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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF RIVERSIDE – HISTORIC COURTHOUSE

CREED-21 and DOES 1 through 10, Petitioners and Plaintiffs, vs. CITY OF CORONA and DOES 11 through 100, Respondents and Defendants, THE NEW HOME COMPANY, and DOES 101 through 1,000, Real Parties in Interest.	CASE NO. RIC 1607635 **PLAINTIFF AND PETITIONER CREED-21'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE** Hearing date: TBD Hearing time: TBD Department: 05 (Hon. Craig G. Riemer)

Plaintiff and Petitioner CREED-21 ("Petitioner") respectfully submits this reply brief in support of its petition for writ of mandate and complaint for declaratory and injunctive relief.

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I. Introduction

In its Opening Brief, Petitioner emphasized that the SEIR's traffic and circulation section was deficient because the City failed to disclose that all of the Revised Project's dwelling units could be occupied prior to completion of the Cajalco Bridge. Critically, Respondents' Opposition Brief did not (because it could not) cite to a single page in the SEIR disclosing that fact. The question the Court must answer then is whether the City failed to proceed in a manner required by law when it omitted that information, thereby rendering the SEIR inadequate as a matter of law.

As to the Revised Project's impact on recreation and parklands, Respondents argue that the impact is insignificant because there is a surplus of parklands throughout the City. However, the Court in *City of Hayward v. Board of Trustees of the California State University*, 242 Cal. App. 4th 833 (2015) ("*City of Hayward*") was unequivocal that such an insignificance finding is not supported by substantial evidence where the agency fails to analyze a project's impact on parklands in close proximity to the project. It logically follows that the City's decision to make an insignificance finding without considering the Revised Project's impact on nearby Spyglass Park and Eagle Glen Community Park means the finding is not supported by substantial evidence. The Court should also note Respondents' failure to dispute Petitioner's argument that the impacts to parklands and recreation are significantly greater than those identified in the Original Project's EIR, thereby conceding the point.

Finally, Respondents argue that the Revised Project complies with the Planning and Zoning Law's requirement that the project site be "physically suitable" for the project since the site consists of land, and land can accommodate housing. Surely, the Legislature did not contemplate agencies performing such a cursory analysis in determining the physical suitability of a project site. As discussed below, case law demonstrates that determining the physical suitability of a project site means consideration of the totality of the environmental setting. In this regard, Respondents completely fail to address Petitioner's argument that the project site is not physically suitable because the necessary infrastructure is not in place to accommodate the traffic impacts of the Revised Project.

For these reasons, and those elaborated below, Petitioner respectfully requests the Court grant its Petition for Writ of Mandate.

II. ARGUMENT AND ANALYSIS

A. The SEIR Fails As An Informational Document Regarding the Revised Project's Traffic and Circulation Impacts

1. Petitioner Exhausted Its Remedies as to the SEIR's Traffic and Circulation Analysis

Respondents argue that Petitioner failed to exhaust its remedies regarding its "hides from the public" traffic-impact claim. Opp'n Br., p. 15, lns. 10-11. The underlying issue here is the City's failure to disclose the traffic and circulation impacts resulting from the issuance of 1,806 certificates of occupancy prior to completion of the Interchange Project. That Petitioner did not use the precise phase, "hides from the public," is not fatal to Petitioner's claim. Respondents' argument appears to be that for a challenger to have its claim heard in court, the "exact issue" must have been presented to the administrative agency. *Id.* But that is not the standard.

There are no specific words that must be used in order to preserve an argument for litigation. Indeed, less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding. *Santa Clarita Org. for Planning the Env't v. City of Santa Clarita*, 197 Cal. App. 4th 1042, 1052 (2011) ("Despite the general nature of [petitioner's] comments, we find that this letter 'fairly apprised' the city of [petitioner's] concerns"); *see also Save our Residential Env't v. City of West Hollywood*, 9 Cal. App. 4th 1745, 1751 (1992) ("we find that [petitioner's] objections to the Project, while not identifying the precise legal inadequacy upon which the trial court's ruling ultimately rested, ultimately apprised the City and [the developer] that . . . developing the Project . . . would be deleterious to the surrounding community"). The key question is whether the objections are "sufficiently specific so that the agency has the opportunity to evaluate and respond to them." *Citizens for Responsible Equitable Envtl. Dev't v. City of San Diego*, 196 Cal. App. 4th 515, 521 (2011).

Here, Petitioner pointed out at the administrative level that the City erred in determining there was "no new information requiring major revisions to the EIR." Admin. R. 2:322:16730. The "new

information" highlighted by Petitioner included, among other things, the issuance of "up to 1258[1] certificates of occupancy prior to completion of the Cajalco Road/I-15 Interchange Project" even though "the City's own planning Manager has admitted that the current Cajalco Road overpass can barely accommodate the traffic around the project site." *Id.* In other words, Petitioner's grievance was that the City utterly failed to adequately discuss and disclose the Project's traffic impacts in light of its decision to issue such a high number of certificates of occupancy prior to completion of the Interchange Project. Indeed, the City's failure in this regard forms the basis for Petitioner's argument that the "SEIR fails as an informational document regarding the Revised Project's traffic impacts." Op'g Br., p. 14, lns. 13-14. Altogether, the objections raised in the administrative proceedings satisfy any exhaustion-of-remedies requirement.

2. The City Failed to Disclose the Traffic and Circulation Impacts of the Revised Project

The issue then is whether the SEIR fails as an informational document when it comes to the Project's traffic impacts. As stated in the Opening Brief, the fact that ***all*** of the certificates of occupancy may be issued prior to completion of the Interchange Project is not contained in the SEIR but buried deep in the development agreement. *See* Op'g Br., pp. 13-14. Respondents argue that it discussed "the potential that the developer can construct additional units before the interchange improvements are complete." Opp'n Br., p. 16, lns. 26-28. Critically, Respondents do not deny that the SEIR fails to disclose that all certificates of occupancy may issue without completion of the Interchange Project. Instead, Respondents' citations vaguely discuss the possibility that certificates of occupancy may issue after Phase 1, stating that "while the developer cannot develop more than Phase 1 prior to the commencement of construction of the interchange improvements, it is possible that more than Phase 1 would be developed prior to completion of the interchange improvements." *See* Admin. R. 1:17:5953 (only discussing Phase 1) & 5965-5966 (failing to discuss number of certificates to be issued without completion of Interchange Project). The next citation relied on by Respondents recognizes that up to

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[1] Petitioner discovered that the true number of potential certificates to be issued prior to completion of the Cajalco Bridge was even higher than 1,258 after reviewing the development agreement. Nevertheless, the issuance of either 1,258 or 1,806 certificates of occupancy was not explicitly discussed in the SEIR.

600 additional certificates may issue but that still falls far short of the 1,806 certificates allowed for under the development agreement. *See id.*, 1:18:8756-8757; *see also* Opp'n Br., pp. 22-24. Again, ***Respondents cite to no portion of the SEIR that discloses the possibility that all homes may be built and occupied prior to completion of the Cajalco Bridge.***

The SEIR's failure to discuss and disclose this information is important because the public was led to believe that only 308 homes would be built prior to completion of the Cajalco Bridge. For example, at the City Council meeting on the Project, Council member Spiegel told the public that the developer could "legally . . . build 300 homes without the bridge being approved." Transcript 2:45:11034-135, lns. 14-18. The implication here is that the developer is forbidden from exceeding 300 homes without completion of the Cajalco Bridge. This sentiment was echoed by City officials responding to public concern over the Revised Project being built without completion of the Cajalco Bridge. Indeed, the City's Planning Manager stated that "the new traffic analysis concludes that up to 308 units can be built and occupied before the Cajalco interchange mitigation is even required as mitigation. Beyond that point, then ***the requirement for the interchange is triggered***, and that's when the city can legally require that it be ***completed before any more units would be built and occupied***." *Id.*, I:18:8839. (emphasis added). Thus, it was unsurprising when members of the public mistakenly believed that only 308 homes would be built and occupied prior to completion of the Interchange Project. *See id.*, 2:45:11034-108, lns. 6-9 ("And quite frankly, I really feel sorry for the individuals, the 308 homes and residents of those homes, because like I've experienced in my community, a lot of people looked at the opportunity to live at a certain spot, they bought homes, and then found out that they couldn't deal with the transportation or their commutes to go to and from work, and as a result, they left. I'd hate to see that with this group of 308").

Respondents argue that substantial evidence supports the City's conclusions on traffic impacts and its "determinations about the amount and type of information contained in the supplemental EIR . . . ." Opp'n Br., p. 21, lns. 19-21 & p. 24, lns. 19-22. But the question here is not whether the SEIR's traffic and circulation conclusions are supported by substantial evidence but whether the City failed to proceed in a matter required by law when it chose not to disclose that all of the Revised Project's homes could be occupied prior to completion of the Cajalco Bridge. As stated by the Court of Appeal in

Communities for a Better Environment v. City of Richmond, 184 Cal. App. 4th 70, 82 (2010), when an environmental document 'does not adequately apprise all interested parties of the true scope of the project,' the agency has failed to proceed in a manner required by law and the [environmental document] is inadequate as a matter of law." In this regard, "'***the existence of substantial evidence supporting the agency's ultimate decision on a disputed issue is not relevant*** when one is assessing a violation of the information disclosure provisions of CEQA.'" *Id.* at 82. (emphasis added). This is especially true where, as in this case, "[t]he dispute . . . centers on the question of whether pertinent information was omitted from the EIR." *Id.* Thus, the question is not whether the City's decision to omit information was supported by substantial evidence,[2] but whether that omission violated the informational requirements of CEQA. "When the informational requirements of CEQA are not complied with, an agency has failed to proceed in 'a manner required by law' and has therefore abused its discretion." *Save our Peninsula Committee v. Monterey County Board of Supervisors*, 87 Cal. App. 4th 99, 118 (2001).

B. <u>The SEIR's Conclusions Regarding the Revised Project's Impact on Recreation and Parklands Are Not Supported by Substantial Evidence</u>

1. <u>Petitioner Exhausted Its Remedies as to the Revised Project's Impact on Recreation and Parklands</u>

Respondents argue that Petitioner failed to exhaust its remedies on the issue of the Revised Project's impacts on recreation and parklands. Petitioner exhausted on this issue as follows:

> III. Recreation
>
> 3.01 There is no substantial evidence supporting the SEIR's conclusion that there are no changes or new information requiring major revisions to the EIR as it relates to recreation space. The SEIR should have analyzed the project's impact on

[2] Even if this was a substantial evidence issue, Respondents' evidence falls short. For example, Respondents argue that the City's traffic conclusions are supported by the fact that the City has required the developer to post bond for the full amount of the Interchange Project prior to building permits being issued. However, the developer's posting of the bond does not change the fact that all homes may be built and occupied prior to completion of the Cajalco Bridge. Respondents also argue that the City's traffic conclusions are supported by evidence demonstrating the Revised Project will reduce by 11,000 the average daily trips as compared to the original project. But that conclusion ignores the fact that the Revised Project includes the deletion of 20 mitigation measures and an increase in residential dwelling by 55 acres, resulting in the addition of at least 1,000 more residents than originally contemplated under the first approval of the Project. *See* Admin. R. 1:8:566 & 809.

> recreation space. The project not only eliminates 6 acres of overall park space, it is eliminating all 13.1 acres of the public park space that was previously approved. The SEIR contends that the impact on park space will be addressed through creation of private parks within the development. However, that conclusion is premised on the faulty assumption that new residents will not utilize other public park space near the project.

Admin. R. 2:322:16731-16732. Again, there are no specific words that must be used in order to preserve an argument for litigation and less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding. *See Santa Clarita Org. for Planning the Env't v. City of Santa Clarita*, 197 Cal. App. 4th at 1052 ("Despite the general nature of [petitioner's] comments, we find that this letter 'fairly apprised' the city of [petitioner's] concerns"); *see also Save our Residential Env't v. City of West Hollywood*, 9 Cal. App. 4th at 1751 ("we find that [petitioner's] objections to the Project, while not identifying the precise legal inadequacy upon which the trial court's ruling ultimately rested, ultimately apprised the City and [the developer] that . . . developing the Project . . . would be deleterious to the surrounding community").

Respondents argue that Petitioner was required, at the administrative level, to specifically point out that the City's reliance on the Department of Finance ("DOF") factor in determining the number of people likely to live in a particular number of homes was inappropriate. Opp'n Br., p. 17, pp. 15-18. However, that evidence was cited in the Opening Brief to support Petitioner's argument, initially raised in the administrative proceedings, that "[t]here is no substantial evidence supporting the SEIR's conclusion that there are no changes or new information requiring major revisions to the EIR as it relates to recreation space." Admin. R. 2:322:16731-16732. Similarly, Respondents argue that Petitioner waived its right to argue the park issue because it did not specifically identify Spyglass Park and Eagle Glen Community Park in its comments to the City Council. Opp'n Br., p. 17, lns. 23-26. But those points are part and parcel of Petitioner's argument, raised at the administrative level, that the SEIR wrongfully "contends that the impact on park space will be addressed through the creation of private parks within the development" since "that conclusion is premised on the faulty assumption that new residents will not utilize ***other public park space near the project***." Admin. R. 2:322:16731-16732 (emphasis added). Indeed, there are no cases standing for the proposition that CEQA petitioners are required to make an evidentiary showing at the administrative level, as opposed to merely raising

specific issues, in order to exhaust their remedies. Thus, Petitioner's detailed comments at the administrative level were sufficient to preserve these issues for litigation.

2. <u>There Is No Substantial Evidence the Revised Project's Impact on Recreation and Parklands Is Consistent with the Impacts Identified in the Original Project's EIR</u>

There are two reasons the Revised Project is inconsistent with the Original Project. For the sake of brevity, Petitioner will summarize those points and cite to its Opening Brief. First, the City erred in applying the same methodology – the Department of Finance factor – to calculate the number of residents per household under the Revised Project as it did for the Original Project. The problem with relying solely on the DOF factor is that it ignores the fact that the Revised Project contains 55 more acres of residential development than the Original Project despite having the same number of dwellings. *See generally* Op'g Br., pp. 14-15. The SEIR attempts to gloss over this vast increase by stating that "[t]he total number of [dwelling units] allowed by the Specific Plan (1,806) would not change as a result of the proposed project." *Id.*, I:17:5922. But common sense tells us that relying solely on the DOF factor to calculate the number of residents resulting from the Revised Project completely fails to account for the inevitable increase in residents from building vastly larger home sizes.

The second reason the Revised Project is significantly different than the Original Project is that it not only reduces the Project's parklands by 6.5 acres, it does away with all 13.1 acres of public parklands and "[a]ll parks [associated with the Revised Project] will be privately owned and maintained, as opposed to the approved project that contemplated public ownership and maintenance of the 11-acre and 5-acre parks." *Id.*, I:17:5823. In other words, the City and its residents – other than those living within the private gated community of the Revised Project – lose out on the 13.1 acres of public parklands guaranteed by the Original Project. Conversely, there is nothing preventing the thousands of new residents from utilizing the public parks in the neighborhood, discussed further *infra*.

Critically, Respondents do not even challenge Petitioner's claim that there is no substantial evidence supporting the City's conclusion that the Revised Project's impact on recreation and parklands is consistent with those identified in the Original Project's EIR. *See* Opp'n Br., pp. 24-25 (subheading "E." stating revised project will not result in new or more significant park impacts while text of the

heading ***solely*** addresses whether there is substantial evidence to support the SEIR's conclusion "that the modified project will result in less than significant park impacts"). Accordingly, Respondents have effectively conceded that the Revised Project is inconsistent with the Original Project's EIR.

In the end, the inevitable increase in residents resulting from increasing dwelling units by 55 acres, the reduction of total parklands by 6.5 acres, and the reduction of public parklands by 13.1 acres, means there is no substantial evidence supporting the SEIR's conclusion that there are "[n]o changes or new information requiring major or minor revisions" to the Original EIR. *Id.*, I:17:5925-5927.

3. There Is No Substantial Evidence the Revised Project's Impacts on Recreation and Parklands Will Be Less Than Significant

As to the SEIR's finding that the Revised Project will have a less than significant impact on recreation and parklands, that conclusion is not supported by substantial evidence. Despite the addition of, at a minimum, 6,249 residents to the Revised Project area, the SEIR concludes that the Project will have a less than significant impact on recreation and parklands because there is a surplus of parklands "within other parts of the City . . . ." Admin. R. I:17:5926-5927. The problem is the SEIR does not address the Revised Project's impact on the two parks that exist in the same neighborhood as the Project: Spyglass Park and Eagle Glen Community Park. *Id.*, I:16:5556 (showing location of Eagle Glen Community Park and Woodrow Wilson Elementary School) & Req. for Judicial Not., Ex. C (showing Spyglass Park adjoining Woodrow Wilson Elementary School). Instead, the SEIR erroneously premises its less than significant impact conclusion on the fact that surplus lands exist generally throughout the 37.6 square mile City. See II:323:16947. As established in *City of Hayward*, *supra*, such a faulty analysis unequivocally violates CEQA.

In *City of Hayward*, the California State University approved a master plan for development of its East Bay campus. *Id.* at 838. The EIR for the master plan concluded that the project "would not result in impacts to parks or other recreational facilities." *Id.* at 858. In finding the EIR violated CEQA, the First District Court of Appeal stated the following

> The trial court found this analysis deficient in that it fails to evaluate potential impacts to two neighboring parks, Garin Regional Park and Dry Creek Pioneer Regional Park . . . . Together, Garin and Dry Creek make up 4,763 acres of parkland, offering 20 miles of trails for hikers, mountain bikers, and horseback riders. Despite the proximity of these regional parks to the campus, ***the EIR does not address potential***

> ***impacts to these parks specifically, but refers only to insignificant impact on the entire East Bay Regional Park District.*** The Trustees argue that the EIR analysis is sufficient because it is reasonable to conclude that the increased student population, including the 600 new occupants of the proposed student housing project, would make the same "nominal" use of these parks "consistent with long-standing use patterns" and because the master plan includes ample on-campus recreation offerings. Like the trial court, we disagree.

Id. at 858. Indeed, exactly like the California State University in *City of Hayward*, the City in this case premised its less-than-significant recreation and parklands impact finding on the fact that surplus parklands exist throughout the City, while making zero mention of the two parks sitting in the same neighborhood as the Revised Project. See I:17:5798-8689.

Respondents argue that Petitioner "fails to point out that the modifications to the project result in a net increase of 14 acres of public and private parks when open space are considered together." Opp'n Br., p. 25, ll. 26-28. But that argument is irrelevant here because Petitioner's claim is directed specifically at parklands. To that point, the chart cited by Respondents show that the Original Project included 15.2 acres of park space while the Revised Project includes just 8.7 acres of park space. *Id.*

Respondents then argue that "the 'City has determined that any new park funding would be better spent on new park facilities within existing underdeveloped public park facilities and public park maintenance rather than the creation of additional surplus parks.'" *Id.*, p. 25, lns. 24-26. But that argument is a red herring intended to distract from the City's failure to study the Revised Project's impacts on the two parks nearest to the Project site. Indeed, the Court in *City of Hayward* was unequivocal that an agency is required to study the impacts to parks in close proximity to a project site.

Finally, Respondents try to distinguish *City of Hayward* from the case at bar by arguing that "[h]ere, the City recognized there would be increased use of existing parks, but properly determined that the modified project would not result in new or more significant park impacts based on a number of facts, including the City's 'net surplus of park lands' and the unchanged number of residential units between the original and the modified project." Opp'n Br., p. 25, lns. 8-12 (citing AR 1:17:5926;1:8:558). First, the SEIR never recognized an increase in the use of existing ***neighborhood*** parks. In fact, the SEIR does the exact opposite, baldly concluding that "[i]t is not anticipated that . . . an . . . additional 1,000 residents would substantially increase the use or accelerate the deterioration [sic] existing neighborhood or regional parks . . . ." Admin. R. 1:17:5926. That the City has surplus

parklands throughout the City is irrelevant. Again, when the agency in *City of Hayward* tried to make an insignificance finding premised on the existence of parklands throughout the entire district, the Court of Appeal rejected the finding because of the agency's failure to analyze the impacts on those parks nearest the project site. *City of Hayward, supra*, 242 Cal. App. 4th at 858.

In light of the foregoing, the SEIR's conclusion that the Revised Project will have a less than significant impact on the City's recreation and parklands is not supported by substantial evidence.

C. The City Violated the Planning and Zoning Law

1. Petitioner Exhausted Its Remedies on Its Planning and Zoning Law Claim

Respondents argue that Petitioner failed to exhaust administrative remedies as to its Planning and Zoning Law claims. Opp'n Br., p. 18, lns. 4-8. Specifically, Respondents argue that Petitioner's "Planning and Zoning Law claim is premised on the argument that the property is not 'suitable' for the proposed development but Petitioner "never mentions 'suitability' of the site" during the administrative proceedings. *Id.*, p. 18, lns. 9-16. Respondents are wrong for the simple reason that Petitioner explicitly pointed out that the City failed to make "all of the necessary findings under the Subdivision Map Act to approve the tract map. To the extent findings were made under Government Code Sections 66473.5 and 66474, the findings are not supported by substantial evidence." Admin. R. 2:322:16733. Government Code Section 66474 specifically requires, among other the things, the following findings to be made when approving a tract map:

> (c) That the site is physically ***suitable*** for the type of development.
>
> (d) That the site is physically ***suitable*** for the proposed density of development.

Thus, Respondents' argument appears to be that Petitioner failed to quote Section 66474 in full and is therefore barred from raising the claim. However, there is no case standing for the proposition that Petitioner's failure to quote a statute in full – as opposed to just citing the statute – constitutes a failure to exhaust remedies.

2. The City Failed to Comply with Government Code Section 66474

Respondents argue that the Project site is physically suitable for the Revised Project merely because "[a] residential development can readily be built on land, just as neighboring properties have had houses built on them." Opp'n Br., p. 26, lns. 15-16. That buildings can be developed on land is

not enough of a showing to demonstrate that the Project site is suitable for the Revised Project. For example, in *Carmel Valley View, Ltd. v. Board of Supervisors*, 58 Cal. App. 3d 817 (1976), the agency considered whether or not the development at issue was physically suitable under Section 66474 in light of the project's use of individual sewage disposal systems. *Id.* at 821. In *Markley v. City Council*, 131 Cal. App. 3d 656 (1982), the agency supported its finding of physical suitability with evidence that the project was "compatible with the surrounding ***environmental*** setting." *Id.* at 674 (emphasis added). By contrast, in the case at bar, the City completely fails to address Petitioner' s argument that the site is not suitable because of the Revised Project's traffic impact.

As fully explained above and in Petitioner's Opening Brief, the City has admitted for years that the existing infrastructure at the Arantine Hills site could not sustain the Project's traffic until the Interchange Project was complete. Yet, when the developer came in offering funds to advance the cost of the Interchange Project, the City changed its tune and found that the Interchange Project was not necessary to accommodate the Project's traffic. Indeed, the evidence – accumulated through the long history of the Project and discussed throughout Petitioner's briefing – only points to one conclusion: that the infrastructure needs to be in place prior to filling the dwelling units that are a part of the Revised Project. ***The Developer coming in with extra cash for the City does not change that conclusion***. This is especially true when we consider the Developer is not only failing to guarantee completion of the Interchange Project, it is also deleting 20 traffic mitigation measures from the SEIR. *See* Admin. R. I:17:5962-5965 (deleting numerous traffic mitigation measures).

In the end, Respondents' argument that the Project site is physically suitable simply because homes can be built on land is laughable and entirely without merit. The reality is that, as approved, the Revised Project's dwelling units can be filled without the proper infrastructure in place and any finding that the Project site is suitable for the development has not been supported by substantial evidence.

Finally, Respondents argue that Petitioner interprets Section 66474 incorrectly because "the statute actually contains a list of findings that, if made, allow the City to deny the project . . . ." Opp'n Br., p. 27, lns. 20-22. In this regard, "the City would only deny a tract map if, for example, the City found the 'site not physically suitable for the type of development.'" In other words, Respondents' argument is that the City was not required to make any of the findings under Section 66474. However,

this argument was expressly rejected by the Fourth District Court of Appeal, Division One, in *Spring Valley Lake Association v. City of Victorville*, 248 Cal. App. 4th 91 (2016). In that case, the petitioner argued that the lead agency violated the Planning and Zoning Law because it failed to make affirmative findings under Section 66474 and that failure, *ipso facto*, violated the Planning and Zoning Law. The Court agreed, finding that an agency is required to "***affirmatively address all of the matters covered by Government Code section 66474 before approving the parcel map***." *Id.* at 106 (emphasis added). Thus, there can be no question the City was required to make the findings under Section 66474 prior to approving the Revised Project.

D. The Major Revisions to the Project Required the City to Prepare a Subsequent EIR

As pointed out in Petitioner's Opening Brief, the City violated CEQA when it chose to prepare a supplement to the Original Project's EIR instead of a subsequent EIR. Under the CEQA Guidelines, a lead agency may choose to prepare a supplement to an EIR in lieu of a subsequent EIR where "[o]nly minor additions or changes would be necessary to make the previous EIR adequately apply to the project in the changed situation." CAL. CODE OF REGS., tit. 14, § 15163(a)(1)-(2). Despite CEQA's specifically distinguishing between supplemental and subsequent EIRs, Respondents argue that its labeling of the environmental document is irrelevant. In support of the argument, Respondents rely on *City of Irvine v. County of Orange*, 238 Cal. App. 4th 526 (2015), wherein that Court of Appeal stated that the decision to "proceed by way of a supplemental as distinct from a subsequent EIR is a discretionary one with the lead agency, thus tested under a reasonableness standard. *Id.* at 540-541. What Respondents neglect to mention is that, in that case, the original and revised projects were similar in scope and effect, thereby justifying a supplemental EIR. Specifically, the Court recognized that

> The land affected remains the same. The building configuration is close to the same (a single H-shaped building instead of three complexes with octagonal modules), as are some miscellaneous support buildings and parking structures . . . . [P]lans for a multilevel parking structure were dropped for a less-intensive at-grade design. It appears the biggest change to the actual project qua project as envisioned . . . is dropping 22 acres from direct agricultural use and instead devoting them to open space.

Id. at 540. By contrast, Petitioner submits that (1) the Revised Project's potential for full occupancy prior to completion of the Interchange Project (and Cajalco Bridge), (2) the SEIR's deletion of 20 traffic

mitigation measures, and (3) the SEIR's deletion of 6.5 acres of overall parklands and 13.1 acres of public parklands, constitute the types of significant change that distinguish this case from the minor changes in *City of Irvine*. Accordingly, those changes cannot be addressed in a supplemental EIR, but by a subsequent EIR.

E. Petitioner Did Not Waive Its Claims by Not Citing All of the Evidence in the Record

Respondents argue that Petitioner's arguments regarding the lack of substantial evidence supporting the City's findings are waived because Petitioner has not presented all of the evidence supporting the findings.[3] This argument fails for the simple reason that it presupposes evidence exists supporting the City's findings. It does not. In Petitioner's view, no evidence – let alone substantial evidence – supports the City's findings. Nevertheless, Petitioner cited to evidence relied on by the City to demonstrate its evidence was insufficient. For example, when discussing parkland and recreational impacts, Petitioner pointed out that the City wrongfully relied on the DOF factor in estimating the number of potential residents in the area. With respect to the Planning and Zoning Law, there was simply no evidence supporting Respondents' claim that the Project site is suitable for the Revised Project. Indeed, Respondents' own opposition brief states the Project site is suitable solely because the Revised Project involves buildings which can be placed on land. At any rate, assuming *arguendo* Petitioner did not discuss every piece of evidence in the nearly 18,000-plus page record in its 19-page opening brief, waiver is not mandatory and courts routinely consider the merits in such cases. *See Markley v. City Council*, 131 Cal. App. 3d 656, 673 (1982) ("Despite appellant's omission we have examined the evidence . . . ."; *see also Citizens For A Megaplex-Free Alameda v. City of Alameda*, 149 Cal. App. 4th 91, 113 (2007) ("despite [appellant's] omission and concession, we review the record evidence . . . .").

F. The City Violated the Public's Due Process Rights

Respondents argue Petitioner waived its due process claim because it was not backed by any substantive argument in the Opening Brief. Respondents are wrong. As an initial matter, it must be

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[3] Petitioner notes this argument is irrelevant on the issue of whether the City failed to proceed in the manner required by law, i.e., whether it wrongfully omitted certain information regarding traffic impacts from the SEIR. *See* CODE OF CIV. PROC. § 1094.5(b).

noted that Respondents offer no good reason for why the City held the meeting on the Revised Project on a Thursday instead of its regularly scheduled Wednesday meeting. Instead, Respondents claim the scheduling was merely a coincidence and that Petitioner offers no evidence of someone wanting to attend the meeting who otherwise would have. That argument fails for two reasons. First, the City's decision to hold the meeting at the exact time as two important school events, coupled with its ***only Thursday meeting of 2016***, indicates the timing was anything but coincidental. Second, the record understandably lacks evidence of parents who hoped to attend the City Council meeting but had to attend the school events. If they were at the school events, they naturally didn't show up to speak out against the Revised Project. In this respect, if there is documentation of citizens complaining about the timing of the meeting after it occurred, that documentation was not included in the record because it wasn't before the City Council at the time the Revised Project was approved. As "[o]ur Supreme Court has declined to fix rigid procedures for the protection of fair procedure rights," it is for this Court to decide whether, under these facts, the public's rights were violated. *See Applebaum v. Board of Directors*, 104 Cal. App. 3d 648, 658 (1980).[4]

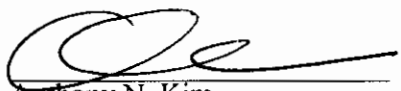
III. CONCLUSION

For all these reasons and those stated in its Opening Brief, Petitioner respectfully urges this Court to order the relief requested in the petition for writ of mandate.

Dated: December 23, 2016.

Respectfully submitted,

BRIGGS LAW CORPORATION

By: 

Anthony N. Kim

Attorney for Plaintiff and Petitioner
CREED-21

[4] To the extent Respondents argue Petitioner doesn't have standing to vindicate the public's right to a fair hearing, Petitioner once again refers to the Supreme Court's recent pronouncement that "where the question is one of public right and the object of mandamus is to procure the enforcement of a public duty, . . . it is sufficient that he is interested as a citizen in having laws executed and the duty in question enforced." *Save the Plastic Bag Coalition v. City of Manhattan Beach*, 52 Cal.4th 155, 167 (2011) (internal citations omitted).

PROOF OF SERVICE

1. My name is **Keri Taylor**. I am over the age of eighteen. I am employed in the State of California, County of **San Bernardino**.

2. My ✓ business ___ residence address is **Briggs Law Corporation 99 East "C" Street, Suite 111, Upland, CA 91786**.

3. On **December 23, 2016**, I served ___ an original copy ✓ a true and correct copy of the following documents: **Petitioner's Reply Brief**

4. I served the documents on the person(s) identified on the attached mailing/service list as follows:

___ ***by personal service.*** I personally delivered the documents to the person(s) at the address(es) indicated on the list.

✓ ***by U.S. mail.*** I sealed the documents in an envelope or package addressed to the person(s) at the address(es) iodicated on the list, with first-class postage fully prepaid, and then I

✓ deposited the envelope/package with the U.S. Postal Service

___ placed the envelope/package in a box for outgoing mail in accordance with my office's ordinary practices for collecting and processing outgoing mail, with which I am readily familiar. On the same day that mail is placed in the box for outgoing mail, it is deposited in the ordinary course of business with the U.S. Postal Service.

I am a resident of or employed in the county where the mailing occurred. The mailing occurred in the city of **Upland**, California.

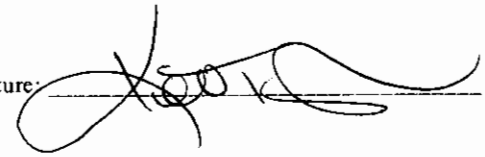
___ ***by overnight delivery***. I sealed the documents in an envelope/package provided by an overnight-delivery service and addressed to the person(s) at the address(es) indicated on the list, and then I placed the envelope/package for collection and overnight delivery in the service's box regularly utilized for receiving items for overnight delivery or at the service's office where such items are accepted for overnight delivery.

___ ***by facsimile transmission***. Based on an agreement of the parties or a court order, I sent the documents to the person(s) at the fax number(s) shown on the list. Afterward, the fax machine from which the documents were sent reported that they were sent successfully.

✓ ***by e-mail delivery***. Based on the parties' agreement or a court order or rule, I sent the documents to the person(s) at the e-mail address(es) shown oo the list. I did not receive, within a reasonable period of time afterward, any electronic message or other indication that the transmission was unsuccessful.

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

Date: **December 23, 2016**

Signature: 

SERVICE LIST

CREED-21, et al. v. City of Corona, et al.

Riverside Superior Court Case No. RIC1607635

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