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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

TAXPAYERS FOR RESPONSIBLE LAND USE et al.,

Plaintiffs and Petitioners,

v.

CITY OF SAN DIEGO et al.,

Defendants and Respondents.

HILLEL OF SAN DIEGO et al.

Real Parties-in-Interest.

No. GIC867378

RESPONDENTS' AND REAL PARTY-IN-INTEREST'S CONSOLIDATED BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS UNDER CEQA

Date: March 1, 2007
Time: 1:30 p.m.
Dept: 74

ASSIGNED FOR ALL PURPOSES
TO: *Hon. Linda B. Quinn*

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I. INTRODUCTION

Petitioners widely miss the mark with each attack they raise against Hillel of San Diego's ("Hillel") acquisition of Site 653. Because Site 653 is adjacent to and within walking distance of the University of California at San Diego ("UCSD") campus, Hillel identified it as the ***only site*** available to construct its long-standing vision – a religious center for Jewish students attending UCSD. On May 9, 2006, after more than six years of project planning, design review, research studies, city review processes, litigation,[1] negotiation and extensive public comment, Hillel obtained the San Diego City ("the City") Council's approval, on a 6-2 vote, of the Hillel Project. The Council certified Mitigated Negative Declaration ("MND") No. 6098, adopted a Mitigation Monitoring Program and imposed additional "good-neighbor" conditions generated by Hillel's willingness to work with its neighbors and appease all community concerns. (AR 01669-73.)

Petitioners now challenge the City's actions and allege the City should have prepared an Environmental Impact Report ("EIR") because substantial evidence exists to support a fair argument that the Project may significantly impact traffic, parking, aesthetics, and biological resources. But petitioners fail to show a fair argument because they rely solely on conclusory, argumentative, speculative and unsubstantiated neighborhood-resident opinions. Such opinions do not constitute "substantial evidence" under California's Environmental Quality Act ("CEQA") and thus do not support a fair argument. Indeed, there is no substantial evidence in the record to support the petition. All potentially significant impacts have been identified and mitigated to a level of insignificance. Petitioners' opinions, speculative fears and generalized opposition to the Project do not show otherwise. Further, the City fully complied with CEQA's procedural requirements in preparing and certifying MND No. 6098. The petition must be denied.

II. STATEMENT OF FACTS

The proposed Hillel development is a one-story, 12,100 square-foot student religious center, and a 17,000 square-foot subterranean garage accommodating 68 on-site parking spaces (AR 00016.) 10,000 square feet of the Hillel project area will be landscaped by Hillel to create a

[1] This is the second suit filed to stop this Project. The first, challenging the City's 2000 decision to approve negotiations with Hillel, ended with the 4th District Court of Appeal upholding the Superior Court's denial of mandamus. Petitioners in that case still owe the City over $15,000 in costs associated with that failed effort.

neighborhood amenity. (AR 00016-17.) In 2003, the City's Initial Study under CEQA found that the project, as originally proposed, could have a significant effect on paleontological resources and parking. (AR Ex. 11.) Subsequent revisions to the Hillel Project mitigate all identified potential impacts to a level of insignificance, as identified in MND No. 6098. (AR Ex. 7-9.)

The Initial Study relied on the City approved professional traffic and parking study prepared by Kimley-Horn & Associates, Inc., May 11, 2004, to analyze potential Project impacts on the roadway system and on-street parking. (AR Ex. 35.) The traffic and parking analysis evaluated the potential impact of weekly Shabbat observances (Friday evening through sundown on Saturday) and occasional special events. (AR 01130, 01133-34, 01136.) To determine the traffic generation and parking demand, the study conducted: (1) a survey of traffic generation at three Hillel properties at other UC campuses (AR 01130-32); (2) a survey of students attending Shabbat at the existing Hillel UCSD facility (AR 01132-33); (3) a profile of Jewish students at UCSD (*Id.*); (4) area traffic studies in December 2003 and April 2004 (AR 01134); and (5) parking surveys in October 2003 (AR 01127, 01135-37.)

The Kimley-Horn study concluded (1) the Hillel Project would not significantly impact traffic, and (2) any potentially significant impacts on parking could be mitigated to a level of insignificance if Hillel secures additional off-site parking spaces through a shared parking agreement for special events and implements Transportation Demand Management ("TDM") measures. (AR 01137-39.) As a result, the Initial Study found the Hillel Project will not significantly effect the environment as long as mitigation measures are implemented to reduce potential parking impacts to below a level of significance. (*Id.*)

In January 2005, the City's office of Development Services ("DSD") issued MND No. 6098 in connection with the sale or lease of Site 653 to Hillel and the approval of a planned development permit, a site development permit, a public-right-of-way vacation and a right-of-way dedication to the Hillel project. (AR Ex. 9.) DSD determined that the Hillel Project, as revised, avoided or mitigated the potentially significant environmental effects previously identified in the Initial Study. (AR 00335.) Specifically, MND No. 6098 requires the following mitigation measures: Hillel must (1) provide off-site parking spaces for weekly Shabbat services; (2) provide a shared parking agreement prior to the City issuing a building permit; (3) provide shuttle service

between the off-site parking location and the facility for Friday Shabbat services and special events; (4) inform attendees by use of signage about the off-site parking; and (5) submit a Transportation Demand Management Plan ("TDMP") prior to the City issuing a building permit, which requires Hillel to provide parking monitors for special events and conduct an annual post-occupancy parking demand study to ***ensure*** that the off-site parking mitigation is eliminating any potential adverse project impacts to on-street parking. (AR 00339-41, AR 00013-14.) These mitigation requirements are also included in the Planned Development Permit and Site Development Permit ("PDP/SDP"). (AR 00027, 00029-30.)

In addition to the mitigation required by the MND, the PDP/SDP include a total of 107 conditions imposed on the Hillel development, including site engineering, landscaping, environmental, transportation, planning and design, wastewater and mapping requirements. (AR 00024-38.) The PDP/SDP does not impose new mitigation and does not identify any new potential impacts; the conditions serve to ***monitor*** and ensure Hillel's compliance with the MND.

DSD determined that because any potentially significant environmental impacts were either eliminated or mitigated to a level of insignificance, an EIR was not required. (AR 00335.) MND No. 6098 was noticed and distributed for public review, and all public comments submitted were reviewed by City Staff. (AR 00075-00333.) On May 9, 2006, the Council held a public session in La Jolla and heard testimony from City Staff, Hillel Project proponents and opponents. (AR Ex. 48.) City Staff recommended the Council adopt resolutions to certify MND No. 6098 as in compliance with CEQA, and grant associated development permits, lot-line adjustments, street vacations, and authorize the sale of Site 653 to Hillel. (AR Ex. 39.) At the May 9, 2006, Council session, the Council voted 6-2 to adopt each proposed resolution relating to the Project and certified MND No. 6098. (AR 00007-08, 00015-23, 00040-41, 00048-50, 00054-56.)

III. THE RECORD LACKS SUBSTANTIAL EVIDENCE TO SUPPORT A FAIR ARGUMENT.

Petitioners fail to provide ***any credible evidence of fact*** sufficient to constitute "substantial evidence" supporting a "fair argument" that the Hillel Project may cause a significant environmental impact. Where (as here) the record lacks substantial evidence to support a fair argument, an agency's decision to adopt an MND may not be disturbed. *See San Joaquin Raptor Wildlife Rescue Ctr. v. County of Stanislaus*, 42 Cal. App. 4th 608, 622 (1996).

A. The City Certified MND No. 6098 Because The Hillel Project – As Mitigated – Will Not Have A Significant Effect On The Environment.

Petitioners fundamentally misunderstand the purpose and content of an MND. The CEQA Guidelines strongly encourage preparing MNDs and recommend that projects be revised to eliminate potentially significant environmental effects so that a negative declaration can be prepared, instead of an EIR. 14 CAL. CODE REGS. §§ 15006(h), 15063(c)(2), 15064(f)(2), 15070, 15369.5. An MND ***shall*** be prepared:

> "...when the initial study has identified potentially significant effects on the environment, but (A) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (B) there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect ..."

CAL. PUB. RES. CODE § 21080(c)(2); *see also Citizens' Comm. to Save our Village v. City of Claremont*, 37 Cal. App. 4th 1157, 1167 (1995). Courts do not pass upon the correctness of environmental conclusions, but only upon the sufficiency of the MND as an informative document. *See, e.g., Citizens of Goleta Valley v. Bd. of Supervisors*, 52 Cal. 3d 553, 564 (1990).

The City and Hillel proceeded precisely as required by CEQA in preparing MND No. 6098. Indeed, the MND is comprehensive and detailed with respect to traffic and parking (AR 00070-72, 00302-05); biological resources (AR 00306); and aesthetics (AR 00314-16). Moreover, the record reflects that the Project, as mitigated, will not have a significant adverse impact on the environment. (AR 00066.) Because Hillel has tailored its Project to avoid potential impacts and is willing to accept mitigating conditions – there is no need for an EIR. *See Running Fence Corp. v. Superior Court of Sonoma*, 51 Cal. App. 3d 400, 430-31 (1975).

B. Petitioners Fail To Point To Any Evidence Sufficient To Constitute Substantial Evidence Under CEQA.

The MND may only be set aside if petitioners meet their burden to "demonstrate by substantial evidence that the proposed mitigation measures are inadequate and that the project as revised and/or mitigated may have a significant effect on the environment." *Citizens' Comm.*, 37 Cal. App. 4th at 1167; *Citizens for Responsible Dev. v. City of W. Hollywood*, 39 Cal. App. 4th

490, 498-99 (1995). They do not. Petitioners utterly fail to cite to substantial evidence in the record and instead rely on ***contentions*** (which they refer to as 'evidence') that are argumentative, speculative, unsubstantiated and, at times, blatantly false. To be sure, petitioners clearly establish their opinion about the Hillel Project, but repeated citation to one's own opinion letters is not "evidence," substantial or otherwise.[2] CAL. PUB. RES. CODE § 21080(e); *Pala Band of Mission Indians v. County of San Diego*, 68 Cal. App. 4th 556, 580 (1998).

CEQA defines substantial evidence as "facts, reasonable assumptions predicated on facts, and expert opinions supported by facts." 14 CAL. CODE REGS. § 15384(b). CEQA also defines what does ***not*** constitute substantial evidence: (1) argument; (2) speculation; (3) unsubstantiated opinions or narratives; (4) clearly inaccurate or erroneous evidence; and (5) evidence of social and economic impacts that do not physically impact the environment. *See* CAL. PUB. RES. CODE §§ 21080(e)(2), 21082.2(c); 14 CAL. CODE REGS. §§ 15064(f)(5), 15384(a); *see also Pocket Protectors v. City of Sacramento*, 124 Cal. App. 4th 903, 927-28 (2005); *Citizens for Responsible Dev.*, 39 Cal. App. 4th at 499 n.2.

To determine whether evidence in the record constitutes "substantial evidence," a court must determine whether the information is relevant, material and sufficiently reliable to have evidentiary value. Evidentiary value requires that the information is: (1) based on an adequate foundation and the witness's personal knowledge (*Oro Fino Gold Mining Corp. v. County of El Dorado*, 225 Cal. App. 3d 872, 882-83 (1990)); (2) provided by a witness that is qualified to render an opinion on the subject (*Ocean View Estates Homeowners Ass'n, Inc. v. Montecito Water Dist.*, 116 Cal. App. 4th 396, 402 (2004)); and (3) credible, reasonable and not hearsay. *See Lucas Valley Homeowners Ass'n, Inc. v. County of Marin*, 233 Cal. App. 3d 130, 142 (1991).

Although a court may not "weigh" evidence in the record under the fair argument standard of review, it must evaluate the ***value*** of the evidence in the record to determine whether it meets CEQA's definition of "substantial evidence." *See Citizens' Comm.*, 37 Cal. App. 4th at 1167-68; *Lucas Valley*, 233 Cal. App. 3d at 142. Evidence that rebuts, contradicts or diminishes the

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[2] It is interesting to note that petitioners' opening brief cites to ***its own*** comment/opinion letters, public comment and briefings no less than fifty (50) times as the alleged "substantial evidence."

reliability or credibility of the project opponents' evidence is properly considered, as is the absence of supporting evidence. *Id.* Public comments that do not identify or provide substantial evidence cannot invalidate an MND. Indeed, the mere existence of public controversy will not require an EIR. 14 CAL. CODE REGS. § 15064(f)(4); *San Joaquin,* 42 Cal. App. 4th at 622.

C. There is No Evidence Of A Biological Project Impact.

Petitioners claim the City suppressed or otherwise altered the Site 653 biological survey to hide the existence of raptor nests. (Points & Authorities In Support Of Petition For Writ Of Mandamus ("CEQA P&As") at 1:8-10.) Not true. Petitioners provide no evidence, substantial or otherwise, of any such "fraud on the public." (*See id.* at 5:12-13.) Nor do petitioners cite any evidence showing the existence of any raptor nests on site. Without evidence, there is no "fair argument" that the Project may cause a significant biological impact.

Contrary to petitioners' argument that the biological survey "demonstrates the biologist felt that there were potential raptor (ie. hawks and falcons) nests at the Project site," (CEQA P&As at 4:27-28), the biological survey found exactly the opposite. The RECON report, prepared by a specialist after surveying the site for wildlife and "calls, tracks, scat, [and] ***nests***" (AR 01108), concludes: "***No sensitive wildlife species were located within the site during the biological survey or are expected to occur on-site***. The site is disturbed, surrounded by urban development, lacks suitable habitat and ground cover for wildlife, and ***lacks suitable habitat and trees for nesting raptors***." (AR 01109) (emphasis added). While the report recognizes that the ***loss*** of a raptor nest ***would be*** a significant impact (AR 01110), the report specifically states that "***no sensitive wildlife species were located on site***," there is "no suitable habitat and trees for nesting," and "no impacts to active raptor nests are expected to occur" (AR 01109-01110, 01123).

To support their claim, petitioners rely on two pieces of "evidence." First, petitioners cite to a Laura Black email in combination with the RECON report. (AR 06702, 01108-25.) But instead of supporting petitioners' position, these record cites evidence that raptors are ***not*** present on Site 653. Ms. Black's email states: "I have discussed the report with City staff whom have extensive biological knowledge and shown pictures of the site or have knowledge of the site and surrounding area." (AR 06702.) Based on review of the report and discussions with City staff,

Ms. Black expressed her concern that the recommendations for a further raptor survey were not appropriate because neither RECON nor City staff with "extensive biological knowledge" have ever observed any raptor nests at the site. (AR 06702.)

Petitioners present no evidence to suggest that the City requested survey results to be altered or RECON was told to alter its findings in any way. There is no evidence of any direction to RECON "to remove evidence of a potentially significant impact." (CEQA P&As at 5: 12-13.) If anything, the proper inference from the Black email is that a further study was unnecessary. This is not evidence of a plot to bury a significant impact.[3]

Similarly, petitioners' second piece of "evidence," a letter from Penelope Bourk, is not substantial evidence of nesting raptors on-site. First, reliance on a primary project opponent's opinion letter is not substantial evidence. CAL. PUB. RES. CODE § 21080(e). Second, although Ms. Bourk claims to have seen "hawks and peregrine falcons" out of her kitchen window overlooking Site 653 (AR 00817), there is no evidence that she ever observed any raptor ***nests*** on-site. ***Only the loss of a nest would create a significant impact*** (*see* AR 01110), not the mere existence of the birds. Also, petitioners present no evidence to suggest Ms. Bourk is qualified to accurately identify and classify bird species; her opinion is unsubstantiated. Finally, Ms. Bourk admits in her ***September 2004*** comments that the "very trees" where she claimed to see raptors were "bulldozed" as part of the La Jolla Village Drive Widening Project. (AR 00817, 01009.) There is no evidence that there were ever any raptor nests, and without suitable trees, there never could be.

Petitioners' reliance on *Mejia v. City of Los Angeles*, 130 Cal. App. 4th 322 (2005), is misguided. In *Mejia* the project opponents' observations were considered to be substantial evidence because they concerned ***nontechnical*** matters (observing the ***presence*** of wildlife) and were ***corroborated by an expert***. *Id.* at 339. Proper taxonomy of bird species and identifying nests are not nontechnical subjects and are not akin to observing the general presence of wildlife. Moreover, Ms. Bourk's opinion is not corroborated – it is directly ***contradicted*** by qualified biologists' studies and observations, and City staff with extensive biological knowledge.

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[3] For its part, RECON acknowledges the report was revised "based on comments provided by Jennifer Ayala at M.W. Steele Group, Inc." (AR 01108.) The September 23, 2005 RECON report was not included in the record, nor was the letter from Ms. Ayala. As a result, we cannot determine what revisions were made to the report. (AR 06702.)

D. Potentially Significant Parking Impacts Are Adequately Mitigated To A Level Of Insignificance.

Petitioners rely on more anecdotal neighborhood-resident comments to rebut the accuracy of the City's conclusion that the Hillel Project, as mitigated, will not cause significant parking impacts. Petitioners fail, however, to present substantial evidence supporting a fair argument. Petitioners argue: (1) the Project does not provide adequate parking; (2) the mitigation measures are unlawful; (3) the Project will significantly impact parking "regardless of the mitigation measures;" and (4) the City improperly deferred mitigation.[4] Each argument is without merit.

1. The Project Provides The Number Of Spaces Required By Code.

The Hillel Project is required to provide 135 parking spaces for weekly Shabbat services and 143 spaces for special events. (AR 00017-20, 00029-30.) This complies with the SDMC. (AR 00019-22; SDMC § 142.0530.) Petitioners argue the Project will only provide 68 spaces and, thus, is "severely deficient in parking." (CEQA P&As at 6:18.) This is blatantly untrue. The Project SDP/PDP explicitly requires Hillel to provide the number of spaces required by code.

2. Petitioners' Position That The Parking Mitigations Violate The Municipal Code Is Wrong.

Petitioners claim the parking mitigation measures are unlawful because the "Municipal Code specifically prohibits shared parking agreements in single unit residential zones." (CEQA P&As at 6:19-21.) This ignores the fact that Hillel specifically requested a deviation from the Municipal Code limitations on shared parking agreements (AR 01436, 01513), and that the City specifically approved the deviation because it will be more beneficial to the neighborhood than strict compliance with the code. (AR 00019-22, 01433-37.) The Council has discretion to grant such a deviation; its decision to do so is supported by substantial evidence. (*See* Opposition to Petition for Writs of Mandate at § IV,D(3).) The mitigation measures are lawful and appropriate.

3. There Is No Substantial Evidence To Support A Fair Argument That The Project – As Mitigated – Will Significantly Impact Parking.

Petitioners rely on "personal observations and independent newspaper reports" to support their argument that shared parking agreements do not work. (CEQA P&As at 6:28-7:2.)

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[4] Petitioners also cite a letter from UCSD's Community Planner. (CEQA P&As at 6:4-10.) This letter is irrelevant because it discusses parking availability at a specific lot, P-102, that is no longer a potential off-site parking location.

Petitioners complain that students will be unwilling to take shuttles from "far-flung" parking lots (CEQA P&As at 7:9-10), that other shared parking agreements have failed (CEQA P&As at 7:13-14), and that the Union Tribune confirms that shared parking agreements are "completely ineffective" (CEQA P&As at 7:19-21). Petitioners argue that these unsubstantiated opinions amount to substantial evidence. They do not. These opinions are not evidence of a project specific impact. Unsubstantiated opinions and speculation about a project, "though sincere and deeply felt, do not rise to the level of substantial evidence." *Bankers Hill, Hillcrest, Park W. Comm. Pres. Group v. City of San Diego*, 139 Cal. App. 4th 249, 274 (2006) (citation omitted).

"[A]lthough local residents may testify to their ***observations*** regarding ***existing*** traffic conditions, in the absence of specific factual foundation in the record, dire predictions by nonexperts ***regarding the consequences of a project*** do not constitute substantial evidence." *Id.* (emphasis in original). Petitioners' subjective concerns and personal beliefs that the parking mitigation measures will be ineffective do not constitute substantial evidence and thus cannot support a fair argument. *See Newberry Springs Water Ass'n v. County of San Bernardino*, 150 Cal. App. 3d 740, 749 (1984); *see also Lucas Valley*, 233 Cal. App. 3d at 157-58, 163-64 .

Moreover, a mitigated negative declaration cannot be attacked on the theory that the conditions will not be enforced. ***Compliance with the conditions is presumed***. *Lucas Valley*, 233 Cal. App. 3d at 164. "The focus must be the use, as approved, and not the feared or anticipated use." *Id.*

Petitioners also assert that "[a] permanent location for the off-site parking is a necessary pre-condition before the City can even make a colorable argument the off-site parking plan is effective mitigation." (CEQA P&As at 8:23-24.) This assertion is a straw man. A "permanent" location is unnecessary; there is no requirement that the off-site parking be fixed in a particular location. In theory the off-site parking location could change over time and it would not affect the adequacy of the mitigation – as long as the required number of off-site spaces are provided. Hillel is required to secure a shared parking agreement for 67 spaces, and 75 spaces for special events. This mitigation will absolutely be effective "to a point where clearly no significant effect on the environment would occur" – because ***without a shared parking agreement – there can be no Hillel center***. 14 CAL. CODE REGS 15064(f)(2). Without a shared parking agreement, the

Hillel Project will not be approved for construction or, if already built and operating, all use of the center will be suspended. (AR 00013, 00018, 00020, 00029-33.) The Mitigation, Monitoring and Reporting Program ("MMRP"), the permit's transportation requirements and TDMP will adequately ensure that Hillel provides and sufficiently maintains the required off-site parking.

4. The TDMP Does Not Defer Mitigation.

Petitioners argue the City "improperly deferred mitigation based on future studies." (CEQA P&As at 9:18.) This mischaracterizes the record and the law. An agency may impose conditions in an MND that require ***monitoring*** to ensure potential impacts will not occur. *Running Fence*, 51 Cal. App. 3d at 422. The City imposed numerous measures to mitigate any potential parking impacts (AR 00027, 00029-30, 00339-41). One requirement is a TDMP intended to ***monitor*** the effectiveness of the other mitigation measures, ensure compliance and provide specific solutions for all situations that may arise over the life of the Project (AR 00340-41). The TDMP is not a deferral of mitigation. Like the lead agency in *Sacramento Old City Ass'n v. City Council*, 229 Cal. App. 3d 1011 (1991), the City here recognized that the Project had the potential of causing a significant parking impact and implemented mitigation measures to eliminate that impact. *See id.* at 1029-30. Moreover, "where future action to carry a project forward is contingent on devising means to satisfy such criteria, the agency should be able to rely on its commitment as evidence that significant impacts will in fact be mitigated." *Defend the Bay v. City of Irvine*, 119 Cal. App. 4th 1261, 1276 (2004).

In addition to the MND's specific mitigation measures, the City has specifically identified several requirements, as a condition to the issuance of building permits, to ensure that the mitigation requirements are fulfilled by Hillel. (AR 00029-33.) Before the City will issue a building permit, Hillel must provide satisfactory shared parking agreements. (AR 00030, 00339.) If the shared parking agreements are cancelled at any time, Hillel is required to immediately suspend any activities with more than 120 people in attendance. (AR 00030.) Because the City expressly identified the parking impacts, and provided specific and concrete measures to mitigate the impacts, this case is distinguishable from *Sundstrom v. County of Mendocino*, 202 Cal. App. 3d 296 (1988), where the agency never conducted a hydrological study but instead required the

applicant to conduct a future study and incorporate unknown mitigation into its permit, violating CEQA. *Id.* at 306. In contrast, here, the City approved a professional parking study and required specific measures that directly mitigate any potential impacts. (AR 00029-30.) The TDMP will ***monitor*** these measures and is permitted by CEQA. CAL PUB. RES. CODE § 21081.6.

E. Petitioners' Lay Speculations About And Criticisms Of A Professional Traffic Study Are Not Substantial Evidence And Do Not Support A Fair Argument.

Petitioners' entire attack on the professional traffic study is based on a lay person's anecdotal complaint that "the traffic analysis ... does not take into account any increase in pedestrian traffic" that will allegedly impact vehicular traffic because of an increase in pedestrians who "push the walk signal." (*See* CEQA P&As at 11:1-5.) This attack is without merit. The only "evidence" petitioners cite is a quintessential example of what is ***not*** substantial evidence under CEQA. Petitioners claim the City-approved traffic and parking study performed by Kimley-Horn & Associates, Inc. (an "American Institute of Certified Planners" certified transportation planner) was inadequate. (CEQA P&As at 11:1-8.) But petitioners' only support for this argument are comments by Helen Boyden and Sherri Lightner. (AR 00829-30, 04536.) Neither woman is an expert in transportation or statistical analysis. While a lay person may testify to observations of ***existing*** traffic conditions – that person is not qualified to speculate about future traffic impacts or challenge the sufficiency of a professional study. *Citizens Assoc. for Sensible Dev. v. County of Inyo*, 172 Cal. App. 3d 151, 172-73 (1989); *Bowman v. City of Berkeley*, 122 Cal. App. 4th 572, 583 (2004) (noting neighbors' lay reading of technical reports is not substantial evidence as they are not qualified to interpret and criticize). Surely the approved professional traffic study is not "inadequate" simply because neighborhood residents say so.

To illustrate, petitioners cite Ms. Boyden's opinion that an increase in pedestrian traffic will affect vehicular traffic because "when the 'Walk' lights are used, the period of 'red' for vehicles is substantially lengthened." (AR 00829-30.) Because Ms. Boyden's opinion that the traffic study's statistical assumptions and variables were flawed is unsubstantiated and offered by someone who is not qualified to render an opinion on the subject, it does not constitute substantial evidence and does not support a fair argument. *See Bankers Hill,* 139 Cal. App. 4th at 274.

The City found, based on a professional traffic study and City staff's recommendations, and taking into consideration all public comments, that the Hillel Project will not significantly impact traffic. (AR 01511, 00325-26, & Ex. 35.) Because petitioners fail to show substantial evidence in the record to show otherwise, the City's finding must be upheld.

F. There Is No Evidence In The Record To Support A Fair Argument That The Project May Significantly Impact Aesthetics.

The City adequately analyzed whether the Project may significantly impact aesthetics and found that it would not. (AR 01434-35, 01781-84, 01846-47, 01866-68.) The Initial Study asked nine questions on "aesthetics/neighborhood character," and all nine questions were answered with a finding of no impact. (AR 00314-16.) The Initial Study found "no such public views would be obstructed" and the "[p]roposed project would be compatible with surrounding development" and "consistent with the character of the area." (*Id.*) Moreover, the Project incorporates specific design features including variations in height, texture, roof lines, landscaped berms and use of Torrey Pine trees to screen the project from the neighborhood and create a landscaped buffer from La Jolla Village Drive. (AR 01435-36, 01570-71, 01575, 03095-96, 07180-83.)

Petitioners rely on a few public comments regarding the Project's size and the Planning Commission's alleged finding of incompatibility with the surrounding homes. (CEQA P&As at 12:18-26.) Petitioners contend that the Project will "tower" above the homes to the east, but they ignore the fact that the Project is only 21 feet high, less than many two story homes, and 9 feet less than allowed in the zone. (AR 00314-15, 03097, 07267.) Although the square footage of the Project is greater than some homes (but not all (AR 01846-47)), it is spread over 33,000 square feet of land that will include 10,000 square feet of landscaped open space. (AR 00016.)

Petitioners' obstructed view claim is based on a single homeowner comment. (CEQA P&As at 12:11-12) Under CEQA, "[o]bstruction of a few private views in a project's immediate vicinity is not generally regarded as a significant environmental impact." *Bowman*, 122 Cal. App. 4th at 586; *see also Mira Mar Mobile Cmty. v. City of Oceanside,* 119 Cal. App. 4th 477, 492-93 (2004) (distinguishing public and private views; "[u]nder CEQA, the question is whether a project will affect the environment of persons in general, not whether a project will affect

particular persons"). Given the limited scope of the purported impact, any effect on scenic views is not environmentally significant.

Petitioners' primary objection is that the Project it is "out of character" with its surroundings. But the Initial Study expressly found that the Project will be "compatible with surrounding development" and "consistent with the character of the area." (AR 00314-16.) This finding is supported by the record, including extensive design review, and is consistent with a reasonable reading of CEQA. (AR 00018, 00024-38.) Further, where a project undergoes design review under local law, that process itself mitigates purely aesthetic impacts to insignificance, even if some people are dissatisfied with the outcome. *Bowman,* 122 Cal. App. 4th at 830 (noting an EIR cannot be required every time "people … complain about how [the project] will look").

Petitioners rely on *Stanislaus Audubon Society, Inc. v. County of Stanislaus*, 33 Cal. App. 4th 144, 155 (1995), for the proposition that the Planning Commission's assessment of the Project's "use" compatibility amounts to an expert opinion on aesthetics. (CEQA P&As at 12:18-26.) The Commission's assessment was that the "use is not compatible with the single family uses that surround it." (AR 01945.) The Commission was focused on ***use*** – ***not*** aesthetics. (AR 01430, 02031, 02280.)[5] Thus, the Commission's evaluation – expert or not – is not substantial evidence of a potential significant ***aesthetic*** impact. The City, in contrast, carefully examined aesthetic issues such as: "obstruction of … scenic view form a public viewing area;" "creation of a negative aesthetic site;" "project bulk, scale, materials, or style;" "alteration to the existing character of the area;" "change in topography;" loss of unique "geologic or physical features;" and the imposition of substantial light or shading; and found no aesthetic impact. (AR 00314-16.)

IV. THE CITY FULLY COMPLIED WITH CEQA.

A. The City Adequately Considered Public Comments Received During The Review Period And Has Spent Six Years Responding To Individual Concerns.

Petitioners allege the City's responses to public comments on the MND were "non-responsive, inadequate or inaccurate." (CEQA P&As at 13:8-9.) But even petitioners admit (*id.* at 13:3-4) CEQA does not require an agency to prepare responses to comments. CAL. PUB. RES.

[5] Despite the Commission's recommendation, "compatibility" was a minor issue, and even the Chairperson acknowledged that he did not "have a problem with the use." (AR 02057.)

CODE § 21091(d)(2)(b); 14 CAL. CODE REGS § 15073(a). CEQA only requires that the agency "consider" public comments. 14 CAL. CODE REGS § 15074(b). Thus, although it was not required to, the City formally responded (paragraph by paragraph) to literally hundreds of comments received during the review period, and has spent six years entertaining and responding to public concerns. (AR 00075-298, 00900-1107.)

One person, Ms. Bourk, individually submitted 367 comments and the City responded to every one. (AR 00101-27.) The City held its May 9, 2006 session, in the community, specifically to hear local comments. (AR 01706-07, 01760-64.) Countless public meetings have been held since the Project's inception in 2000. (AR 00046-58.) There has been an extensive period of public review, public comment and response to those comments. The City's responses were more than sufficient. Petitioners' claim that the City ignored the public is unfounded.

B. Recirculation Of The MND Was Not Required.

As a last resort, plaintiffs argue the City was required to recirculate the MND after adding additional mitigation and "good neighbor" conditions. (*See* CEQA P&As at 15:21.) But recirculation is ***not*** required where (as here) the additional measures are equivalent or better than those already in place. Recirculation is only required if an MND is substantially revised after the public comment period. A "substantial revision" is only when (1) a new significant impact is identified and requires mitigation, or (2) the agency determines the proposed mitigation is not sufficient and requires new measures. 14 CAL. CODE REGS 15073.5(b). The conditions added to the Hillel Project are not a "substantial revision." Further, recirculation is ***not*** required when:

- Mitigation measures are replaced with ***equal or more effective measures*** pursuant to 14 CAL. CODE REGS § 15074.1
- New project revisions are ***added in response to written or verbal comments***
- Measures or conditions of approval are added which are ***not required by CEQA***

14 CAL. CODE REGS 15073.5(c)(1)-(3). The Hillel Project conditions specifically aim to supplement existing mitigation. These conditions are a result of Hillel's willingness to go ***above and beyond*** to accommodate its neighbors' concerns. The Council adopted the new measures and conditions pursuant to 14 CAL. CODE REGS § 15074.1(b)(2). (AR 00055.) The Council

specifically found the conditions to be equivalent or more effective in mitigating or avoiding significant effects. (*Id.*)

Moreover, courts specifically guard against recirculation in cases such as this. In *Long Beach Sav. & Loan Ass'n v. Long Beach Redev. Agency*, 188 Cal. App. 3d 249 (1986), the court held recirculation of a negative declaration was not required when the agency added minor mitigation measures ***in response to public comments***. The court noted:

> We find nothing in CEQA commanding respondents to circulate for public review ***additional*** mitigation measures made in ***response to comments by those who oppose the project***. To allow the public review period to proceed *ad nauseam* would only serve to arm persons dead set against a project with a paralyzing weapon ... the purpose of CEQA is to inform government decision makers and their constituency of the consequence of a given project, not to derail it in a sea of administrative hearings and paperwork.

Id. at 263 (emphasis in original). Hillel and the City offered the additional "good neighbor" measures in a direct attempt to compromise with the Project opponents. (AR 01669-73.) These "good neighbor" conditions do not trigger recircualtion under CEQA. Petitioners should not be rewarded for attacking efforts made specifically to satisfy their concerns.

V. CONCLUSION

Petitioners do not show a "fair argument" to justify requiring an EIR. Petitioners fail to articulate anything that constitutes substantial evidence to support a fair argument that the Hillel project – as mitigated and approved – may have a significant effect on the environment. Because there is no substantial evidence to support a fair argument, the City's decision to adopt the MND may not be disturbed. Further, petitioners do not prove a lack of substantial evidence supporting the City's resolutions and certification of MND No. 6098. The petition should be DENIED.

Dated: February 2, 2007

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