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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO – CENTRAL DIVISION

SERRA MESA COMMUNITY COUNCIL, INC., a California non-profit corporation, SERRA MESANS FOR RESPONSIBLE PLANNING, a California unincorporated association, et al.

Petitioners,

v.

CITY OF SAN DIEGO, a public entity; and DOES ONE through FIVE, inclusive,

Respondent,

WESTCORE SANDROCK, LLC, a registered California Limited Liability Company, et al.

Real Parties in Interest.

Case No.: 37-2008-00098488-CU-TT-CTL

[case filing date: December 19, 2008]

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF MANDATE

Date: December 4, 2009
Time: 2:00 p.m.
Dept.: 68
I/C Judge: Hon. Judith F. Hayes

Petitioners Serra Mesans for Responsible Planning, Cynthia A. Moore, Doug Wescott, and James Feinberg (collectively hereafter, "SMRP" or "Petitioners") file this *Reply Brief* in response to City of San Diego and Real Parties in Interest's (collectively, "Respondents") *Joint Opposition Brief Opposing the Petition for Writ of Mandate* ("RB" or "Opposition Brief") filed with this Court on or about October 13, 2009 according to the Order for briefing and hearing dated September 18, 2009.

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A. SUMMARY OF ARGUMENTS ON REBUTTAL

The "Project" is a general plan amendment and rezone to allow a very different type of land use from what exists today near or adjacent to the Project site. While respondents are correct the area is urban and developed, the changes in land use, bulk, density and setbacks of the proposed development are far different from anything that exists at, or in close proximity to, the Project site. The facts of this case are remarkably different from those present in Bowman v. City of Berkeley ("Bowman"), (2004) 122 Cal.App.4th at 572, which merely involved the granting of a building permit through a regulatory "design review" process for a development consistent with the underlying zoning and plans. (Id. at p. 576)

Respondents summarily argue in the Introduction there is no "substantial evidence" regarding *any* potential impact arising from the proposed 800-foot, multi-parcel street-front development configuration because all citations of Petitioners are unsubstantiated, speculative, lacking foundation, and are lay challenges to expert evidence without factual support. (Opposition at 2:1-22) However, the Opposition Brief never addresses which, if any, "evidence" and record citations proffered by Petitioners are not qualified. There is good a reason for this. Respondents cannot refute actual *existing* measured and pictorial comparisons of how the drastically different development scheme and land use plan for converting the Project site and the Aero Drive Industrial Park will stand in stark contrast to what is there now.

With the WADLUS expressly incorporated into the Kearny Mesa Community Plan as a policy and guidance document for future general plan amendments and land use conversion, there is no support that the recommended Land Use Plan in the WADLUS cannot or should not be studied during the current general plan amendment and rezoning. The record and WADLUS explain that the prior 2005 land use study was "primarily mapped and developed for industrial users" to preserve the industrial uses "in order to attract quality tenants and uses" (T123, 4 AR 1420) whereas the subject 2008 WADLUS and general plan amendment adopts the recommendation "to support collocation/conversion suitability factors designated Industrial land uses to residential/Mixed-Use/Office uses, as defined in the City of San Diego General Plan, Appendix C, EP-2." (T123, 4 AR 1422) The Project's rezoning and land use change, along with a plan amendment expressly incorporating the WADLUS, have been adopted as express intentions of the City as a policy and foreseeable land use change - not merely as Respondents assert - a "vision" of a developer consultant to be ignored. Upon adoption of the Project and WADLUS, both City staff and elected officials respectively admitted – the Project is first of many and could set a precedent (T223, 8 AR 3597-3598; T223, 8 AR 3601) and "this

is the future of where development is going as we enter a new way of doing business" (T223, 8 AR 3616). The City cannot have it both ways. By incorporating the WADLUS policy, visions, and future expectations for specific Industrial Park land use conversions, CEQA requires such foreseeable direct and cumulative impacts be analyzed now as the first West Aero Drive conversion project is approved by this Project.

Petitioners' legal challenge to the Project arises not because the project is *affordable infill housing*, but because the City continues to amend its general and community plans at developers' requests on an incremental project-by-project basis. This violates basic land use planning tenets and is in violation of the State's restriction that general plans are only to be amended at most 4 times per year. (Cal. Gov. Code § 65358, subd. (b).) There is no exception to the spot-zoning land use amendment for the Project because it does not offer 25% affordable housing to meet the plan amendment exception. (Cal. Gov. Code § 65358, subd. (c).)

With regards to the challenged right-of-way street vacation, Respondents circularly argue that conditions imposed for Project VTM construction make the entire corner (right-of-way) of Sandrock Road and Aero Drive "obsolete" and available for construction of a private multi-family housing development. (RB at 29:13-22) This is not the standard challenged by Petitioners pursuant to SDMC § 125.0941(a) and related City Council policy. The existing "like nature" use of the right turn pork chop is an open space entryway feature for the community of Serra Mesa that has been a landmark present in the community for approximately 50 years. (T144, 5 AR 2060) Respondents attempt to convince this Court of some great public benefit that abandonment of 6,494 square feet of right-of-way will result in a new (lessened – net loss) remnant dedication of 1,665 square feet. (RB at 29:26-28) In this case, the abandonment of right-of-way *currently being used for the purpose that it was originally acquired* is improperly being granted for convenience of the Developers for more ground space to build a bigger building and with more units.

B. THE BOWMAN DECISION IS DISTINGUISHABLE AND NOT APPLICABLE TO THIS CASE. COMMUNITY CHARACTER AND AESTHETICS IMPACTS "MAY" RESULT FROM IMPLEMENTATION OF THE PROJECT

Respondents criticize Petitioners for not citing or arguing Bowman in their brief and instead providing citation to Ocean View Estates and Pocket Protectors. (RB at 3:1-9) Their criticism is misplaced and the Bowman case can be readily distinguished. Petitioners cite to Ocean View and Pocket Protectors to exemplify the legal standard for testimony and evidence

presented by laypersons that amounts to fair argument substantial evidence under CEQA. (*See* OB at 5:15-24) As explained further below, the best Respondents do to refute Petitioners' fair argument evidence is *argue*, by *concluding* without support, that it is unsubstantiated, speculative, lacking foundation, and are lay challenges to expert evidence without factual support. (Opposition at 2:1-22) But they do not disqualify any of the particular photographs, comparative studies, diagrams, observations or comments made by local residents and city officials familiar with the Project area that were cited by Petitioners. (*See* OB at 5:8-14)

Respondents cite to Bowman for the principal premise that it is controlling in this case because (1) CEQA does not involve the "aesthetic merit of a building in a highly developed area" (RB at 4:1-4, citing Bowman at p. 592), (2) the facts are remarkably analogous to the Palladium (RB at pp. 4-8), and (3) potential adverse aesthetic impacts should measured against what one or more Petitioner argued or urged the City to approve (RB at 7:22-8:2). Respondents' demanded application and narrowed reading of Bowman is neither legally nor factually correct under the circumstances of this case and the law under CEQA.

1. Community Character and Aesthetics Impacts Distinguished from Bowman

Cases decided since Bowman have made it clear that changes in established land use and development patterns can result in significant adverse aesthetic and community impacts under CEQA. (Citizens for Responsible & Open Government v. City of Grand Terrace ("Citizens"), (2008) 160 Cal.App.4th 1323, 1337-1338; Pocket Protectors, *supra*, 124 Cal.App.4th at 939.) This is true even where designated "scenic views" or "environmentally sensitive settings" are *not* involved. (Id.) Citizens is a case involving the development of a 120-unit senior center next to a school and a block away from another 2-story apartment building. The Citizens court distinguished Bowman by ruling there was "evidence the environmental impact is not just obstruction of the views of a few adjacent homeowners. The impact creates a change in the aesthetic environment and interferes with scenic views of the public in general by introducing into the primarily single-family, residential neighborhood a large, high-density, residential building, which includes mixed two-story and three-story structures." (Id. at pp. 1337-1338) In Pocket Protectors, the development of narrow homes with minimal front yard setback, created a "canyon" effect by putting so many houses of similar scale so close together along the whole length of the site, amounting to potential significant effects on the environment as to existing land use standards and aesthetic impacts. (Pocket Protectors, *supra*, 124 Cal.App.4th at pp. 909-910, 929) These character and aesthetic impacts in Pocket Protectors similarly did not involve any scenic public vista or

environmentally sensitive area, but the development proposal intended to change an established land use pattern and development scheme that was just remarkably different from what was existing and allowed under the local plans and zoning regulations (a PUD in that case).

2. Inapplicability of Bowman to this Case and How it is Easily Distinguished

The Bowman case can be readily distinguished from the Project here in many regards. The development of the mixed 40-unit residential senior center with ground floor commercial in Bowman was compliant with the existing land use designation that allows for a mixed-use, residential and commercial development. (Id. at p. 576) The Project here involves a zoning and general plan land use change to one of the highest levels of residential densities allowed in any zone of the city (T202, 7 AR 3176-3177; T195, 7 AR 2936, 2973), and the plan amendment adopted a process and policy to do so for over 70 acres and 25 parcels throughout the entire WADLUS area (T223, 8 AR 3653, 3656; T123, 4 AR 1406, 1426). The compliant zoning and land use in Bowman involved a mere 0.41 acre and 40-unit development whereas here the Project involves the merging of three large parcels amounting to 7.69 acres and development of 412 units. In Bowman there was a similar two-story apartment building *immediately adjacent* to the north (id. at p. 576)[1], whereas here the closest thing resembling a building type and land use like Palladium is the Parkview Project over one mile away on Kearny Villa Road adjacent to Highway 805. (T147, 5 AR 2155) The demand for the City to vacate public roadway for the project - so the developer can build its structure and units in an existing open space community entryway, all the way to the corner with reduced setbacks (T171, 5 AR 2317-2318) - is also a fact unique and distinguishable that did not exist in Bowman. Overall, the development intensity (bulk, massing, setback, percentage of lot coverage, height, number of persons) is not similar to anything immediately adjacent or in the surrounding community. Nor does Aero Drive have any type of development, housing, setback, height or development of intensity equivalent to the Project. (T184, 6 AR 2374-2384)

3. Determination of Significant Impacts is Measured Against Existing Conditions, Not What One or More Plaintiffs May Have Argued or Advocated For at One Time or Another

Respondents repeatedly argue and cite to Bowman for the premise that because Petitioners asked for density to be reduced to "RM 3-7" instead of "RM 3-9" during the hearing

[1] Similar to the immediate adjacency as found in Bankers Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego, (2006) 139 Cal.App.4th 249, 255 whereby the building on the immediately lot next door was similar in height but even greater in width and bulk, and did not amount to adverse CEQA impacts when the primary issue raised was views and heights and the project was *a single-lot in-fill development compliant with the zoning and land use and needing only a simple building permit to construct it.*

process, then all potential community character and aesthetics impacts should only be "measured by the difference between what the City actually approved and what the Petitioners urged them to approve instead." (RB at 7:21-8:2, citing Bowman at p. 592; RB at 6:26-7:2, citing Bowman at p. 588; RB at 12:28-13:6) Once again, this argument is without merit both in regards to CEQA and the facts of this case.

According to CEQA, a project's impacts must be measured against the physical environmental conditions existing at the time of the Notice or Preparation of the environmental review document. (CEQA Guidelines § 15125, subd. (a).) It makes no sense, and the law does not support Respondents' argument that significant impacts be evaluated based on the differing requests or advocacy (whether objection or in support) of who might want a particular project feature added or removed. Additionally, even if it somehow mattered what project revisions one or more Petitioners may have requested in this case, Respondents misrepresent the full and fair scope of the objections and necessary corrections requested by Petitioners to attain an acceptable and legally compliant Project. For instance, on the same administrative record page of "SMPG Recommendations" cited by Respondents - claiming all impacts that matter are just a one-zoning-size-difference (RB at 6:28, citing T184, 6 AR 2396) - Petitioners additionally demanded "do not approve the project as currently proposed; do not certify the mitigated negative declaration; [and] do not approve the right-of-way vacation." (T184, 6 AR 2396) Petitioners consistently requested a project with many more reduced impacts than a simple reduction in density that would leave the Project with the same height, setback and configuration. (T171, 5 AR 2296-2347) Respondents' comparison arguments and wholesale reliance on Bowman do not apply on the facts of this case.

4. It is the City's Adopted "Thresholds" of Significant Community Character and Aesthetics Impacts that Matter in this Case and the City Simply Refused to Apply or Follow Them

Respondents cite to the facially defective Initial Study Checklist – with every single box checked "NO" - for the assertion the City correctly analyzed and decided the issue of potential community character and aesthetics impacts. (RB at 11:26-27, citing T145, 5 AR 2096-97) However, Respondents misrepresent the fact and claim that the City and "the MND utilized the City's CEQA Significance Thresholds." (RB at 11:26-27)

The City's adopted Significance Thresholds are different and more detailed and instructive than the cursory ones in the Initial Study.[2] Petitioners referenced and fully set forth two of the most applicable City-adopted Significance Thresholds (found on page 75) regarding community character and aesthetics:

> A project has a significant impact on neighborhood character if it exceeds the height and bulk of existing patterns in the vicinity by a substantial margin.
>
> In addition, a significant impact will be found if the project would have the cumulative effect of changing the overall character by allowing the creation of structures that substantially differ in height bulk, scale, type of use, etc. when it is reasonably foreseeable that other such changes in neighborhood character will follow. (T171, 5 AR 2312)

An agency that has adopted CEQA Thresholds of Significance is required to use them to determine if there "may be" a significant effect on the environment for the purposes of preparing an EIR. (CEQA Guidelines § 15064.7, subd. (a); Protect the Historic Amador Waterways v. Amador Water Agency, (2004) 116 Cal.App.4th 1099, 1106-1109; Meija v. City of Los Angeles, (2005) 130 Cal.App.4th 322, 342)

Despite the request and exhaustion of administrative remedies by Petitioners (T220, 8 AR 3516:19-23; T 171, 5 AR 2312), the record indicates the City's adopted CEQA Thresholds were not utilized or analyzed. Irrespective of the City's unsupported checked boxes in the Initial Study and the City's complete failure to study a subject as required and directed by CEQA and its local CEQA thresholds, Petitioners presented substantial evidence of potential adverse impact pertaining to the same with numerous factual comparisons of height, bulk, setback, building types and existing differing land uses. (T155, 5 AR 2215-2220; T172, 6 AR 2349-2350; T184, 6 AR 2374-2376; T171, 5 AR 2296-2347)

C. THE GENERAL PLAN AMENDMENTS, INCLUDING BOTH THE DEVELOPMENT PROJECT AND THE WEST AERO DRIVE LAND USE STUDY FOR FUTURE INTENDED LAND USE CONVERSIONS, MUST BE EVALUATED UNDER CEQA AT AN EARLY AND MEANINGFUL TIME.

As explained in Section II.C of Petitioners' Opening Brief, under CEQA all reasonably foreseeable direct and indirect physical changes contemplated by a project must be analyzed.

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[2] The full set of the City's adopted Significance Threshold are not contained in the record, but can be found on the City's Website at http://www.sandiego.gov/development-services/news/pdf/sdtceqa.pdf. Petitioners have not set forth or argued all of them because the panoply of standards is unnecessary for them to make their case.

(OB at pp. 12-13, citing CEQA Guidelines § 15378, subd. (a); (Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal., (1988) 47 Cal.3d 376, 396) Respondents seek to persuade this Court that environmental review of the adopted policy to rezone and redesignate the Aero Drive corridor is not necessary because it is only a "vision." Petitioners are perplexed by this argument. When is an adopted community plan policy or "vision" not foreseeable? As explained in this section, the Project expressly encompassed, approved and incorporated an intent, plan, rezoning, streetscape, and incorporated a general plan policy for conversion of the entire West Aero Drive corridor via the WADLUS. Not only will the initial significant changes in building size, use, lot coverage, setback location and street landscaping individually and collectively set precedent for the next WADLUS area conversion as cumulative effects, but the growth inducing impacts have not been considered. (See, e.g., T189, 6 AR 2434 [Kearny Mesa Community Plan: recognizing "traffic congestion is a troublesome by-product created by the increased traffic volumes" with conversion of the industrial designated land].)

1. The West Aero Drive Land Use Study (WADLUS) Was Incorporated and Made Part of the City's General Plan as a Policy and Urban Design Guideline to Convert Land Uses

Respondents argue without any factual or legal support "the General Plan and KMCP amendments *did not* include the land use "vision" described in the 2008 WADLUS." (RB at 21:21-28) Factually, the reference and express mention of the WADLUS is incorporated into KMCP to "provide background information to assist in the analysis of future community plan amendments and/or a community plan update." (T225, 8 AR 3653) Resolution No. 304438 amending the KMCP states:

> The City Council of the city has considered all maps, exhibits, and written documents contained in the file for this project on record in the City of San Diego...and adopts the amendment to the general Plan for the City of San Diego to incorporate the amended Kearny Mesa Community Plan. (T227, 8 AR 3648)

The reference to the WADLUS is incorporated into the "Urban Design Guidelines" section of the KMCP which "guidelines have been developed for general application in the community" to control development of building scale and design, and transportation corridors and streets. (*See* T189, 6 AR 2476-2481) Once Palladium is constructed as the first-tiered project for the Aero Drive Corridor under WADLUS, this land use conversion plan and development scheme will become firmly planted and pass an environmental consequences *point of no return.* Respondents' attempt to single-out and say that the "Recommended Land Use" map in the WADLUS (T123, 4 AR 1426) was somehow not considered or incorporated with the WADLUS is without merit. The City cannot have it both ways with the City conveniently coming back

later to say what it did or did not *actually* mean to include or incorporate from the WADLUS as part of the general plan amendment.[3] The evidence shows the City has adopted the firm policy and detailed approach for a land use conversion scheme, and has adopted general plan amendment "project" to provide a *manner to analyze and implement future conversions* .

2. The Piecemealed Approach for Environmental Review of the West Aero Drive Corridor and Plan Should not be Endorsed or Allowed by this Court

It is telling that Respondents claim all potential impacts arising from the Project are eliminated because the next piecemealed land use change within the WADLUS would have to "seek all the same land use approvals that Palladium did." (RB at 22: 22-23; RB 25:12-16 ["future land use conversions ...cannot be one of [the Project's] direct or indirect effects because any such conversion would require a [general plan and rezone] exactly the approvals required from Palladium."].) This is the epitome of incremental impacts that CEQA abhors. (Bozung v. LAFCO, (1977) 13 Cal.3d 263, 269-270, 283 [potential future land use conversion must be analyzed to prevent agencies from chopping plan areas and "projects" into little ones].)

Respondents additionally argue that the Project and WADLUS land use conversions have been pre-decided, studied and approved as important general policcs and goals (RB at 10:8-16, citing General Plan Housing Element and 2008 General Plan and Update), and all that remains now is to implement them on a project-by-project rezoning and plan amendment basis. However, any such argument that the Project's and WADLUS land uses impacts have been pre-authorized or studied in prior general plan amendments is neither supported by fact or law. Respondents can provide no citation or evidence in the MND or administrative record where land use changes and community character impacts have been studied and/or mitigated under CEQA.[4] Even if they could, it is improper for an agency to adopt a CEQA negative declaration

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[3] The KMCP states that the "recommended land use plan [ ]...is a visual representation of the major land use proposals set forth in the plan text" and the map should be read in conjunction with the text to interpret the intent of the community and the City of San Diego. (T189, 6 AR 2426) The text of the plan equally indicates adoption of the WADLUS – "In view of these largely conflicting uses, there may be other more appropriate land use designations for this area of Kearny Mesa." (T227, 8 AR 3653 [sentence preceding the Project's plan amendment and WADLUS incorporation].)

[4] Respondents' argument that the Parkview Aero Court Project was first to implement WADLUS and set precedent for the communities on West Aero Drive is without merit. (RB at 24:22-28) First, Parkview is not located on Aero Drive, it fronts Highway 805 and is approximately one mile away. Its development does not set any precedence for development, setback, density, building mass and bulk, or use of land along Aero Drive. Second, as mentioned above, the 2005 WADLUS was "primarily mapped and developed for industrial users" to preserve the industrial uses "in order to attract quality tenants and uses" (T123, 4 AR 1420) whereas the subject 2008 WADLUS and general plan amendment adopts the recommendation "to support collocation/

in reliance of a prior EIR under the claim, finding, and a CEQA environment document that there were former identified potential significant impacts. An agency must still go on the record and explain why they are approving projects with those same continued significant effects and how they may be mitigated or overridden. (Citizens for a Better Environment v. Calif. Resources Agency, (2002) 103 Cal.App.4th 98, 124-125; *see also* Stanislaus Natural Heritage Project v. County of Stanislaus, (1996) 48 Cal.App.4th 182.)

The policy to covert the industrial lands of the WADLUS and the first Aero Drive Project doing so requires the City to analyze potential cumulative and growth inducing impacts. The detailed streetscape and urban design intended by the Project and WADLUS are succinctly laid out, are not speculative, and future implementation is reasonably foreseeable because of the Project and recommended Land Use Plan. The fact that an exact development proposal is not filed for any of the 70 acres and 25 other WADLUS parcels is no reason or excuse to avoid such intended potential land use conversion impacts.[5] CEQA Guidelines § 15144 recognizes that environmental review and analysis "necessarily involves some degree of forecasting" and it is not mere speculation for the City to analyze the impacts from allowing build-out of the WADLUS studied and adopted as a land use conversion plan and policy in the general plan.

D. TRAFFIC BASELINE REMAIN MISCALCULATED AND THE CITY'S AFTER-THE FACT ATTEMPT AT CEQA COMPLIANCE BY REFERENCE TO CITY CODES WOULD ONLY CONTROL CONSTRUCTION WITHIN THE RIGHT-OF-WAY

On the traffic issue, like the Initial Study and MND, Respondents rely on a rote and unrealistic version of baseline traffic conditions, continue to discount valid and supportable observation evidence, and assume lack of impact based solely on an unadopted traffic manual.

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conversion suitability factors designated Industrial land uses to residential/Mixed-Use/Office uses, as defined in the City of San Diego General Plan, Appendix C, EP-2." (T123, 4 AR 1422)

[5] Respondents citation to Lucas Valley Homeowners Ass'n v. County of Marin, (1991) 233 Cal.App.3d 130, 162 is easily distinguished to the "project" here where a general plan amendment is being made and is *actually* implementing the recommended WADLUS land use map and plan. (RB at 22:24-23:5) Respondents' citation (RB at 22:24-23:14) to San Franciscans for Reasonable Growth v. City of County of San Francisco, (1984) 151 Cal.App.3d 61, 73-74 is not only also readily distinguishable, but also assists Petitioners in stating a correct evaluation standard because (1) that case involved a challenge to *an EIR*, but (2) the court rejected the agency's decision to omit and not analyze probable future projects under CEQA Guidelines, § 15355, subd. (b); Public Res. Code § 21083, subd. (b) merely because an application had not been filed or all regulatory hurdles had been cleared.

1 Respondents' claim that a proper traffic baseline was employed based on the two Traffic Studies and the points offered in consultant Sam Kab's memorandum. (RB at 14:25-
2
3 16:19) However, even with this new information considered, the City's baseline is still incorrect. Supportable observation evidence by transportation designing engineer Dicken Hall
4 was offered on the subject but inappropriately ignored by the City. (T171, 5 AR 2339)
5 Upon closer inspection, the numbers offered by the consultant just do not add up,
6 notwithstanding employment of a subjective and so-called "engineering judgment." (RB at 14:28) If 763 parking spaces are provided for cars and another 48 for motorcycles, totaling 813
7
8 vehicles for the tenants, and assuming, as City does, that only 40% of them (160 in the morning, 165 in the evening) use Murray Ridge Road only once per day, then no tenants, by his
9 interpretation, will ever frequent the nearby large commercial center of Mission Valley. (RB at
10 15:26-16:15)
11 Realistically, and as provided by Dicken Hall, the only sensible path to Mission Valley
12 is along Murray Ridge Road and down Mission Center Road. (OB at 8:18-28, *see* T205, 7 AR 3262; T223, 8 AR 3524-3525; T171, 5 AR 2316-1318) Petitioners have presented objective,
13
14 factual and verifiable fair argument substantial evidence that Mr. Kab's report and "engineering judgment" is clearly not based on reality. Although this very argument was
15 raised during public hearing, the City refused to acknowledge it, instead relying on their faulty
16 view of the real-world traffic patterns. Now Respondents try to characterize this substantial,
17 supported observation evidence as "dire prediction" and mere unsubstantiated opinion. (RB at
18 13:27-14:7) As the <u>factual</u> basis shows above, this cannot be further from the truth.
19 A second point of issue is City's use of the existing "Bead Shop" at the Project site to inflate the existing baseline. Respondents claim that the observational evidence - showing that
20 the number assigned to the bead shop was grossly disproportionate to reality - lacks the proper
21 foundation to qualify as substantial evidence. (RB at 17:1-12) This argument flatly ignores the
22 basic CEQA presumption that it is the job of the City, not the local residents in opposition, to
23 fully study and analyze the existing baseline conditions. (<u>Sundstrom v. County of Mendocino</u>,
24 (1988) 202 Cal.App.3d 296, 311 ["If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record."].)
25
26 Here, the City apparently never did this, instead relying on an <u>assumption</u> of full use and operation of every square foot of the Bead Shop building. This indifferent method of baseline
27 analysis resulted in a rote paper calculation of 1520 ADT when in reality such facts and traffic
28 simply do not exist. In other words, instead of investigating and studying the actual existing

traffic (as is their duty under CEQA), the City chose to simply apply a blind calculation, even when faced with observation evidence that existing conditions are dramatically different.

Finally, Respondents claim that City's failure to analyze or even discuss construction traffic impacts or mitigation is satisfied because standard Site Development Permit, Vesting Tentative Map, and the City code requirements are in place. (RB at 18:17-19:10) Contrary to this assertion, there is no analysis, no mitigation measure adopted, and Respondents' referenced codes only apply to work performed within a city right-of-way.

As Petitioners' have proven based on public comment, ordinary experience with massive construction sites such as the Project, and the law and City's duty under CEQA, there is no analysis or consideration *whatsoever* pertaining to short-term construction impacts or phasing despite the large scale and intense nature of the Project. (T171, 5 AR 2320; T223, 8 AR 3516) Respondents' reference to a city code permit requirement for specific right-of-way construction work does not supplant CEQA analysis and mitigation to address the alleged defect here. Work in the right-of-way has nothing to do with, and is completely irrelevant to, trucks, traffic, dirt, debris, noise, and lane closures associated with work to be done on the Project site (outside right-of-ways). Respondents' eleventh hour citation to the Municipal Code is a failed attempt to address impacts, after-the-fact, because they did not do it as part of the required MND and CEQA process.

E. RESPONDENTS' ARGUMENTS ABOUT THE UNLAWFUL RIGHT-OF-WAY VACATION ARE CIRCULAR AND DO NOT ADDRESS THE DEFICIENCIES RAISED BY PETITIONERS

Respondents' argument on the right-of-way vacation issue can be summed up as this: ***after*** vacation and full build-out of the Project a new right-hand turn lane will be constructed making the existing free right "porkchop" obsolete, and the vacation justified. (RB at 29:13-22; 30:8-13) This kind of circular reasoning results in an ineffectual and unsupported finding. Perhaps recognizing there is no actual or provable evidence or support for the same, Respondents' apparently have dropped and dismissed their prior rationale given for eliminating the right-of-way based on "new regional standards" requiring a safer design. (T144, 5 AR 2061). Instead, Respondents now argue the Developer must be given over 5,000 square feet of public right-of-way, and a remaining small 1,600-foot section will have a newly built different turn lane outside the footprint of Developer's new building. (RB at 29:18-28; 30:8-10) What is lost in this argument is current and prospective use goes beyond a mere turn lane and provides existing travel, visual open spaces, and a gateway location for the Serra Mesa community.

According to City's own Council Policy 600-15 on this precise subject, "It is the policy of the Council to vacate or abandon, in whole or in part, a public right-of-way when there is no *present* or prospective use for the right-of-way, and such action will serve the public interest." (T197, 7 AR 3023, emphasis added.) The policy goes on to stress that no action will be taken until particular findings can be made. The first of these named findings, cribbed from Municipal Code §125.0941(a), requires that "there is no present or prospective use for the easement or right-of-way, either for the facility for which the [sic] it was originally acquired or for any other public use of a like nature that can be anticipated." (Id., emphasis added)

Despite Respondents' flawed, unsupported, and circular opposition, the fact remains that no such finding was ever made during any part of the process. As Petitioners' brief points out, several valid present and prospective uses (for the public use and/or purpose and facility originally acquired) were raised in public comment and hearing (OB at 19:24-20:10 [signature element to community, reducing speeds, lost open space on corner for openness and visibility, historic area for entrance sign]), but Respondents simply chose not to address these past, present, and prospective uses, opting instead to summarily list the required findings as if they were proof in and of themselves. (T228, 8 AR 3660-3661) Now, Respondents principally justify this oversight by claiming that any present or prospective use goes away once the proposed vacation occurs. (RB at 30:8-13 ["when the vacation occurs"]) However, this is not the fundamental purpose or substantive content of the finding required by Municipal Code and Council Policy. If Respondents' notion is taken as true, then City can *always* argue that a finding for § 125.0941(a) will be met because once a right-of-way is actually vacated it obviously can no longer be of essential use.

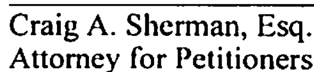
F. CONCLUSION

Based on the above and as previously argued in their Opening Brief, Petitioners request that a peremptory writ of mandamus be granted against the City overturning the Project and its related Project Approvals until and if further appropriate environmental review and findings can be made and appropriately supported by law and evidence.

Respectfully submitted,

Dated: November 4, 2009

LAW OFFICE OF CRAIG A. SHERMAN



Craig A. Sherman, Esq.
Attorney for Petitioners

PROOF OF SERVICE

Serra Mesa Community Council, Inc. v. City of San Diego, et al.
San Diego Superior Court, Case No. 37-2008-00098488-CU-TT-CTL

I, the undersigned, declare under the penalty of perjury that I am over the age of eighteen years. my place of business is in the County of San Diego, located at 1901 First Avenue, San Diego, CA; and I served the below-named person(s) the following document(s):

REPLY BRIEF OF PETITIOENR'S IN SUPPORT OF PETITION FOR WRIT OF MANDATE

on November 4, 2009 on the following person(s) in a sealed envelope or package, addressed as follows:

Christopher W. Garrett, Esq. Ryan Watterman, Esq. LATHAM & WATKINS, LLP 600 West Broadway, Suite 1800 San Diego, CA 92101-3375 FAX: 619-696-7419	Glenn Spitzer, Esq. CITY OF SAN DIEGO Office of the City Attorney 1200 Third Avenue, Suite 1100 San Diego, CA 92101 FAX: 619-533-5856

in the following manner:

☐ By sending by facsimile to each person and address named above, and retaining the proof of transmitission of said facsimile.

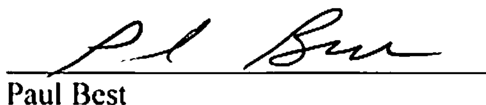
☐ By placing a copy in a separate envelope, with postage fully pre-paid, for each person and address named above and depositing each in the U.S. Mails at San Diego, California.

☒ By personally delivering copies to the person(s) served.

☐ By placing a copy in a separate envelope, with postage fully arranged for payment, for delivery to the persons and addresses named above and depositing each with the overnight carrier via Overnite Express at San Diego, California.

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

Executed on November 4, 2009 at San Diego, California.



Paul Best