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11 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
12 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

13 TAXPAYERS FOR RESPONSIBLE LAND	)	Case No. GIC867378
14 USE, et al.,)	
15 Plaintiffs and Petitioners,	)	OPENING BRIEF: PETITIONERS'
16 v.	)	MEMORANDUM OF POINTS AND
17 CITY OF SAN DIEGO, et al.,	)	AUTHORITIES IN SUPPORT OF WRIT OF
18 Defendants and Respondents.	)	MANDAMUS UNDER CEQA
19	)	ASSIGNED FOR ALL PURPOSES TO:
	)	Hon. Linda B. Quinn
)	
20 HILLEL OF SAN DIEGO, et al.,	)	Date: March 1, 2006
21 Real Parties-in-Interest.	)	Time: 1:30 PM
	)	Dept: 74
	)	Action filed: June 12, 2006
)	

22 Petitioners TAXPAYERS FOR RESPONSIBLE LAND USE and LA JOLLA SHORES
23 ASSOCIATION respectfully submit this Opening Brief: Petitioners' Memorandum of Points and
24 Authorities in Support of Mandamus Under CEQA.

25 Dated: January 8, 2007


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La Jolla Shores Association

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I. INTRODUCTION

Petitioners and Plaintiffs TAXPAYERS FOR RESPONSIBLE LAND USE and LA JOLLA SHORES ASSOCIATION (collectively "Petitioners") challenge the CITY OF SAN DIEGO's ("City") approval of HILLEL OF SAN DIEGO's ("Hillel") application to build a 12,100 square foot student center with a 17,000¹ square foot underground parking garage based on a mitigated negative declaration ("MND"). Comments from Petitioners and others establish substantial evidence to support a fair argument the Project may have a number of significant environmental impacts, including, but not limited to: biology, parking, traffic, aesthetics. In addition, the record demonstrates the City requested a biologist report be altered to suppress expert evidence of potential significant impacts to raptors (birds of prey). The responses to comments were so inadequate the City utterly failed "to demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its action." *No Oil, Inc. v. Los Angeles*, 13 Cal. 3d 68, 86 (1974). Finally, twenty-four new mitigation measures were added after the close of public comment without recirculating the MND.

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II. STATEMENT OF FACTS

The project at issue, entitled "Hillel of San Diego," has two phases. (1 AR 1.) Phase I is the continued use of a residence as an office for Hillel in violation of zoning. (1 AR 65; 18 AR 7733.) Phase II is the construction of a 12,100 square foot Hillel Student Center with a 17,000 square foot subterranean garage (hereinafter "Project"). (1 AR 65.) The Project is proposed to be located on what is commonly known as Site 653, a triangular lot bounded to north by La Jolla Village Drive, to the east by La Jolla Scenic Way and to the south by La Jolla Scenic Drive North. (1 AR 65, 309, 310.) The lot is directly across La Jolla Village Drive from UCSD. (4 AR 1404, 1432, 1570.) Single family residences are located to the south of the project and town-houses and a single family residence lie directly east of the Project. (17 AR 7369-7375; 18 AR 7759-67.) The area immediately to the east drops off 14 - 16 feet below the grade level of Site 653. (2 AR 673, 6 AR 2161, 10 AR 3960, 12 AR 5176; 18 AR 7760.)

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In May of 2003, the City prepared the Initial Study for the Project. (2 AR 625.) The City identified only two potential impacts: parking and paleontological resources. (2 AR 612 and 613.)

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¹The 17,000 sq. ft. garage was for 40 spaces. The City increased the on-site parking to 68 spaces, requiring a significant increase in the size of the underground garage.

1 Based on Hillel's traffic study arguing only 38 students would drive to Friday Shabbat Services, the
2 original initial study discussion stated only 40 on-site parking spaces would be sufficient parking for the
3 Project, with 75 additional off-site spaces required for occasional special events. (2 AR 572, 594.)
4 Later, the parking was changed to include 27 off-site spaces for Shabbat based on the Hillel's assertions
5 that the Project would have only 200 removable seats, (1 AR 77; 2 AR 594), despite the Project being
6 large enough to hold 600-900 people (2 AR 674; 5 AR 1861; 6 AR 2309; *See also* 16 AR 6638-42
7 (describing how to determine occupancy loads).) The initial study also noted that the project would
8 result in the direct loss of 12-15 parking spaces. (2 AR 594.) There is no mitigation for the loss of these
9 on-street parking spaces.

10 The draft MND was circulated on September 1, 2004. (17 AR 7194.) The comment period for
11 the draft MND was open until October 1, 2004. (*Id.*) The City received substantial comments on the
12 draft MND. (2 AR 669-899.) The City responded to comments and prepared a final MND. (1 AR 334
13 to 2 AR 567.) The final MND was again revised after the Planning Commission hearings. (1 AR 65.)
14 However, the MND was never re-circulated and no further responses were prepared in response to the
15 hundreds of comments received after October 1, 2004. (*In passim.*)

16 Every planning group that reviewed the Project recommended denial. On January 18, 2005 the
17 La Jolla Planned District Advisory Board recommended denial of the Project. (4 AR 1430.) On
18 February 3, 2005, the La Jolla Community Planning Group voted 10-2 to deny the Project. (12 AR
19 5277.) On February 24, 2005, the City of San Diego Planning Commission unanimously recommended
20 denial of the Project. (4 AR 1430.) Even the University City Planning Group, which the Project was not
21 before, felt the Project may have significant impacts in its planning area. (8 AR 3122-23, 13 AR 5357.)

22 The primary environmental concerns of the vast majority of the citizens and the planning groups
23 concerned: 1. The size, bulk and neighborhood compatibility of the Project (aesthetics); 2. Parking, and;
24 3. Traffic. (2 AR 674, 683, 676, 683-84, 4 AR 1430-1431; 12 AR 5276-77.) In addition, citizens
25 complained of potential noise impacts, biological impacts, construction impacts and numerous other
26 potential problems. (2 AR 689, 771, 805, 817, 853, 870, 896; 13 AR 5526.) Cumulative impact were
27 also brought up by the community. (13 AR 5391-92.) There were also complaints that the City's
28 responses to comments were inadequate. (6 AR 2190; 13 AR 5512.)

1 On May 9, 2006, the City Council considered the Project. (4 AR 1649.) After the close of public
2 comment, the City adopted twenty-four conditions proposed by the Mayor. (4 AR 1669-73; 5 AR 1850.)
3 The MND was not re-circulated to permit public comment on the additional mitigation measures. The
4 City Council certified the MND and approved the Project. (1 AR 1-2.)

5 III. STANDARD OF REVIEW

6 “The legislature intended [CEQA] to be interpreted in such manner as to afford the fullest
7 possible protection to the environment within the reasonable scope of the statutory language.” *Friends*
8 *of Mammoth v. Bd. of Supervisors*, 8 Cal. 3d 247, 259 (1972). The Environmental Impact Report (EIR)
9 is described as the heart of CEQA. *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 83 (1974).
10 Therefore, there is a low threshold for requiring an EIR. *Id.* at 84. CEQA requires an agency to prepare
11 an EIR whenever the proposed project “may have a significant effect on the environment.” Pub. Res.
12 Code §§ 21080(d), 21100 & 21151. “[T]he preparation of an EIR [is required] whenever it can be *fairly*
13 *argued* on the basis of substantial evidence that the project *may have* significant environmental
14 impacts.” *No Oil*, 13 Cal. 3d at 75 (emphasis added). “‘May’ means a reasonable possibility.” *Pocket*
15 *Protectors v. Sacramento*, 124 Cal. App. 4th 903, 927 (2004). Doubts as to whether there is a significant
16 impact should be resolved in favor of preparing an EIR. *League for Protection of Oakland’s*
17 *Architectural and Historical Resources v. City of Oakland*, 52 Cal. App. 4th 896, 905 (1997).

18 “If there was substantial evidence that the proposed project might have a significant
19 environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with
20 preparation of an EIR.” *Friends of “B” Street v. City of Hayward*, 106 Cal. App. 3d 988, 1002 (1980).
21 “‘Substantial evidence’... means enough relevant information and reasonable inferences from this
22 information that a fair argument can be made to support a conclusion, even though other conclusions
23 might also be reached.” 14 CCR 15384. “Substantial evidence includes fact, a reasonable assumption
24 predicated upon fact, or expert opinion supported by fact.” Pub. Res. Code § 21080(e)(1). “Substantial
25 evidence is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly
26 inaccurate or erroneous.” Pub. Res. Code § 21080(e)(2).

27 While “substantial evidence” may be tendered by an expert, “[I]nput from non-experts can be
28 substantial evidence where such input is credible and does not purport to embody analysis that would

1 require special training.” Remy et al., GUIDE TO THE CAL. ENVIRONMENTAL QUALITY
2 219. For example, adjacent property owners may testify to traffic conditions based up
3 knowledge. *Citizens Association for Sensible Dev. of Bishop Area v. County of Inyo*, 112 Cal. App. 3d
4 151, 173 (1985); *Oro Fino Gold Mining Corp. v. County of El Dorado*, 225 Cal. App. 3d 872, 883
5 (1990). Personal observations of wildlife constitutes substantial evidence. *Mejia v. City of Los Angeles*,
6 130 Cal. App. 4th 322, 339 (2005). Personal observations about noise from similar projects can
7 constitute substantial evidence. *Oro Fino Gold Mining Corp.*, at 882. “[A] decision not to require an
8 EIR can be upheld only when there is no credible evidence to the contrary.” *Quail Botanical Gardens*
9 *Foundation, Inc. v. City of Encinitas*, 29 Cal. App. 4th 1597, 1602 (1994) (quoting *Sierra Club v.*
10 *County of Sonoma*, 6 Cal. App. 4th 1307 (1992)).

11 Finally, it is the lead agency’s, not the public’s duty to conduct the proper studies. *Sundstrom v.*
12 *County of Mendocino*, 202 Cal. App. 3d 296, 311 (1988). As discussed in *Sundstrom*

13 The agency should not be allowed to hide behind its own failure to gather relevant data...If the
14 local agency has failed to study an area of possible environmental impact, a fair argument may be
15 based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope
16 of fair argument by lending a logical plausibility to a wider range of inferences. (Id.) (citations
omitted).

17 “One major purpose of an EIR is...to demonstrate to an apprehensive citizenry that the agency has in fact
18 analyzed and considered the ecological implications of its action.” *No Oil*, 13 Cal. 3d at 86. Failing to
19 study potential impacts identified by the public frustrates the major policy goals of CEQA. 14 CCR 15003

20 IV. ARGUMENT

21 1. BIOLOGICAL RESOURCES

22 A. The Record Demonstrates the City of San Diego Intentionally Suppressed a Biologist’s Report Identifying Evidence the Project May Have a Significant Impact on Raptors.

23 Upon reviewing the application for the Project, the City staff determined Hillel would have to
24 provide a biological survey of Site 653 because the Project potentially impacted biological resources.
25 (18 AR 7600.) Hillel submitted a study prepared by its biological consultant, RECON, dated September
26 25, 2003. (Id.) Although the record does not have a copy of the September 25, 2003 biological survey,
27 an email from the City’s Development Project Manager, Laura Black, demonstrates the biologist felt that
28 there were potential raptor (ie. hawks and falcons) nests at the Project site. (16 AR 6702.) The biologist

1 recommended a focused raptor survey be conducted prior to clearing eucalyptus trees, and construction
2 activities be limited to September 1 through January 31st. (Id.)

3 Laura Black directed Hillel to request RECON to revise the report before public review. (Id.)

4 Mrs. Black warned:

5 As you are aware, the public is very interested in this project and all technical reports can be
6 reviewed/copied by the public. That being said, a revised biology report is necessary for
7 consistency with the City's determination that no mitigation is required for biological resources
(raptors). (16 AR 6702.)

8 Laura Black's email is direct evidence the City's process was focused on a predetermined finding
9 of no significant impact, instead of a neutral process to determine whether an EIR should be prepared.
10 As discussed in the RECON report that was released, "The loss of an active raptor nest by removal of a
11 tree or the abandonment of an active nest due to construction activity would be considered a significant
12 impact." (3 AR 1110.) Requesting the biologist to alter his report to remove evidence of a potentially
13 significant impact is fraud on the public. Based on this evidence alone, the MND should be rescinded.

14 Furthermore, the City ignored substantial evidence presented by a neighbor whose kitchen
15 window overlooks Site 653. (2 AR 817.) The neighbor states, "I frequently see hawks and peregrine
16 falcons on the four eucalyptus trees where Ms. Black denies their presence." (2 AR 817.) She notes
17 that Site 653 is "gopher heaven...no wonder raptors perch on the tree in that area." (Id.) Clearly,
18 observations from her kitchen window on a daily basis are more accurate than a biologist who surveyed
19 Site 653 one afternoon on July 25, 2003. (2 AR 820; 3 AR 1108.) Such personal observations of
20 wildlife constitute substantial evidence there may be a significant impact on biological resources.
21 *Mejia*, 130 Cal. App. 4th at 339.

22 2. PARKING

23 A. The Project is Severely Deficient of Parking, because it Requires, at Least, 135 Parking 24 Spaces Under the Municipal Code but can only Accommodate 68 Parking Spaces On-Site.

25 The City initially determined the Project only needed 40 on-site parking spaces for Friday Night
26 Shabbat, and 115 (40 on-site and 75 off-site) spaces for special events. (2 AR 571.) The Projects'
27 parking was based on Hillel's parking study which asserted a majority of student visitors would park in
28 lot P-102 at UCSD and walk to the Hillel Center. (3 AR 1133, 1137.) The initial study recognized, but

1 downplayed, the increased competition for parking in the neighborhood, stating, "It is reasonable to
2 assume that a relatively small number of vehicles will park on nearby streets even if there are spaces on
3 the site. This spillover could be accommodated along the roadways adjacent to the site." (2 AR 571.)

4 Hillel's traffic and parking study was roundly criticized by UCSD's Community Planner, who
5 found the survey failed to provide an accurate portrayal of parking availability at Lot P-102. UCSD's
6 planner noted "[T]he three dates when [parking] surveys were performed that the La Jolla Playhouse was
7 not in performance." (2 AR 886.) Based on the planner's expert knowledge, "A survey on a La Jolla
8 Playhouse or Theatre Department performance evening would reveal very few, if any available spaces."
9 (2 AR 887.) UCSD's planner also noted the Theatre Department and La Jolla Playhouse held
10 performances on Friday and Saturday night 34 weeks of the year, including on major Jewish holy days.

11 The calculations for traffic and parking were also criticized by the Petitioners who pointed out
12 the calculation did not comply with the Municipal Code requirement of three parking spaces for each
13 fixed seat or thirty parking spaces per 1,000 square feet of assembly area. (SDMC table 142-05F, 6 AR
14 2410.) Thus, depending how one calculates the "assembly area" the Project requires anywhere from
15 135 to 187 to 272 spaces. (1 AR 20; 2 AR 674.) The City at the final hearing determined the proper
16 amount of parking under the Municipal Code was 135 parking spaces for Shabbat and 143 parking
17 spaces for special events. (1 AR 20.) However, the architect stated the Project cannot provide more than
18 68 on-site parking spots. (Id.) Thus, the Project is severely deficient in available parking.

19 The City attempts to mitigate the deficient parking by requiring Hillel obtain the remaining
20 parking spaces, off-site, through "shared parking agreements," despite the fact the Municipal Code
21 specifically prohibits shared parking agreements in single unit residential zones. (SDMC § 142.0545(a);
22 7 AR 2505.) The Planned Development Permit ("PDP") requires Hillel provide sixty seven (67) off-site
23 parking spaces through shared parking agreements for weekly Shabbat services, and seventy five (75)
24 off-site parking spaces for occasional special events. (1 AR 29-30.) The PDP also require a shuttle
25 between the off-site parking location(s) and the Hillel Center. (1 AR 30.) One of the conditions of the
26 PDP is to "advise visitors to the Center on Friday night Shabbat and during occasional Special Events
27 not to park in the neighborhood." (1 AR 35.)

28 Regardless of these mitigation measures, there is a fair argument based upon personal

1 observations and independent newspaper reports concerning similar shared parking agreements that the
2 Project may still cause a significant impact on parking in the neighborhood. Further, because neither the
3 MND, PDP or Mitigation Monitoring Report Plan (“MMRP”) indicates the location of the off-site
4 parking, the City lacks substantial evidence the off-site parking will “mitigate the effects on the
5 environment to a point where clearly no significant effect on the environment would occur.” 14 CCR
6 15064(f)(2). Finally, the City improperly defers future mitigation of parking based on future studies.

7
8 **B. The Community Provided Substantial Evidence the Hillel Student Center would
Adversely Impact Parking Regardless of the Mitigation Measures.**

9 The community is justifiably skeptical about willingness of Hillel students to bypass parking
10 places in the neighborhood and take a shuttle from “far-flung” parking lots. (2 AR 686.) The lack of
11 effectiveness of other shared parking arrangements has been personally witnessed within the
12 neighborhood. Temple Adat Yeshurun, one of the local Orthodox Jewish temples, is supposed to have a
13 shared parking agreement with Torrey Pines Christian Church. (2 AR 868.) Despite such shared parking
14 agreement, and the fact that Orthodox Jews are not supposed to drive on Sabbath or high holy days, the
15 congregation regularly parks in the neighborhood. (2 AR 866.) Attempts to prevent congregants from
16 parking in the neighborhood have proven ineffective. During a September event at the Temple Adat
17 Yeshurun, the temple hired six people to monitor parking and direct people to the off-site parking. (2 AR
18 736.) Much of the congregation simply parked in the neighborhood anyway.

19 Criticism of the off-site parking plan is further supported by an article in the Union Tribune
20 which reports that a shared parking agreement for Thomas Jefferson School of Law is completely
21 ineffective at mitigating parking impacts on the local neighborhood. (13 AR 5560; *See also*, 13 AR
22 5297 (referring to the article) .) The Union Tribune article describes how on-street parking is completely
23 occupied by law students despite Thomas Jefferson’s leasing of 60 parking spaces at a parking lot 1/4
24 mile away, and paying students \$5 per day to park there for free. (13 AR 5561.)

25 Personal observations by neighbors of a similarly ineffective off-site parking arrangement and the
26 Union Tribune article regarding Thomas Jefferson’s parking problems, constitutes substantial evidence
27 to support a fair argument the Project may have a significant impact on parking regardless of a shared
28 parking agreement. *See, Oro Fino Gold Mining Corp.*, 225 Cal. App. 3d at 883 (“substantial evidence

1 based on personal observations.) The City must prepare an EIR.

2 **C. The City lacks substantial evidence off-site parking will clearly mitigate parking**
3 **impacts because it does not know where the off-site parking will be located.**

4 There is nothing in the Initial Study, PDP, MND, MMRP, Resolutions or Findings indicating the
5 location of the off-site parking. Even the draft Transportation Demand Management Plan (TDMP) fails
6 to identify the location of the off-site parking. (11 AR 4388; 13 AR 5300.) Without identifying the
7 permanent location for off-site parking, the City lacks substantial evidence that the offsite parking
8 mitigation measures will “mitigate the effects on the environment to a point where clearly no significant
9 effect on the environment would occur.” 14 CCR 15064(f)(2).

10 The importance of the location for the off-site parking was pointed out in numerous comments.
11 (2 AR 683, 687, 698, 730, 734; 6 AR 2266, 2395; 13 AR 5300, 5302, 5358.) However, there is no
12 requirement in the PDP for the off-site parking to be convenient, close-by, safe, lighted, or even paved.
13 Obviously, the more remote and inconvenient the location, the less likely visitors to Hillel will use the
14 off-site parking. As currently conditioned, the off-site parking could be located 1/4 mile, 1 mile, or 5
15 miles or more away. The off-site parking could even, theoretically, be located in Pacific Beach,
16 Qualcomm Stadium or even El Cajon. Furthermore, the impact of 75 additional cars seeking parking at
17 certain locations may have significant impacts on its own. (See 13 AR 5300, 5302, 5358 (objecting to
18 potential off-site parking at the La Jolla Corporate Center).)

19 Requiring off-site parking to be to the satisfaction of the City engineer is not sufficient under
20 CEQA. (1 AR 18.) “[T]he CEQA process demands that mitigation measures timely be set forth, that
21 environmental information be complete and relevant, and that environmental decisions be made in an
22 accountable arena.” *Oro Fino Gold Mining Corp.*, 225 Cal. App. 3d at 885. The City engineer cannot
23 make such a crucial decision. A permanent location for the off-site parking is a necessary pre-condition
24 before the City can even make a colorable argument the off-site parking plan is effective mitigation.

25 The failure of the MND, PDP or MMRP to identify a permanent location for off-site parking is
26 fatal to the City’s claim it mitigated the Project’s impacts to parking. *Topanga Asso. for Scenic Cmty. v.*
27 *County of L.A.*, 11 Cal. 3d 506, 515 (1974)(“Findings [must] bridge the analytical gap between the raw
28 evidence and ultimate decision”). Without a location for the off-site parking, the City lack substantial.

1 evidence the shared parking agreement(s) “mitigate the effects to a point where clearly no significant
2 effect on the environment would occur.” Pub. Res. Code § 21080(c)(2); 14 CCR 15064(d)(2).

3 **D. The City Improperly Deferred Proper Study and the Imposition of Mitigation of**
4 **Parking Impacts into the Future.**

5 Part of the mitigation required by the permit is to prepare a Transportation Demand Management
6 Plan (TDMP). As noted in the Planned Development Permit:

7 The TDM Plan shall include the following:

8 c. Annual post-occupancy parking demand study shall be conducted by Hillel for
9 Shabbat services and occasional special services for three years after the facility becomes
10 operational, satisfactory to the City Engineer. If post occupancy study indicates a need
11 for additional off-site parking, then Hillel shall secure the additional parking spaces,
12 satisfactory to the City of San Diego. If post occupancy study indicates that Hillel has no
13 need for the required off-site parking spaces, then those spaces do not need to be
14 provided. The parking demand study should also include an annual summary of the type
15 and frequency of the events that take place at Hillel’s facility. **The parking demand
16 study should also monitor the use of the on-street parking in the vicinity of the
17 project and eliminate any adverse impact of the project on the on-street parking.**

18 (1 AR 133 (Condition 57))(emphasis added.)

19 There are two basic problems with this mitigation measure. First, it demonstrates the City
20 believed that there may be a significant adverse impact to on-street parking, and secondly, such
21 mitigation measure improperly defers mitigation based on future studies. “The requirement that the
22 applicant adopt mitigation measures recommended in a future study is in direct conflict with the
23 guidelines implementing CEQA.” *Sundstrom*, 202 Cal. App. 3d at 306 (citing 14 CCR 15070).

24 A mitigated negative declaration is only appropriate when there is no substantial evidence in light
25 of the whole record, that the project may have a significant effect on the environment. Pub. Res. Code §
26 21080(c)(1). If there may be an impact, revisions or mitigation measures may be adopted by the lead
27 agency or the applicant to mitigate the impacts to a point where clearly no significant effect on the
28 environment would occur. Pub. Res. Code § 21080(c)(2) (emphasis added).

In this case, it is impossible to reconcile a requirement for future study and mitigation of such
potential impact with CEQA’s requirement to prepare an EIR whenever there may be a significant
impact on the environment. Clearly, a fair argument was made if the City is requiring a post occupancy

1 study and “eliminate any adverse impact of the project on the on-street parking,” discovered by the
2 study. Requiring future mitigation based on future study is an admission by the City that there may be a
3 significant unmitigated impact to parking in the neighborhood.

4 There is one case that upheld future mitigation based on future studies of parking plans.
5 *Sacramento Old City Assn. v. City Council*, 229 Cal. App. 3d 1011, 1026 (1991). In *Sacramento Old*
6 *City Assn*, the court upheld an environmental impact report which mitigated parking based on a
7 transportation management plan. The court found that the list of alternatives, and a commitment to
8 mitigate the parking using one of the alternatives, complied with CEQA. *Id.* at 1028. However, the
9 Court was very careful to distinguish the *Sundstrom* case, noting that unlike *Sundstrom*, where an MND
10 was used, “the City in the present case acknowledged traffic and parking have the potential, particularly
11 under the worst case scenario, of causing serious environmental problems. The City did not minimize or
12 ignore the impacts in reliance on some future parking study.” *Sacramento Old City Assn.*, 229 Cal. App.
13 3d at 1028; *See also* the City Attorneys’ Analysis (12 AR 5020.)

14 Unlike *Sacramento Old City Assn.* case, the City is ignoring the possibility that the “shuttle plan”
15 may not effectively mitigate impacts on parking. Considering the City does not even know where the
16 off-site parking will be located on a permanent bases, whether the off-site parking location may have its
17 own significant impacts, and whether enforcement will be successful, there is a fair argument there may
18 be a significant impact to on-street parking. The City must prepare an EIR.

19 3. TRAFFIC

20 A. The Traffic Study Failed to Evaluate the Impacts Caused by Pedestrians Crossing La 21 Jolla Village Drive.

22 According to Hillel’s traffic and parking study, “The project is designed to encourage pedestrian
23 access.” (3 AR 1138.) The study estimates that only 38 students will drive to the site for Shabbat
24 services. (3 AR 1136.) In addition, the study estimates 2 students for each vehicle. (3 AR 1134.) Thus,
25 assuming full occupancy for Shabbat services of 200 students, 40 of which drive with one other student
26 (80 total), 120 students will be walking to or from the Hillel Center on Friday night between 5:30 and
27 7:30 p.m.. According to the traffic study, these students will be coming from UCSD. (3 AR 1136-37.)
28 Thus, potentially 120 students will push the walk signal to cross La Jolla Village Drive.

1 As pointed out in the comments, “the traffic analysis...does not take into account any increase in
2 pedestrian traffic crossing La Jolla Village Drive from UCSD to use the student center. This would
3 affect traffic because when the ‘walk’ lights are used, the period of ‘red’ for vehicles is substantially
4 lengthened.” (2 AR 829-30; 4 AR 1679; *See also* 11 AR 4536.) Thus, not only will the red light be
5 triggered a number of extra times during rush hour on Friday night, the light will remain red for longer.

6 The traffic impacts caused by walk signals is common knowledge. It does not take a traffic
7 engineer to opine that pushing the walk signal an extra 100 times between 5:30 and 7:30 p.m. on a
8 Friday night may have a significant impact on traffic. It is the duty of the City to prepare the proper
9 studies, not the public’s. *Sundstrom*, 202 Cal. App. 3d at 311. The City cannot ignore such
10 uncontradicted evidence. *Citizens Assn. for Sensible Development of Bishop Area*, 172 Cal. App. 3d at
11 173. Considering Hillel’s own traffic expert opined the majority of student would walk to the Hillel
12 Center from UCSD, the community made a fair argument based on substantial evidence the increase in
13 pedestrian traffic may cause a significant environmental impact.

14 4. AESTHETICS

15 A. The Community Made a Fair Argument that There are Significant Impacts on 16 Aesthetics Caused by the Scale, Size and Bulk of the Project.

17 CEQA specifically seeks to protect the aesthetic quality of the environment. Pub. Res. Code §
18 21002(b). No special expertise is required to establish aesthetic impacts and the opinions of area
19 residents, if based on direct observation, may constitute substantial evidence. *Pocket Protectors v. City*
20 *of Sacramento*, 124 Cal. App. 4th 903, 937 (2004).

21 Almost every person who opposed the Project, objected to the lack of community compatibility
22 of Project. Site 653 is currently open space and is surrounded by single family residences. The City
23 dismissed the communities concerns arguing the Project was only 21 feet in height and “The proposed
24 student center meets all of the requirements for the zone in which it is located” (1 AR 83, 88, 252, 254;
25 2 AR 584.) However, a finding of compliance with a zoning code is not sufficient under CEQA . The
26 City must still determine whether there may be a significant impact to aesthetics, despite complying with
27 a legislative standard. *Communities for a Better Environment v. California Resources Agency*, 103 Cal.
28 App. 4th 98, 113 (2002).

1 The Project is grossly out of scale for the surrounding community. The 12,100 square foot
2 Project spans three potentially buildable lots. (10 AR 3967; 13 AR 5374.) It is four to six times larger
3 than the neighboring homes, which average in the range of 2,000 - 3,000 square feet. (2 AR 854, 870.)
4 Furthermore, to accommodate the Project, the City must vacate a portion of the La Jolla Scenic Drive,
5 more than doubling the size of Site 653. (12 AR 5225.) In addition, there are single family homes
6 directly south of Site 653 and a mix of single family homes and town-homes directly to the east. (2 AR
7 673; 18 AR 7759-67.) Thus, the Project is substantially larger than any of the surrounding structures.

8 To make matters worse, although the Project will be 21 feet high from finished grade, because
9 there is a significant slope, the Project will tower 38 to 44 feet above the homes to the east. (6 AR 2161;
10 13 AR 5503.) This is especially disturbing considering the patio on the north-east corner of the Project
11 will overlook bedrooms, living rooms and backyards. (13 AR 5505.) In addition, the Project will block
12 scenic views of the mountains. (2 AR 820.)

13 Finally, at various times, the Site 653 was proposed to be developed as a small pocket park. (6
14 AR 2119-20; 16 AR 6691.) While the City may no longer be considering the site for a pocket park does
15 not take away from the fact that Site 653 serves as a gateway and buffer from UCSD and La Jolla
16 Village Drive and marks the transition between UCSD and the residential community. (6 AR 2253; 16
17 AR 6540.) Thus, the aesthetic impact of the Project is very important to the community.

18 Furthermore, the Planning Commission also denied the Project based on its incompatibility with
19 the neighborhood. (5 AR 1945.) "It is undisputed that members of the planning commission are
20 experienced in matters of planning and development." *Stanislaus Audubon Society, Inc. v. County of*
21 *Stanislaus*, 33 Cal. App. 4th 144, 155 (1995). The Planning Commission's unanimous rejection of the
22 Project based on its incompatibility with the neighborhood should be considered expert opinion
23 supporting a fair argument the Project may have a significant impact on aesthetics. The Public's
24 comments and the votes of all the community planning groups including the City's Planning
25 Commission, constitute substantial evidence to support a fair argument the Project may have a
26 significant impact on aesthetics.

27 **5. PROCEDURE**

28 **A. The Responses to Comments Demonstrate the City Ignore Substantial Evidence of**

1 **Significant Impacts.**

2 The lead agency must consider all comments on significant environmental issues received on a
3 negative declaration. Pub. Res. Code § 21091. While CEQA does not expressly require a specific
4 response to comments in a negative declaration, failure to adequately respond demonstrates a lack of
5 consideration of potential impacts. As discussed in the context of EIR's, responses to comments
6 maintain "the integrity of the process of decision by precluding stubborn problems or serious criticism
7 from being swept under the rug." *Cleary v. County of Stanislaus*, 118 Cal. App. 3d 348, 357 (1981).

8 The City's responses on a whole range of issues were either non-responsive, inadequate or
9 inaccurate. For example, one comment stated, "the traffic analysis...does not take into account any
10 increase in pedestrian traffic crossing La Jolla Village Drive from UCSD to use the student center. This
11 would affect traffic because when the 'walk' lights are used, the period of 'red' for vehicles is
12 substantially lengthened." (2 AR 829-30.) The City's response to this comment was: "This comment
13 addresses the merits of the project, not the accuracy or the adequacy of the MND. No comment is
14 necessary." (1 AR 229 referring to 1 AR 78.) Obviously, commenting on the failure to analyze a
15 potential impact does address the accuracy and adequacy of the MND. The City simply did not wish to
16 consider impact from pedestrians, because it would demonstrate an unmitigable impact requiring an EIR.

17 Similarly, UCSD's Community Planner pointed out the parking survey of Lot P-102 was
18 conducted during "three dates...that the La Jolla Playhouse was not in performance." (2 AR 886.)
19 UCSD's Planner identified the numerous conflicts between Hillel's use of P-102 and the current and
20 future theatres at UCSD. (1 AR 287.) UCSD's Planner concludes, "A survey on a La Jolla Playhouse or
21 Theatre Department performance evening would reveal very few, if any available spaces." (2 AR 887.)

22 Such comment from an expert presenting direct evidence disputing the validity of the traffic and
23 parking study should have been giant red flag for the City. The City should have immediately required
24 an independent parking and traffic study, or prepared another study themselves. Instead, the response of
25 the City was "comment noted" and to simply refer to the MND's parking requirements. (1 AR 287; 1
26 AR 77.) The City failed to consider the significance of the comment: either theatre patrons will be
27 displaced and will park in the neighborhood, or Hillel Students will park in the neighborhood.

28 Sue Moore, one of the Petitioners' members, identified potential construction impacts:

1 Environmental analysis does not consider the impact of dust, noise pollution, and construction
2 parking, vehicle emissions and so on for a project of this magnitude in such a confined heavily
3 parked area. Please provide factual details of the construction timeline, vehicular access,
4 employee parking agreements (there is no room left in the daytime in this area)...and the number
of haulage trips to remove the low estimate of 5,950 cubic yards of materials. (2 AR 853; *See*
also, 2 AR 689 (“night construction and traffic impacts”); 2 AR 764 (“construction noise”).)

5 The Project is a huge, consisting of over 29,000 square feet of new construction, with over 7,000
6 cubic yards of soils to be excavated, directly across from single family homes. The noise, dust and
7 inconvenience of major construction is well within the experience of most people. There is a fair
8 argument based upon substantial evidence construction impacts will be a significant impact.

9 The City’s response to this comment was, “Construction timetable is not appropriate CEQA
10 mitigation. The construction will be in conformance with regulations within the Land Development
11 Code.” (1 AR 253 referring to 1 AR 159.) Such response is entirely non-responsive, and fails to rebut a
12 fair argument that construction impacts are not mitigated. What part of the Land Development Code
13 mitigates traffic impacts caused by 700 + round trips by dump trucks (assuming 10 cubic yard dump
14 trucks)? What is the mitigation for the impacts caused by dust (air quality) from excavating more than
15 7,000 cubic yards of soil? How long are these impacts going to last? Two years? Referring simply to
16 the Land Development Code fails to establish the significant impacts caused by construction have been
17 considered and mitigated. The community has a right to know how the City proposes to mitigate the
18 clanking of heavy machinery, the rattle of jack hammers, the loss of street access, the nuisance of
19 airborne dust, and the nuisance of construction at night. (1 AR 68-69 (discussing night work).)

20 The most outrageous responses concerns biological resources. Penelope Bourke, whose kitchen
21 window overlooks site 653, states, “I frequently see hawks and peregrine falcons on the four eucalyptus
22 trees where Ms. Black denies their presence.” (2 AR 817.) In her comments, she cites to and attaches an
23 email from the City’s Project Manager, Ms. Black, to Hillel which states “As you are aware, the public is
24 very interested in this project and all technical reports can be reviewed/copied by the public. That being
25 said, a revised biology report is necessary for consistence with the City’s determination that no
26 mitigation is required for biological resources (raptors).” (2 AR 817.) The City’s response to such
27 information ranges from “The biological report has been revised [sic] sent to the author of the letter
28 along with the Final MND” to “The biological resources report was revised to eliminate the need for a

1 raptor survey. Therefore, no significant impacts to biological resources were identified.” (1 AR 216.)
2 Such response is not only inadequate, it demonstrates the City’s desire to “sweep environmental
3 problems under the rug.” *Cleary*, 118 Cal. App. 3d at 357.

4 On the whole, the responses to comments utterly fail “to demonstrate to an apprehensive
5 citizenry that the agency has in fact analyzed and considered the ecological implications of its action.”
6 *No Oil*, 13 Cal. 3d at 86. In fact, the responses were so inadequate, illogical, and non-responsive, they
7 actually increased the apprehension of the public and demonstrate a fair argument has been made.

8 **B. The Twenty-Four Additional Mitigation Measures Required Recirculation of the MND.**

9 The Initial Study only demonstrated a token observance of CEQA and fails to identify the source
10 or content of the data relied upon for its findings of no significant impacts. *Sundstrom*, 202 Cal. App. 3d
11 305-306. The project underwent numerous changes after the release of the MND. In particular, after
12 close of public comment, the City added twenty-four mitigation measures to the Project. (4 AR 1669-
13 73.) Such measures included limits on occupancy, amplified music. hours of operation, and an increase
14 in the size of the garage to 68 parking spaces. (4 AR 1669.) The City found the mitigation measures
15 complied with CEQA because the mitigation measures mitigate the impacts as well or better than the
16 previous mitigation measures and do not cause any additional impacts. (1 AR 55.)

17 First, the MND still fails to identify the location of the parking, and fails to mitigate pedestrian
18 traffic, aesthetics or construction impacts. Furthermore, once substantial evidence is presented to
19 support a fair argument there may be a significant impact, the City cannot simply impose new mitigation
20 measures without recirculating the MND. *Gentry v. City of Murrieta*, 36 Cal. App. 4th 1359, 1411-12
21 (1995). The City’s failure to recirculate the MND constitutes an abuse of discretion under CEQA.

22 **V. CONCLUSION**

23 The City’s basic strategy throughout the MND process was to ignore and avoid discussions of
24 impacts. In fact, the record demonstrates an effort to suppress evidence of potential impacts. The City
25 requested a revision of the biology report and ignored direct expert evidence the traffic and parking study
26 was inaccurate. Despite such efforts, community activists thoroughly analyzed the Project and identified
27 potential impacts in comments provided to the City. The community provided a fair argument the
28 Project may have a significant impact on the environment.