviations for setbacks and street visibility have not been disclosed or analyzed in a proper CEQA manner. As noted above in connection with the CEQA causes of action alleged by Petitioner, these arguments are without merit.

E. Fifth Cause of Action for Writ of Mandate

Petitioner's petition for writ of mandate is granted in part and denied in part as to Petitioner's fifth cause of action based on unsupported findings for approval of subdivision.

In its fifth cause of action, Petitioner alleges that the City's approval of the subdivision map for the project violates state and city laws that require approval of a subdivision to comply with applicable zoning and development regulations and not to conflict with easements required for public access. Petitioner alleges the City improperly granted variances, improperly abandoned the alley, and improperly calculated density.

As noted above, it appears to the Court that the City vacated the alley without making the proper findings. As such, approval of the subdivision map is improper. The writ petition is granted with respect to this issue. As also noted above, Petitioner has failed to meet its burden of establishing that variances were improper or that the City improperly calculated density. Therefore, the Court cannot determine that approval of the subdivision map was improper on these grounds. The writ petition is denied with respect to these issues.

F. Requests for Judicial Notice

The parties' requests for judicial notice are granted in part and denied in part.

Petitioner asks the Court to take judicial notice of several Municipal Code sections, a portion of a subdivision map, and a City Council policy regarding Street Vacations and Easement Abandonments. LJP asks the Court to take judicial notice of several Municipal Code sections, the Uptown Public Facilities Financing Plan, and an "Amended Preliminary Report" attached to a title insurance policy to be issued to LJP. The City asks the Court to take judicial notice of numerous sections of the San Diego Municipal Code ("SDMC").

The Municipal Code sections are the proper subjects of judicial notice, pursuant to Evidence Code § 452(b). The

subdivision map is also the proper subject of judicial notice pursuant to Evidence Code § 452(h). The Uptown Public Facilities Financing Plan and the City Council policy were adopted and amended by resolution and are therefore the proper subjects of judicial notice. Unfair Fire Tax Committee v. City of Oakland (2006) 136 Cal.App.4th 1424, 1430 (judicial notice of city resolutions is permissible).

The Amended Preliminary Report (LJP's Exhibit 5) does not appear to be the proper subject of judicial notice. LJP argues that the property description attached to the Report was drafted based on a review of the subdivision map of which Petitioner seeks judicial notice. However, the fact that this report may have been based on a document that is the proper subject of judicial notice does not render the report itself subject to judicial notice. The document is a property description attached to a title report and thus a property description evidently prepared by the person who prepared the title report. The Court cannot determine that a title report and an unrecorded property description written by an unnamed person, with no information provided as to the source, is subject to judicial notice. LJP's request for judicial notice is denied as to Exhibit 5.

With its replies, Petitioner asks the Court to take judicial notice of pages from a San Diego Association of Governments ("SANDAG") website which relate to a study on average daily traffic volumes. It seeks judicial notice under Evidence Code § 452(h). This code section permits judicial notice of "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." This section normally applies to "facts which are widely accepted as established by experts and specialists in the natural, physical, and social sciences which can be verified by reference to treatises, encyclopedias, almanacs and the like or by persons learned in the subject matter" and "facts commonly known in a community, such as ownership, easements and control over land." Gould v. Maryland Sound Industries, Inc. (1995) 31 Cal.App.4th 1137, 1145. Traffic counts at certain intersections are not facts commonly known in a community or widely accepted as established by experts. This request for judicial notice is denied.

Petitioner alternatively asks the Court to supplement the administrative record with this document, "in accordance with the intent of Public Resources Code § 21167.6(e), as a document that should be included in the administrative record." PRC § 21167.6(e) describes the documents that shall be included in the administrative record. It does not provide a means by which Petitioner can supplement the administrative record with a request in its reply brief. CCP § 1094.5(e) provides: "Where the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in the light of that evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ without remanding the case." Petitioner has not shown that this evidence could not have been produced at the hearing before Respondent or that this evidence was improperly excluded. Petitioner's request that the administrative recorded be supplemented with this SANDAG report is denied.

Petitioner shall submit a proposed writ and proposed judgment within 20 days of the date of this ruling.

[1] The Initial Study Checklist is one of the forms recommended by the CEQA Guidelines to be used as part of the Initial Study. See 14 CCR § 15063(f) ("Format. Sample forms for an applicant's project description and a review form for use by the lead agency are contained in Appendices G and H. When used together, these forms would meet the requirements for an initial study, provided that the entries on the checklist are briefly explained pursuant to subdivision (d)(3). These forms are only suggested, and public agencies are free to devise their own format for an initial study. A previously prepared EIR may also be used as the initial study for a later project."). In this case, Respondent did not devise its own format; it used the format suggested by the Regulations, but it did not attach the correct Checklist.
[2] 800 is used because the portion of the lot lying in the MR-800 zone is less than 15,000 square feet.
[3] 600 is used because the portion of the lot lying in the CN-1A zone is less than 30,000 square feet.
[4] 600 is used because the Lot Size as a whole is greater than 30,000 square feet.
[5] 400 is used because the Lot Size as a whole is greater than 30,000 square feet.