

SUPERIOR COURT - STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

CREED-21 and DOES 1 through 10,
Petitioners and Plaintiffs,

vs.

CITY OF CORONA and DOES 11 through
100,

Respondents and Defendants.

Case No. RIC1607635

THE NEW HOME COMPANY, and DOES
101 through 1,000,

Real Parties in Interest.

REPORTER'S TRANSCRIPT OF ORAL PROCEEDINGS

BEFORE THE HONORABLE CRAIG G. RIEMER

April 27, 2017

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RIVERSIDE, CALIFORNIA; APRIL 27, 2017
BEFORE THE HONORABLE CRAIG G. RIEMER

THE COURT: Counsel, good morning. Welcome to
Department 5.

Calling CREED-21 versus the City of Corona.
Actually, just a moment. It's RIC1607635.

Appearances, please.

MR. KIM: Good morning, Your Honor. Anthony Kim for
the petitioner CREED-21.

THE COURT: Thank you.

MR. HIGGINBOTHAM: Good morning, Your Honor. John
Higginbotham, Assistant City Attorney for the City of Corona.

MR. FRIESS: Good morning, Your Honor. Eric Friess on
behalf of the Real Party in Interest Arantine Hills.

THE COURT: Thank you. You can all have seats.

All right. The Court issued a partial tentative ruling
in this case. By 2:00 o'clock yesterday when I needed to give
that to my secretary, I had not completed my analysis, and I
still have not completed the entire analysis. So most of the
tentative ruling was contrary to the petitioner.

So what I propose, Counsel, is that you address the
issues that I've raised in the tentatives since those are
entirely issues related to exhaustion, which is sort of a
preliminary hurdle that you must get over, and then you can move
on from there to address the merits of whatever arguments you
want to focus upon.

MR. KIM: Sure, Your Honor. Thank you very much.

And I do appreciate the detailed tentative, Your Honor,

1 as far as exhaustion goes.

2 I wanted to just discuss a couple of the cases that we
3 cited in our brief. The first case is the *Save Our Residential*
4 *Environment versus City of West Hollywood* case. And in that
5 case, the issue was whether the project was required to examine
6 alternative sites. So the issue -- the issue petitioner had was
7 that the City did not adequately analyze alternative sites.

8 And the City in that case stated that -- and they point
9 out that, "The petitioner did not specifically object to the
10 legal adequacy of the EIR's alternative site analysis each of
11 which alone precludes the petitioner from maintaining this
12 action for failure to exhaust its administrative remedies."

13 And in finding that the petitioner did exhaust
14 remedies, the Court there said, "Moreover, we find that
15 petitioner's objections to the project, while not identifying
16 the precise legal inadequacy upon which the trial court's ruling
17 ultimately rested, fairly apprised the City and Rossmoor that
18 the petitioner believed the environmental impact of developing
19 the project on the Rossmoor site would be deleterious to the
20 surrounding community."

21 THE COURT: How does that -- I recognize that there's
22 cases pretty much all over the board on this issue, Mr. Kim --
23 or at least that's my perception. But how does something that
24 merely apprises the City that the petitioner believes that the
25 environmental analysis is inadequate -- how does that serve the
26 purpose of the Exhaustion Doctrine? The Exhaustion Doctrine is
27 designed to tell the agency there's this problem, and you need
28 to fix this problem or we're going to see you in court later on;

1 and to give the agency the opportunity to fix that without
2 simply saying, "We're going to oppose this." "Oh. Well, on
3 what grounds?" "We don't know. Let's give our analysis to an
4 entirely different consultant and have them redo the entire
5 thing and see if they agree."

6 It seems to me there has to be some definition. And
7 the language that you're quoting, apprise the agency that they
8 don't believe that the environmental analysis is adequate, that
9 would apply to every single person who appears in front of an
10 agency at either the Planning Commission stage or the City
11 Council stage or the Board of Supervisors stage. It applies to
12 every single petitioner, whoever files a lawsuit. They don't
13 agree that the environmental analysis was adequate. Well, of
14 course not. That's why they filed suit.

15 But I don't see how -- despite the language that you're
16 quoting, I don't see how that serves the purpose of what the
17 exhaustion requirement -- or the Exhaustion Doctrine exists to
18 do.

19 MR. KIM: Sure, Your Honor. And I get that. And I
20 think what petitioner did here was a lot more than what this
21 petitioner did in this case. I mean, we didn't -- petitioner
22 didn't just submit some kind of general objection to the
23 project. The overarching issue here was inadequate traffic
24 analysis.

25 And if we look at the letter that we submitted, we
26 specifically point out that there's no new information -- that
27 there is new information requiring -- made the revisions to the
28 EIR, not the least of which is requiring completion of the

1 interchange project prior to --

2 THE COURT REPORTER: I'm sorry? "Which is requiring"

3 --

4 THE COURT: Let me stop you there, Mr. Kim, anyway
5 because I concede that your letter talked about the traffic
6 impacts a lot, but your brief doesn't say there's no substantial
7 evidence to support the conclusion that the City reached. Your
8 letter says this document fails as an informational document
9 because it hides the true impact of the changes in the project
10 because it doesn't disclose to the reader in a readily available
11 fashion the fact that every single unit can be built before the
12 Cajalco Road/I-15 interchange is revised. So that's what the
13 Court focused on, what you argued, not what you said in your
14 letter, but what you argued in your brief.

15 MR. KIM: Okay. And I understand that, Your Honor. I
16 think, one, the Court is imposing a more stringent standard than
17 what's been established in precedent as far as exhaustion goes.

18 And as far as the character of petitioner's claim that
19 information was omitted from the EIR, I think that it would be
20 unfair to impose a more stringent standard because how is the
21 petitioner supposed to know that all homes could be occupied?
22 It's not in the EIR.

23 And if we look at --

24 THE COURT: That was a question I had for you as well
25 because you never tell me that it's not in the EIR. You say
26 that it's not readily available. It is hidden. Well, if I hide
27 something in this room, it's still in this room. If I hide
28 something in the EIR, it's still somewhere within the four

1 corners of the EIR. So are you telling me that it was in there,
2 but it was just hard to find, or are you telling me that it
3 wasn't in there at all?

4 MR. KIM: It's not in there at all, Your Honor. And I
5 apologize if that's the impression that we gave. It's not in
6 there at all.

7 And I think when we look at the comments on the
8 project, when we look at -- people have no idea that this is
9 what's happening, that the City plans on filling up all of these
10 residences prior to possibly the bridge being built. And I
11 think proof of that is if we look at the -- if we look at tab
12 45, the Council member -- one of the Council members deciding on
13 the project, during the hearing she says, but that's an
14 important piece that we all have to realize that the bridge, as
15 Mr. Nelson was explaining, will probably get done. "The
16 worst-case scenario is that 50 percent of the houses could
17 possibly be built before the bridge is done."

18 So the person that's making the decision on the
19 project, who has staff advising her, who is in touch with the
20 developer, even she doesn't know the scope of the project, Your
21 Honor. She doesn't even know that all the homes can be occupied
22 prior to the interchange being built.

23 And so to hold the petitioner to even higher standard
24 just to exhaust on this issue when petitioner extensively
25 discussed traffic in its letter, I think -- I don't think that
26 it's consistent with the Exhaustion Doctrine.

27 THE COURT: Well, but the argument that you're making
28 in your brief strikes the Court as being an entirely different

1 argument than what you're raising in your exhaustion letter.
2 Your letter says there's these enhanced traffic impacts that
3 need to be addressed. Your argument on appeal is they hid the
4 facts from us. The EIR needed to contain the information from
5 the Development Agreement, and it did not. And it was required
6 to be in there. Am I misinterpreting either your letter or your
7 brief?

8 MR. KIM: I don't think you're misinterpreting the
9 letter and the brief. What I do think, Your Honor, is that
10 you're imposing too stringent of a standard as far as exhaustion
11 goes. I think, as I said, the overarching issue here is the
12 adequacy of the traffic analysis. And that's enough to
13 exhaust -- especially when we consider that the decision-maker
14 on the project doesn't even know the scope of the project,
15 petitioner can't be expected --

16 THE COURT: The decision-maker may not have read the
17 EIR. They may not have read the Development Agreement. I don't
18 know what -- the goal here is not to try to get inside the head
19 of the decision-maker. The goal is to decide whether the
20 Supplemental EIR was legally sufficient to inform the
21 decision-maker had the decision-maker read it. There's no way
22 that you can contest the approval of the project by saying the
23 decision-maker is an idiot. He or she either did not read the
24 documents or was too stupid to understand the documents. That's
25 not our test here.

26 So tell me this, Counsel. You would concede, would you
27 not, that the full nature of these revisions with regard to the
28 timing of the completion of the Cajalco interchange remodeling

1 was all laid out in the Development Agreement; correct?

2 MR. KIM: I would admit that it's laid out in the
3 Development Agreement. I would also say that in the final EIR,
4 it says the Development Agreement is still being negotiated. It
5 doesn't say that the Development Agreement is finalized.

6 THE COURT: Okay. But the terms of the Development
7 Agreement as that negotiation draft existed at the time that the
8 EIR was approved was none, wasn't it? Wasn't it publicly
9 available?

10 MR. KIM: It was available, Your Honor, but our
11 position is the EIR is the informational document. You can't
12 say, well, we put the information here in this other document.

13 This is an issue that was -- this is the single most
14 important issue to the community. It wasn't some issue -- this
15 isn't petitioner throwing darts at the board just hoping to find
16 flaws in the EIR. This is the issue. And for the City to put
17 information regarding this very important issue -- and I would
18 say maybe the only issue that a lot of people care about in the
19 Development Agreement -- that that was not proceeding in a
20 manner required by law.

21 THE COURT: So the Development Agreement is -- and I
22 don't know the answer to this question. The Development
23 Agreement in this kind of situation is not some sort of appendix
24 to the SEIR? The SEIR simply describes the project without
25 referring to or incorporating some sort of attachment?

26 MR. KIM: It may be attached, Your Honor, but even when
27 we look at the EIR and it summarizes the Development Agreement,
28 there's nothing in that Development Agreement that tells the

1 public, look, 1,800 homes can be built before the interchange is
2 complete. There's nothing in the summary that says that. It's
3 not disclosed to the public.

4 THE COURT: So there's nothing that the public can look
5 at within the four corners of the EIR and its attachments by
6 which the public contests the description of the project as
7 summarized?

8 MR. KIM: We don't believe that there is, Your Honor,
9 not within the four corners of the EIR.

10 THE COURT: Anything else you want to tell me regarding
11 the exhaustion issue regarding your first issue No. 1, which is
12 the -- issue No. 1 as I have defined it in the --

13 MR. KIM: The last thing is I would just say when we do
14 look at the exhaustion statute in the CEQA Public Resources Code
15 21177, Section (e), it does say, "This section does not apply to
16 any alleged grounds for noncompliance...for which there was no
17 public hearing or other opportunity for members of the public to
18 raise those objections orally or in writing prior to approval of
19 the project."

20 And I would argue that this particular issue would fall
21 under this subdivision because, like I said, that information is
22 not in the EIR. And so that's all I have for that first issue.

23 THE COURT: Let me switch to the other side for a
24 moment regarding that.

25 Mr. Friess, the terms of the Development Agreement
26 regarding the ability of the Real Party to build out all of its
27 units and the ability of the City to issue certificates of
28 occupancy on all of the units prior to the 100 percent

1 completion of the Cajalco interchange, was that added to the
2 Development Agreement after the approval of the Supplemental
3 EIR, or was that a term of the draft Development Agreement prior
4 to the hearing on which the EIR was approved?

5 MR. FRIESS: Prior to, Your Honor. The Supplemental
6 EIR has a whole chapter entitled Development Agreement. At
7 AR 5828 it begins. It describes what that Development Agreement
8 is going to look like, and then at the hearing before the City
9 Council, the Community Planning Director got up and summarized
10 it -- summarized the specifics of the Development Agreement,
11 including the concept that yes, in theory, at 95 percent
12 completion, 100 percent of the building permits and the
13 certificates of occupancy could be out.

14 But, again, that's 95 percent, and it's based on the
15 discretion of the planning official on whether that's done.
16 95 percent completion on a major public works project. That
17 means you've got landscaping and punch-list items to be done.
18 That's what's left. It's going to be a functional interchange.
19 Full-width bridge will be in place long, long before this is
20 done.

21 And as was explained to the City Council and explained
22 in the Supplemental EIR, the Interchange Project is predicted to
23 be 24 months long. The development of the homes is phased out
24 over years and years and years. So there is -- they're getting
25 ready to let the construction contract on the interchange now.
26 They haven't started building the homes. We're long out. This
27 interchange will be thoroughly completed long before we're
28 anywhere near 100 percent occupancy of the homes.

1 That was explained to the City Council. That was the
2 structure of the Development Agreement. It's got very careful
3 milestones to make sure that the construction doesn't get too
4 far ahead -- the construction of the interchange stays far
5 enough ahead of the construction of the homes. Development
6 Agreement has steps all the way through. We spelled those out
7 in our opposition brief.

8 So this was a well-thought-out plan. And importantly,
9 the City made findings of overriding considerations here. The
10 City concluded it is better for the community, it is better for
11 the public to have a funding source to get this interchange
12 built now instead of having the community continue to deal with
13 the existing traffic condition in perpetuity.

14 And so what the Supplemental EIR is saying and what was
15 presented to the City Council was there's going to be some
16 interim increased impacts. We recognize that. But we have
17 concluded as an overriding consideration that getting this thing
18 funded, getting it built is better than leaving the already
19 inadequate status quo in perpetuity because we don't have a
20 funding source. That was good planning. That's how this is
21 supposed to happen.

22 And again, all communicated to the City Council
23 members. Nothing was hidden from them. Of course, if this had
24 been raised as an issue at the City Council meeting or somewhere
25 in the environmental process during the comments, the City could
26 have pointed out specifically to the objecting party, to
27 CREED-21, here's where it's talked about. If there had been any
28 questions, if this had been raised as an issue, Community

1 Development Director, when giving the discussion about the
2 Development Agreement and how it happened, could have said, this
3 also helps to answer that question raised in the objection
4 letter from CREED-21. But of course, that hadn't been raised,
5 and so it couldn't be highlighted then.

6 THE COURT: Do you have a citation for me for where
7 that summary is?

8 MR. FRIESS: Yes, Your Honor. It's at AR 11034-13.
9 And that's part of the transcript that counsel....

10 MR. KIM: Is that 143? 13?

11 MR. FRIESS: AR 011034-13 to -14.

12 MR. KIM: Thanks.

13 THE COURT: So would you agree with Mr. Kim that the
14 Development Agreement itself is not appended in any way to the
15 EIR?

16 MR. FRIESS: Well, it's specifically referenced in the
17 EIR. And certainly EIRs commonly and typically reference lots
18 of other studies and documents. They're already massive
19 documents themselves.

20 I can't tell you -- I can't answer -- is it attached to
21 the EIR? I can look. But I don't have that off the top of my
22 head. But it's certainly referenced in the Supplemental EIR.

23 THE COURT: Was it publicly available?

24 MR. FRIESS: Yes.

25 THE COURT: Even though it was not a final agreement.

26 MR. FRIESS: I believe, Your Honor -- I don't have that
27 AR cite. It was presented to the City Council in the staff
28 report on the day all of this was approved.

1 THE COURT: Mr. Kim, do you want to go to the merits of
2 each of these issues before we go on to the next issue
3 regarding -- and talk about exhaustion and merits, or do you
4 want to talk about exhaustion regarding all of the issues and
5 then go on to a discussion of the merits?

6 MR. KIM: We can go right to the merits on this issue
7 since we're on it already, Your Honor. On the merits, I would
8 just point out that it's clear from the public comments that
9 people didn't know what was happening here. If we looked at --
10 I don't want to rehash all the comments, Your Honor, but if we
11 go to page 7 of our opening brief, we have a bunch of comments
12 listed. You'll see from each of those comments that people
13 didn't know that all the homes would be constructed before this
14 bridge would be done.

15 Page 4 of the brief, same thing. We look at the City
16 Council comment that I cited earlier, the decision-maker unaware
17 of the scope of the project.

18 And when we look at the EIR, Your Honor, I'd urge the
19 Court to go ahead -- in the City's opposition brief they say,
20 well, look. This is where we let the people know that all the
21 homes could be built. And I urge the Court to go ahead and take
22 a look at those citations, and you'll see that nowhere in the
23 EIR is that information divulged. And failure to disclose that
24 fact -- I mean, it was a failure to proceed in a manner required
25 by law, Your Honor. And that's --

26 THE COURT: What is the importance in your mind or the
27 significance in your mind, if any, that -- if, as Mr. Friess
28 says, it was laid out at the public hearing exactly what the

1 impact of the Development Agreement would be on the ability of
2 the City to issue certificates of occupancy for all of the units
3 before the completion of the Cajalco interchange? Does that or
4 would that cure any deficiency in the written document itself?

5 MR. KIM: I don't think it does, Your Honor, because,
6 for one, not everybody goes to the City Council hearing. The
7 cases say it's the EIR that's the informational document, not
8 whatever the City says at the public hearing.

9 And we also raised the issue of this hearing being on a
10 completely separate night in conflict with these other events.
11 For some reason they had their City Council meeting on a night
12 that's not the regular meeting, and it was the only Thursday
13 meeting of the entire year. We have no explanation for why they
14 did that.

15 THE COURT: Is that an issue that -- you discussed that
16 in your sort of procedural background of a portion of your
17 brief, but you don't raise that issue as being one that would
18 justify your petition being granted. Is that something that
19 you're pursuing or not?

20 MR. KIM: Well, I mean, it was our third cause of
21 action, Your Honor. We did raise it in that section. I bring
22 it up here on this particular issue because you're asking
23 whether it's important that they discussed this issue at the
24 City Council meeting. And my point is, there are a bunch of
25 reasons why people can't attend City Council meetings. It
26 doesn't excuse not putting the information in the EIR.

27 THE COURT: Who is the information in the EIR designed
28 to inform? It's the decision-makers, is it not, as opposed to

1 the public?

2 MR. KIM: No. It's designed to inform the
3 decision-makers and the public, Your Honor. It's not just the
4 decision-makers. And I think that's -- you'll find that is very
5 well established in the cases.

6 THE COURT: So nothing that the -- in evaluating the
7 sufficiency of the EIR, the only importance of the transcript of
8 the public hearings is to see what issues were administratively
9 exhausted? Everything said by staff, everything said by a
10 Council member, everything said by a Planning Commissioner,
11 those are all irrelevant?

12 MR. KIM: I'm not saying that it's irrelevant, Your
13 Honor. I mean, it obviously supplements what's happening in the
14 EIR. It helps to inform the public because people are in the
15 audience. But the law is that this information has to be in the
16 EIR. The City is not allowed to make up for whatever
17 deficiencies are in the EIR by just pointing things out at the
18 public hearing. And I am not even sure that at the public
19 hearing that was even disclosed to the members of the public,
20 because when you look at the comments from the public, no one
21 knows that all of the residents might be -- all of the
22 residences might be filled prior to the bridge being completed.
23 I have not seen that in the record where the City divulged that
24 information.

25 THE COURT: That's why I prefaced it, assuming that the
26 disclosure was made as Mr. Friess described.

27 So on the one hand, you tell me that they can't
28 supplement the EIR with statements by staff or whoever. On the

1 other hand you tell me that statements by staff are not
2 irrelevant. So help me -- what is the relevance, then, of
3 statements by staff?

4 MR. KIM: Sure, they can supplement with statements to
5 help people understand. But what I'm saying is that when it
6 comes to important pieces of information like this one,
7 especially when it's regarding the one issue that most of the
8 people care about, that that's something that just needs to be
9 in the EIR. It has to be disclosed to the public prior to the
10 public hearing. I mean, I don't think that's something that you
11 can just spring on the people right at the public hearing right
12 before a decision is going to be made.

13 THE COURT: Thank you.

14 Go ahead.

15 MR. FRIESS: Your Honor, I do have that citation as to
16 the Development Agreement being in the records of the City
17 Council.

18 THE COURT: Go ahead.

19 MR. FRIESS: The City Council on the same night that it
20 approved the EIR and the other documents also approved Ordinance
21 No. 3232, which was the ordinance approving the Development
22 Agreement, and that's at AR 000706 to -788. And that is both
23 the ordinance approving the Development Agreement, and that
24 ordinance does in fact have the proposed Development Agreement
25 attached to it with all of this information.

26 So I can say definitively that yes, the entire
27 Development Agreement was before the City Council. It was part
28 of the staff report in advance of that City Council hearing so

1 all of that was publicly available, provided to the City
2 Council.

3 And again, the Supplemental EIR specifically referred
4 to that Development Agreement, summarized what the terms would
5 be. Of course, at the time of the EIR, it was not a signed
6 Development Agreement. It was a proposed Development Agreement.
7 It couldn't be approved until the EIR was approved.

8 But the EIR says here's what the Development Agreement
9 is going to do. Look at the Development Agreement. City
10 Council had the Development Agreement in front of them at the
11 time that they made these decisions.

12 THE COURT: Thank you. Anything else on issue No. 1?

13 MR. KIM: We're okay, Your Honor. Submit.

14 THE COURT: And did the City wish to add anything?

15 MR. HIGGINBOTHAM: No, Your Honor. I agree with what
16 Mr. Friess has said on that point.

17 THE COURT: Thank you. Then on issue No. 2, the issue
18 of whether substantial evidence supports the City's conclusion
19 that the revised project's impacts on recreation and -- it says
20 wetlands -- of parklands are consistent with the impacts
21 identified in the project's original EIR.

22 Two reasons were offered for that. I indicated that in
23 the Court's mind -- or one of them had been exhausted
24 administratively and the other had not.

25 Mr. Kim, do you want to disagree as to that part of the
26 Court's analysis?

27 MR. KIM: Sure, Your Honor. So again, I would just say
28 I think that the -- well, first let me point to pages 5925 and

1 5927 of the administrative record, and those are the two -- the
2 issues No. 2 and 3 in the tentative ruling. And if you look at
3 the heading under subsection (a) and subsection (b) for issues 2
4 and 3, the City found that there are no new changes or no new
5 information requiring major revision of the EIR.

6 And comment 3.01, which states there's no substantial
7 evidence supporting the SEIR's conclusion that there are no new
8 changes or new information requiring major revisions was
9 directed at both of those -- at issues No. 2 and 3 that the
10 Court identified.

11 And I think the Court is imposing again a too-stringent
12 standard here. The petitioner made clear that the SEIR should
13 have analyzed the project's impact on recreation space, that it
14 eliminates 6 acres of overall park space but all 13.1 acres of
15 public park space.

16 The SEIR focuses -- it contends that the impact on park
17 space will be addressed through the creation of private parks
18 within the development. However, that conclusion is premised on
19 the faulty assumption that new residents will not utilize other
20 public park space near the project.

21 And I do understand the Court saying that this comment
22 doesn't talk about how the City relies on the other park space
23 throughout the entirety of the city, but our position is that
24 this -- the overarching issue here is that the City's
25 conclusions regarding park space and recreation are just not
26 supported by the evidence, and we think that encompasses those
27 issues in the EIR.

28 THE COURT: So would it have been sufficient if -- to

1 exhaust one's administrative remedies if the letter had simply
2 said we believe that the analysis in the SEIR regarding impacts
3 on recreation and parklands is insufficient? Is that all a
4 petitioner has to do?

5 MR. KIM: I honestly think, looking at some of the
6 cases, I think that that is possibly enough under some of the
7 cases. Obviously, I think we did more here. But I do think
8 that that would be sufficient, Your Honor, to exhaust here.

9 In the *Santa Clarita* case that we cited, the petitioner
10 there made one generalized comment about mitigation when there
11 are three specific issues raised in that case about mitigation.
12 The Court there said that "Despite the general nature of SCOPE'S
13 comment, we find that this letter fairly apprised the City of
14 petitioner's concerns."

15 I think when we look at some of these cases that we'll
16 find that sometimes that is all that's needed, Your Honor. But
17 that's not all we did here. We went more into depth than to
18 just say that the park analysis was deficient.

19 THE COURT: Does the Real Party wish to be heard
20 regarding any part of the Court's --

21 MR. FRIESS: Yes, Your Honor.

22 THE COURT: -- exhaustion analysis concerning that
23 issue regarding either of the two grounds that were put forward?

24 MR. FRIESS: Yes, Your Honor. On the specific one
25 about the two neighboring parks, Eagle Glen Park and Spyglass
26 Park -- and the purpose for exhaustion is to avoid "gotcha."
27 It's to allow the independent branch of government's
28 administrative process to function completely, hopefully

1 resolving it and avoiding litigation altogether. If you hide
2 issues -- to use their phrase from the other one -- that doesn't
3 get to happen.

4 Here the original EIR, which CREED-21 never litigated,
5 never objected to, listed all of the other parks. It listed
6 Eagle One Park. It listed Spyglass Park. And it said this
7 development is going to have impacts on those parks. We
8 recognize that. Very different than the case that CREED-21 has
9 cited to where they just said no impacts at all, nobody is going
10 to use the park, without studying it. Here it was studied and
11 it was concluded there are going to be impacts. But fees are
12 going to be paid. There's going to be open space in parks
13 within the development. And with the money and the excess of
14 parks we have, there are not going to be -- there's not going to
15 be deterioration of those neighboring parks. And that's the
16 environmental standard.

17 The actual CEQA standard is "whether there is an
18 increase in the use of existing neighborhood or regional parks
19 or other recreational facilities such that substantial physical
20 deterioration of the facility could occur or be accelerated."

21 Here the City said we have lots of parks. We're going
22 to have plenty of fees here. It specifically calls out in the
23 future there will be additional development. We're going to
24 require other parks there. With all of that said, there is not
25 going to be enough increased use that isn't offset by the fees.
26 And they specifically said the fees are going to be able to use
27 to replace equipment, to refurbish equipment so it's not going
28 to deteriorate.

1 So under the standards set by CEQA for parks' impacts,
2 there is not a substantial physical deterioration. They studied
3 it. They found it. The process worked. So this was, again,
4 good planning.

5 And when they did the Supplemental EIR, they recognized
6 they changed some things. The City made the policy decision
7 that it really didn't need more parks. It's got an excess of
8 parks. What it doesn't have enough of is funds to maintain
9 those parks. So the City made the policy decision, you know,
10 we'd rather you give us more park fees so we can maintain more
11 of our parks, improve our excess of parks. So give us extra
12 open space. There's even more open space -- total acreage
13 between open space and parks in the revised project than there
14 was to begin with. Have some private parks that we the City
15 won't have to fund -- well, they the City won't have to fund but
16 the developers will have to fund.

17 So the City made good policy decisions. And what's not
18 in the record is a single piece of evidence that there will be
19 substantial deterioration of any of those other parks. So there
20 would be no basis for the City to actually make a finding of
21 substantial deterioration. Certainly CREED-21 didn't provide a
22 report by a park expert who said this is going to deteriorate
23 the parks.

24 So the process worked, and because it wasn't exhausted,
25 it wasn't raised even more specifically at this Council hearing.

26 THE COURT: Other than the petitioner raising the
27 issue -- we're not talking about a mitigating negative
28 declaration here or a pure negative declaration where all the --

1 where the petitioner has the burden of producing substantial
2 evidence sufficient to support a fair argument.

3 Here we've got an EIR, and the burden is on the City to
4 have included in its analysis substantial evidence to support
5 whatever conclusions it's made. So you talked about the
6 petitioner hadn't produced any evidence. They don't really have
7 a burden to produce any evidence at this stage, do they?

8 MR. FRIESS: Well, no, they don't have a burden. But
9 what I'm suggesting, Your Honor -- perhaps I didn't state it as
10 articulately as I should have -- is the only evidence and more
11 than sufficient evidence, the professionals who prepared this
12 analysis in the EIR is that there will not be substantial
13 deterioration.

14 THE COURT: And on the issue of exhaustion, what I
15 think I hear you saying is that there is perhaps a sliding scale
16 on how specific the objections have to be. If the EIR doesn't
17 analyze an issue at all, then it may be sufficient for the
18 petitioner in the administrative forum to say you haven't
19 analyzed this issue. But if the City has done substantial
20 analysis, then in order to raise a challenge to that analysis,
21 the defect in that analysis has to be more specifically stated
22 in the administrative setting.

23 MR. FRIESS: Well, that's right, Your Honor, because a
24 lot of work was done by professionals. If the City isn't being
25 told what's wrong with that work, what's wrong with that
26 detailed analysis, then it's perfectly appropriate for the City
27 to say okay, we accept that professional analysis. Go forward.

28 If that specific issue isn't raised, why would it be

1 questioned? That would mean the City has to, as Your Honor
2 suggested earlier in the day, go get separate consultants to
3 redo the work two or three times to see if on every issue
4 somebody might come up with a conflict.

5 If they studied it and the petitioners are now saying
6 there's a specific problem with that, yes, that specific problem
7 needs to be raised.

8 But I agree. If they didn't raise the issue at all,
9 they didn't analyze the issue at all, then the petitioner simply
10 needs to say you didn't even address this issue. You need to
11 look at it.

12 THE COURT: You sort of merged into both the exhaustion
13 issue and the merits on two separate issues, issues 2 and 3 that
14 had been two parts of part 4 of your brief, Mr. Kim.

15 MR. KIM: Sure.

16 THE COURT: So let me ask some questions about the
17 particular issue that I said was not -- you were not barred from
18 pursuing, and that was one of the arguments under the contention
19 that -- that you have as part of 4-A of your opening brief and
20 what I labeled as part of issue No. 2 in my tentative.

21 You contended that there is no substantial evidence
22 that the revised project's impacts on recreation and parklands
23 are consistent with the impacts identified in the original EIR,
24 contrary to the conclusion that the Supplemental EIR includes.

25 But you never tell me what the impacts are that were
26 identified in the original EIR, and you never explain how those
27 impacts are -- how the impacts in the project as revised are
28 inconsistent with those earlier identified impacts. So what do

1 we mean by inconsistent?

2 MR. KIM: Well, what we mean, Your Honor, is that when
3 the project was first approved, there were 13 acres of public
4 park space for the entire community to use. So the 1,800 homes,
5 the people that live there, they can use all the 13.1 acres of
6 public park space. People outside of that project could use it,
7 and they could use also the two parks outside of this gated
8 community. But now we're taking away all 13 acres of public
9 park space. It's all private.

10 So now we have an additional 6,000 residents. The fact
11 that they studied Eagle Glen and Spyglass Park originally, we
12 don't think that has significance here because now we just have
13 13 acres less of public park space. We have all the park space
14 being private within the gated community. When community events
15 happen, those things happen in public parks, and people from
16 this gated community can go to the public parks, and people from
17 the outside of the community aren't likely to go within this
18 gated community to use private parks, Your Honor.

19 So the burden on these two particular parks is greater
20 now because we don't have that 13 acres of public park space to
21 accommodate the additional residents.

22 THE COURT: I'm analyzing your arguments a little
23 more -- I'm segregating your arguments more than you are.

24 In your argument 4-A, you said there's insufficient
25 evidence to support the City's conclusion that the impacts of
26 the project as revised are consistent with the impacts of the
27 project as originally approved. That's 4-A.

28 4-B says there's insufficient evidence to support the

1 conclusion that the impacts are less than significant.

2 MR. KIM: Right.

3 THE COURT: So what I hear you arguing is 4-B. What I
4 want to know is what do you mean by inconsistent? Do you mean
5 that there's going to be a different type of impact under the
6 project as revised or simply a greater degree of impact?

7 MR. KIM: What we're saying was the greater degree.
8 The larger living spaces, you know, was the primary point of
9 that, sir.

10 THE COURT: Then how is argument 4-A different from
11 argument 4-B? Because both of them -- what you're telling me is
12 that both of them go to the issue of the impact on the city's
13 parks is going to be greater in the project as revised than it
14 was as originally proposed. But you've called that -- you put
15 that argument under two labels. And I'm not understanding -- I
16 understand what one label means, the one where there was a
17 failure to exhaust.

18 But as to the -- as to what I have identified as issue
19 No. 2, it is not consistent -- the impacts are not consistent, I
20 don't know what you're -- I don't know what you're talking
21 about.

22 MR. KIM: And I think the reason that those arguments
23 are segregated, Your Honor, I think what we did was in the EIR,
24 they're segregated. We kind of just addressed those specific
25 arguments under each subheading of the EIR. And I understand
26 that there's overlap, and they may essentially be kind of very
27 similar to each other.

28 THE COURT: Anything else you want to tell me regarding

1 either the exhaustion issues or the merits regarding 2 and 3
2 since we have essentially conflated those back together similar
3 to the way they were in the brief?

4 MR. KIM: I just wanted to address a couple things that
5 opposing counsel said, that CREED-21 didn't participate in the
6 prior proceeding. Didn't need to. There was public park space.
7 There was adequate mitigation. The infrastructure was going to
8 be in place before any certificate of occupancy was going to be
9 issued.

10 As far as opposing counsel stating that we didn't
11 exhaust on the issue of the nearby parks, I'd just point out
12 that in our comment letter that we said that the City's
13 conclusion was faulty because it's premised on the faulty
14 assumption that new residents will not utilize other public park
15 space near the project. I think that sufficiently puts the City
16 on notice of that issue.

17 We'll submit on that issue, Your Honor.

18 THE COURT: Let's assume, rather, as I think is
19 reasonable, that regardless of the amount of private parks
20 within the project, some of those people some of the time are
21 going to use other public parks in the city.

22 MR. KIM: Sure.

23 THE COURT: I think it's also reasonable that even if
24 the project had been built out as originally proposed, some of
25 those people some of the time would have used other public parks
26 within the city because the parks are not all fungible. There's
27 dog parks. There's playgrounds. There's ball fields. There's
28 open space. There's wilderness parks. In Riverside, we have

1 all of those different things. I presume that there are similar
2 different types of parks in every community.

3 MR. KIM: Sure.

4 THE COURT: So if the original EIR is sufficient in
5 analyzing the increased load -- or the increased demand for park
6 services, what is it about the revised project that changes the
7 validity of the City saying we've got plenty of parks? Even
8 with all these new people and even if we don't count the park
9 space being created solely for the use of the project residents,
10 we have got plenty of parks. And because the parks aren't
11 fungible, we look at parks as a whole. Why isn't that a valid
12 analysis?

13 MR. KIM: For one, the 13 acres of public park space
14 that's being eliminated. But also, if we look at the *City of*
15 *Hayward* case, that case said that you have to examine the parks
16 that are near the project. Corona is 40 square miles, I
17 believe. To say we have enough park space, say we have park
18 space all on the other side of town, I don't think that's
19 enough, Your Honor. And I think that's what was -- that was the
20 holding in the *City of Hayward* case, that you need to look at
21 the parks that are in proximity because those are really the
22 parks that people are most likely going to be using, not just
23 relying on all the park space throughout the city. It's a big
24 city.

25 THE COURT: But do I know that? For all I know, the
26 two parks that you have identified are dog parks or they're ball
27 fields or there's something that -- or they're simply
28 playgrounds, exactly like the playgrounds that are going to be

1 built within the project. I don't know if the parks that are
2 going to be built within the project are going to offer the same
3 services as these parks outside or whether they're going to try
4 to fill a different niche and thus people who want to use that
5 kind of niche that day are going to stay inside the project and
6 people who want to use sort of a different park niche the next
7 day are going to go to these two nearby parks.

8 MR. KIM: Sure.

9 THE COURT: Is it the petitioner's -- I mean, does the
10 City need to evaluate not only the total amount of acreage but
11 also the specific type of park that's going to be built within
12 the project and explain how that's the same kind of park that is
13 close by and therefore if the project builds "X" kind of park,
14 then there's not going to be any significant overflow to these
15 city parks?

16 MR. KIM: I don't know if they have to take it to that
17 extent, Your Honor. We just want them to look at the parks.
18 How much park space do we have? How are these particular parks
19 going to be impacted, to take a look at it. If they look at
20 those impacts and say they're less than significant, then they
21 can make that decision. But the problem is they didn't look at
22 these two parks at all in making the decision. They did it
23 before in the original EIR, but like I said, in that original
24 EIR, we have the 13 acres of public park space included with the
25 original project whereas we don't have that now.

26 THE COURT: So your position would be whenever there is
27 a significant change in the amount of parks being created by a
28 project or a significant change in the number of residents in a

1 project and thus potential park demand, whether public or
2 private, then the EIR has to do an entirely new analysis on
3 impact on parks?

4 MR. KIM: Looking at the nearby parks, yes, Your Honor.
5 I mean, obviously if we're talking about 500 residents, I think
6 if that were the case, the City would be within its right to do
7 an MMD on the issue. But when we're adding 6,000 residents --

8 THE COURT: But the case that you're relying on was
9 only 600 students, wasn't it? The *Hayward* case.

10 MR. KIM: I'd have to look. I'm not sure about that.

11 THE COURT: That's my recollection of what you quoted.
12 All right. Anything else on parks?

13 MR. KIM: That's it, Your Honor.

14 THE COURT: Anything else from your party on parks?

15 MR. FRIESS: Your Honor, yes. Because we do have a
16 Supplemental EIR. It's not just an MMD. So it is supplementing
17 the original EIR. The original EIR was to every single park,
18 all of the amenities in the parks. So it lists -- I don't have
19 memorized for Eagle Glen and Spyglass which things they had, but
20 it was, are these baseball fields, are these playgrounds, are
21 these dog parks. And then it listed the types of amenities
22 planned in the original project, and it listed the types of
23 amenities in the new project. So all of that information,
24 again, was before the decision-makers. Here's the amenities we
25 have at the different parks. Here's what we're doing here.
26 Here are the changes.

27 And the professional staff, the planning staff, the
28 environmental consultants that looked at it said, you know,

1 again, we've got an excess of parks. What we don't have is
2 enough money to maintain them.

3 And so the better policy is to have the money, and that
4 will prevent any substantial physical deterioration, which again
5 is the CEQA standard. So there is substantial evidence in the
6 record that there will not be a substantial physical
7 deterioration to these parks. And the parks were all looked at,
8 including the two neighborhood parks, but the City actually
9 looked at every single park in the city. So it is thoroughly
10 studied -- park impacts, Your Honor.

11 THE COURT: Park fees is an issue that I've never
12 looked at that I can recall. Park mitigation fees are used for
13 park acquisition, or can they also be used for park operation?

14 MR. FRIESS: I won't tell you that I have looked at the
15 law on it, but very much the EIR is saying they can be used for
16 operations, and I don't see any reason why you couldn't use park
17 fees for operations as well, equipment and the like.

18 THE COURT: But park fees are paid once -- right? --
19 whereas operations go on for years and years and years. Does
20 the documentation here contemplate that there's some sort of
21 endowment being created by these park fees?

22 MR. FRIESS: No, it's not an endowment. But the test
23 again from an environmental standpoint is, is this project going
24 to cause substantial deterioration? Public facilities always
25 have to be maintained. And we all pay significant taxes, from
26 property taxes to income taxes, to pay our share as citizens to
27 maintain our public facilities. That's not a -- that's ongoing
28 maintenance. That's what we're taxed for.

1 But will this project cause substantial deterioration?
2 No, because it's supplying sufficient resources, sufficient park
3 resources in the form of land, private land, open space, and
4 funding to ensure that there's not substantial physical
5 determination [sic], and the professional staff and planners
6 made that determination.

7 THE COURT: Anything else on issues 2 and 3 as I have
8 labeled them?

9 MR. KIM: Not for us, Your Honor.

10 THE COURT: All right. So issue No. 4, Mr. Kim.

11 MR. KIM: Sure.

12 THE COURT: Your argument No. 4 consists in its
13 entirety of three sentences. There's no analysis there. Just
14 basically a statement of your contention.

15 So in this case -- or just in general, what is the
16 substantive difference between a Subsequent EIR and a
17 Supplemental EIR?

18 MR. KIM: I'm just looking at the language of the
19 regulation, Your Honor, that these supplemental -- from what I
20 understand, the Supplemental is used kind of to just update an
21 existing EIR when there are little changes to the project. A
22 Subsequent EIR, from my understanding, requires a more in-depth
23 review.

24 And that's really what's stated here in Section 15163.
25 There's not much case law on that particular issue. The one
26 case that they did cite, I'd say that that case is
27 distinguishable because the footprint and the impacts from the
28 revised and the original project in that case were essentially

1 the same. Here we have some pretty big changes.

2 THE COURT: But the case cited by the City and the Real
3 Party, *City of Irvine vs. County of Orange*, said it doesn't
4 matter what you label it. It matters whether it fulfills the
5 purpose of the type of analysis that was supposed to be done.
6 So what is it that should have been done, had this been a
7 Subsequent EIR, that was not done in this case?

8 MR. KIM: Well, for our purposes, I think what we would
9 want is a more in-depth EIR disclosing to the public that all
10 the houses could be built before the interchange is complete and
11 the park issue, for them to do the analysis --

12 THE COURT: Let me ask the question. Is there anything
13 different about this argument than the three -- other than it
14 being the first three issues lumped together?

15 MR. KIM: No, Your Honor. And I'll admit it could be
16 just a form over substance thing here. Like I said, there's not
17 a lot of case law on this particular regulation. I'm not going
18 to sit here and pretend like there's this big -- I'm just
19 looking at the language of the regulation, Your Honor.

20 THE COURT: Well, if I were to disagree with you on
21 issues 1, 2, and 3, there's nothing more for me to decide
22 regarding issue No. 4.

23 MR. KIM: I think that's -- I don't think that's
24 incorrect, Your Honor.

25 THE COURT: You don't think it's incorrect.

26 All right. And does either the City or Real Party wish
27 to be heard regarding issue No. 4?

28 MR. FRIESS: No, Your Honor.

1 MR. HIGGINBOTHAM: No, Your Honor.

2 THE COURT: That leaves issue No. 5, Mr. Kim, another
3 one in which I tentatively concluded that the -- that there had
4 been no exhaustion of the administrative remedies. So tell me
5 why I'm wrong on that one.

6 MR. KIM: Sure. And I think, you know, the Court took
7 issue with us just citing the statute. I think it's looking at
8 the comment in isolation. We could have put a sentence saying
9 we incorporate everything -- all the other comments into this
10 comment, but we intended for that comment to be read together
11 with all of the other problems cited in the letter, Your Honor.
12 It wasn't meant to be read in isolation that way.

13 And you'll see in our brief that the reason it doesn't
14 comply with 66474 is because the infrastructure is not in place,
15 and that's something that we raised in the comment letter that
16 we submitted to the City Council.

17 THE COURT: All right. Well, when you say that
18 there's -- that it's meant to be read in the context of all the
19 other -- of all the other issues, all the other issues raised in
20 the brief? all the other issues raised in the exhaustion letter?

21 MR. KIM: In the letter, Your Honor. We raised in the
22 letter that the infrastructure is not going to be in place to
23 accommodate the traffic. I mean, I think that's what we raised
24 in the brief under 66474, that this site is not suitable for the
25 project because the infrastructure is not going to be in place.
26 That was raised in our letter. It wasn't under the subheading
27 of the Government Code Section. But the letter that we
28 submitted did talk about that problem. When we look under

1 the -- in the opening brief, that's the essence of the argument
2 that we're making there.

3 THE COURT: All right. And then on the merits of issue
4 No. 5, does it go beyond the arguments raised in issues 1, 2,
5 and 3?

6 MR. KIM: It goes beyond just -- I would just point out
7 that the City's position is that the site is suitable just
8 because there's land, and houses can go on land. But we don't
9 think that that's enough, Your Honor. I think the City failed
10 to look at whether the project could accommodate all of the
11 traffic that's going to be created. I mean, that is part of the
12 issue, I suppose, in issues 1, 2, and 3. But we don't think
13 it's enough to just say that houses can go on land. That's not
14 enough to fulfill the requirements of 66474.

15 If you look at the cases we cited, they go into a much
16 more detailed analysis of why a project site is suitable for a
17 particular project. And it's more than what the City did
18 here -- or what they're arguing in their brief.

19 THE COURT: I'm not sure that I remember exactly what
20 was argued in your brief on this issue. My recollection is that
21 it was rather brief. It was about two pages.

22 So let me ask it differently. Is there anything in
23 your brief identifying -- or arguing to the Court why this
24 project is at least potentially unsuitable and why the
25 suitability had to be examined more closely than issues of
26 traffic and parks and -- basically that, issues of traffic and
27 parks?

28 MR. KIM: I mean, those are our concerns. We think

1 because of the -- especially the traffic issue, that that
2 particularly makes this site unsuitable. They don't even make
3 that argument in their brief.

4 Their argument is that this is land, and houses can go
5 on land. If you look at the cases that we cited in our brief --
6 and this is not just a -- I think maybe you were looking at a
7 different section. We do go into a little bit more of an
8 in-depth analysis here. We cite to the *Carmel Valley View* case,
9 and there the agency considered whether or not the development
10 at issue was physically suitable in light of the project's use
11 of individual sewage disposal systems.

12 And in the *Markley vs. City Council* case, they looked
13 at the project's compatibility with the surrounding
14 environmental setting. And our argument is that, you know, just
15 because the developer is finding a bunch of money to build this
16 bridge, that doesn't change the fact that the site has to be
17 suitable. It has to be able to accommodate the people that are
18 going to be living there and the people that are already living
19 there. So that's the crux of our argument under 66474.

20 THE COURT: So to summarize on that, it's that the City
21 has not -- has concluded that the revised project -- or that the
22 site is suitable for the revised project, but that conclusion is
23 not supported by substantial evidence because there's no
24 substantial evidence that the infrastructure will support the --
25 the existing infrastructure will support such a project. And
26 specifically the items of infrastructure that we're focusing on
27 are traffic -- or roads and parks.

28 MR. KIM: Right, Your Honor. And I'd also point out

1 that there's no guarantee that this bridge is ever going to get
2 built. They're going to post a performance bond, but that money
3 just sits there. There's no guarantee that this project will
4 ever take place. So we could potentially have residents moving
5 in here, and we don't have a bridge in place to accommodate
6 them. The performance bond doesn't guarantee the construction
7 of the bridge. It just guarantees that the money is going to be
8 available one day when the bridge will be built, but....

9 THE COURT: The last segment or the last phase of
10 residents can't move in until the bridge is 95 percent complete.

11 MR. KIM: No. Before the Interchange Project is
12 complete. The bridge is one component of the Interchange
13 Project, Your Honor. There's nothing in the Development
14 Agreement that says the bridge actually has to be complete. So
15 they could complete everything else. It's up to the City's
16 discretion, they said. They could say, hey, look, we're
17 95 percent complete even though the bridge is not complete. The
18 bridge is one part of that project. It's not -- I tried to make
19 that clear. It's not the equivalent of the Interchange Project.
20 It's the overpass that's a part of it.

21 THE COURT: What is the price tag on this project?
22 What's the amount of this bond that's going to be posted?

23 MR. KIM: I actually don't know that number. I think
24 it's like 30- --

25 MR. FRIESS: I know it's tens of millions of dollars,
26 Your Honor. I don't want to misquote. I have in my head 60,
27 but I don't want to represent that to the Court. I do know it's
28 tens of millions of dollars.

1 MR. KIM: I think that sounds about right.

2 THE COURT: It's hard to me to believe that a developer
3 is going to walk away from -- whether it's 30 million or
4 40 million or 60 million -- walk away from that kind of money if
5 it can possibly be helped.

6 Is it the petitioner's contention that the City should
7 not consider what Mr. Friess is saying is the -- is one of the
8 overriding factors that the City was dissuaded by, and that is
9 that if we allow this project to go forward and accept the
10 funding that is being provided for this project by the
11 developer, we solve the traffic problem in this localized
12 vicinity a year sooner than it otherwise would because we don't
13 know where the money is going to come from for this project.

14 It's a project that needs doing right now, but we don't
15 have the money to do it. And this developer is willing to front
16 that money in exchange for being able to start his project while
17 that project -- while the infrastructure project is proceeding.
18 Is that an improper consideration by the City?

19 MR. KIM: I don't think that's improper, Your Honor.
20 As far as the traffic analysis is concerned, if they disclose
21 all of the information to the public and say, look, 1,800 homes
22 can be built here before this bridge is completed and we're
23 going to approve it because we're going to get this money for
24 the development, I think that's perfectly fine. The problem is
25 when they want to make that decision, they have to tell the
26 people. They have to tell their constituents and disclose all
27 of the facts fully to them.

28 And our problem with the traffic analysis is that they

1 didn't do that. They didn't let the people know that this is
2 what their project is. If they did that, if they were
3 forthcoming with the scope of the project, then they certainly
4 have the discretion to approve it and say we're doing it because
5 we're getting the money.

6 THE COURT: Let me go back to your issue No. 1. Even
7 assuming that Mr. Friess is accurate, that the -- that these
8 terms that allowed all the units to be occupied before the
9 Interchange Project is 100 percent complete, were in the draft
10 Development Agreement, and even if that was on calendar for
11 approval at the same City Council meeting, and even if it was
12 obvious through the -- through the EIR that the Development
13 Agreement was for this project, and even if the EIR referred
14 back to that Development Agreement, if the EIR did not
15 accurately summarize those particular terms of the Development
16 Agreement, then the EIR fails as an informational document
17 because it doesn't simply omit those items, but it misleads the
18 public.

19 MR. KIM: That's precisely our argument, Your Honor.
20 And we couple that with things that were being told to the
21 public during the approval process. And that in and of itself,
22 Your Honor, the omission of that information, is a violation of
23 the informational requirements of CEQA.

24 THE COURT: To make sure that I understand it --
25 exactly the limits of your arguments, Mr. Kim, is it the
26 omission of the Development Agreement from the four corners of
27 the EIR, or is it the fact that the EIR did not summarize these
28 particular terms because these terms were so material to the

1 approval of this project that the EIR, to fairly summarize the
2 project, would have to summarize those terms?

3 MR. KIM: Right. It's the omission of the key terms in
4 the Development Agreement that weren't put into the EIR that
5 really is the violation because if we start allowing agencies to
6 start burying important information in other documents outside
7 of the EIR, then petitioner is supposed to go on a hunt outside
8 of the EIR, that's not -- CEQA requires that the agencies be
9 forthcoming with the information, not that they hide key
10 information like this in other documents.

11 So it is the omission of those important terms of the
12 Development Agreement being missing from the EIR that violates
13 CEQA. I don't even think the Development Agreement is attached
14 to the EIR. It might have been approved at the same meeting.

15 THE COURT: Mr. Friess, would you agree that the
16 traffic impacts of this project were the most important
17 consideration that the City was concerned about?

18 MR. FRIESS: Well, yes, I will agree it's the most
19 important. That was the crux of the revision to the project was
20 we're going to get the traffic impacts dealt with now with
21 advanced funding with a developer who has a 32 percent
22 fair-share obligation who is going to front 100 percent. Yes,
23 that was the motivator because there's a traffic issue now that
24 needs to be addressed. But it was studied.

25 These important facts is the most distorted
26 interpretation of the Development Agreement. In reality, the
27 Development Agreement is very careful. It's phased how much you
28 can build as different milestones are done. So we keep getting

1 this phrase, the whole thing can be built without 100 percent
2 completion. No, no. There are phases all along. The actual
3 construction is going to be having to be done as building
4 permits and certificates of occupancy are released. And it's
5 only a 24-month project.

6 So what the EIR and the Development Agreement are
7 recognizing is reality, which is the interchange will be built
8 well before the build-out of the development. But nothing is
9 ever certain. So they have created these different milestones.

10 But the scenario in which you even had a hundred
11 percent build-out and 95 percent completion is very unlikely.
12 It's talked about in the traffic study. None of this stuff is
13 hidden. It's just a fundamental part of the analysis, and the
14 petitioner here is taking the worst-case possible read of the
15 Development Agreement, and that's just not going to happen. I'm
16 not even sure it's possible under the language of the
17 Development Agreement.

18 THE COURT: So does a traffic study discuss or evaluate
19 the impact of that phasing aspect of the Development Agreement?

20 MR. FRIESS: Absolutely. It's got paragraphs talking
21 about the likely timing of the phasing and how that relates to
22 the construction going on. I'm sure I've got a tag on here if I
23 can find the page for Your Honor. But it does cover that.

24 THE COURT: And the traffic study is referred to in the
25 EIR --

26 MR. FRIESS: I believe that's actually attached to a
27 Supplemental EIR. Certainly referred to it.

28 THE COURT: While you're looking, there's two things

1 that I would -- two citations would be helpful to me, and maybe
2 they're both in your brief. One would be the description of the
3 project or of the Development Agreement in the EIR, and one
4 would be the evaluation of the effects of the Development
5 Agreement in the traffic study -- yes, in the traffic study.

6 MR. KIM: I'll be able to do that, Your Honor. The
7 EIR's description of the Development Agreement is at 5828. I
8 don't have the tab number. Sorry.

9 MR. FRIESS: Yes. That is the first page. That is
10 correct on that.

11 And the project phasing in the traffic study, there's a
12 heading 1.6, Project Phasing, on AR 006046. I believe there are
13 other places as you get into the traffic study that further talk
14 about it. For instance, at heading 9.7, Project Phasing at AR
15 006175.

16 THE COURT: Thank you. Anything else the City wants --
17 the City or the Real Party wants to tell me?

18 MR. FRIESS: No, Your Honor.

19 THE COURT: Mr. Higginbotham?

20 MR. HIGGINBOTHAM: Your Honor, I would just make a
21 couple general observations. I know I have been quiet up to
22 this point. As I sit here and listen to this, it strikes me
23 that a lot of the concerns that have been raised are abstract
24 and hypothetical whereas from where I sit and watched this for
25 the last few years as an in-house attorney, the concerns are not
26 abstract and hypothetical. We have been working on this
27 project, getting the land acquisition, doing the engineering,
28 getting this project ready to go for years. And in reality,

1 this project would not be built were it not for the fact that
2 the developer is fronting the money. They're fronting far in
3 excess of their fair share. Without that, it would probably be
4 years if not decades before this happens.

5 So as Mr. Friess has pointed out eloquently, I think,
6 the City Council made a judgment call, and the judgment call was
7 it's better overall to get this thing built and have a short
8 period of time, where there's some perhaps greater traffic
9 impact, in exchange for getting it done for the long-term for
10 the benefit of everybody. And those findings were made. Those
11 issues were analyzed.

12 With respect to the park issue, the reality is that we
13 do have too many parks. We have more parks than we need.
14 Frankly we're in litigation right now over ADA compliance in all
15 of our parks because people think we should have more equipment
16 there. We need more equipment. We need more maintenance more
17 than we need more parks. So that issue was thoroughly looked
18 at. The concerns, again, I think that have been raised are very
19 abstract and hypothetical.

20 Whether the new parks are being built in that
21 development are public or private, nothing will change the fact,
22 as Your Honor pointed out, that people from the new development
23 are going to use existing parks. That's been true before. It's
24 going to be true now. It's going to be true regardless of the
25 changes that were made to this project from the initial EIR or
26 the Supplemental EIR.

27 As Mr. Friess has pointed out, the planning worked the
28 way it was supposed to here, and the City looked at these

1 issues. They studied these issues. They made a judgment call
2 on both the traffic issue and the parks issue, and I think those
3 are judgment calls that are going to work for the benefit of
4 everyone in the long run. Those issues were fully vetted, fully
5 disclosed, and I think that's where it stands from my
6 perspective.

7 THE COURT: Closing comments, Mr. Kim, if any.

8 MR. KIM: I think we're good, Your Honor.

9 THE COURT: All right. Thank you, Counsel. The matter
10 is under submission.

11 MR. KIM: Thank you, Your Honor.

12 MR. HIGGINBOTHAM: Thank you, Your Honor.

13 THE COURT: Off the record.

14 (Proceedings concluded.)

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1 REPORTER'S CERTIFICATE

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3
4 CREED-21 and DOES 1 through 10,
5 Petitioners and Plaintiffs,

6 vs.

Case No. RIC1607635

7 CITY OF CORONA and DOES 11 through
8 100,

9 Respondents and Defendants.

10

THE NEW HOME COMPANY, and DOES
11 101 through 1,000,

12

Real Parties in Interest.

13
14 I, Sheila A. Detwiler, Certified Shorthand Reporter
15 No. 2847, hereby certify:

16 On April 27, 2017, in the county of Riverside, state of
17 California, I took in stenotype a true and correct report of the
18 testimony given and proceedings had in the above-entitled case,
19 pages 28-42, and that the foregoing is a true and accurate
20 transcription of my stenotype notes and is the whole thereof.
21
22

23 DATED: Riverside, California; May 11, 2017.
24

25 *Sheila A. Detwiler*

26

Sheila A. Detwiler, CSR No. 2847
27
28