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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, CENTRAL DIVISION

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.	Case No. GIC867378 **PETITIONERS' REPLY TO RESPONDENT AND REAL PARTY-IN-INTEREST'S JOINT OPPOSITION TO WRIT OF MANDAMUS UNDER CEQA** ASSIGNED FOR ALL PURPOSES TO: Hon. Linda B. Quinn Date: March 1, 2007 Time: 1:30 PM Dept: 74 Action filed: June 12, 2006

Petitioners TAXPAYERS FOR RESPONSIBLE LAND USE and LA JOLLA SHORES ASSOCIATION respectfully submit this Reply to Respondent and Real Party-in-Interest's Joint Opposition to Writ of Mandamus Under CEQA.

Dated: February 15, 2007

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I. INTRODUCTION

This is a very simple case. Once the Court determines the CITY OF SAN DIEGO ("City") or the Real Party-in-Interest, HILLEL OF SAN DIEGO ("Hillel") (collectively "Respondents") suppressed relevant information, the Court may order the City to rescind the approval of the permit regardless of whether the evidence would have resulted in a change in the City's decision. Pub. Res. Code § 21005. As will be discussed below, the email from City Planner Laura Black, conclusively establishes Respondents suppressed relevant evidence.

Even ignoring the blatant suppression of evidence, a review of the administrative record demonstrates Petitioners TAXPAYERS FOR RESPONSIBLE LAND USE and LA JOLLA SHORES ASSOCIATION (collectively "Petitioners") have "substantial evidence" which supports a "fair argument that there may be a significant effect on the environment." 14 CCR 15384. Such substantial evidence consists of personal observations, newspaper articles, and evidence provided by both Hillel and the City. Such evidence is further bolstered by the failure of the City to investigate and study potential significant impacts.

II. STANDARD OF REVIEW

Respondents essentially argue that only detailed studies from a credentialed expert, based on irrefutable evidence, could possibly constitute a fair argument the Project may cause a significant impact. (*See e.g.*, Resp. Brief at 7:23-24 & 11:24-27.) Respondents' arguments imply the citizens of La Jolla cannot tell the difference between a hawk and hummingbird; cannot determine that pushing a walk signal delays traffic; cannot accurately observe parking impacts caused by similar projects; and cannot opine that the excavation of over 7,000 cubic yards of dirt may cause noise, dust and traffic impacts.

Respondent's implied argument that substantial evidence must be "expert" is clearly not supported by CEQA nor case law. "'[S]ubstantial evidence' is simply evidence which is of 'ponderable legal significance . . . reasonable in nature, credible, and of solid value.'" *Stanislaus Audubon Society, Inc. v. County of Stanislaus*, 33 Cal. App. 4th 144, 152 (1995) (citation omitted). "Substantial evidence...means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached" 14 CCR 15384. The "fair argument" standard sets a very low threshold for requiring the preparation of an

EIR. *No Oil, Inc. v. Los Angeles*, 13 Cal. 3d 68, 84 (1974). The record is replete with substantial evidence to support a fair argument the Project may cause a significant environmental impact.

III. ARGUMENT

A. The City's Illegal Request to Alter the Biology Report is Per Se Violation of CEQA.

The Respondents state there is no evidence, "the City suppressed or otherwise altered the Site 653 biological survey..." (Resp. Brief at 6:6-7.) If that was true, the Court would actually have a copy of the original RECON biology report, dated September 25, 2003 ("Original RECON Report") in the administrative record. The Public Resources Code specifically requires the record to include, "All written evidence or correspondence submitted ...with respect to the project." Pub. Res. Code § 21167.6(e)(7). As admitted in Respondent's Opposition Brief, "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." (Resp. Brief at 7, fn. 3, lines 27-28.) However, as discussed below, the suppression of relevant evidence constitutes, in itself, an abuse of discretion, and, further, from the City Planner's email we can accurately infer what was contained in the Original RECON Report.

CEQA specifically states that suppression of relevant evidence constitutes an abuse of discretion:

> [N]oncompliance with the information disclosure provisions of this division which precludes relevant information from being presented to the public agency, or noncompliance with substantive requirements of this division, may constitute a prejudicial abuse of discretion within the meaning of Sections 21168 and 21168.5, regardless of whether a different outcome would have resulted if the public agency had complied with those provisions.

Pub. Res. Code § 21005. In other words, regardless of whether the Original RECON Report contained substantial evidence of a potential impact to biology, the fact the City suppressed the evidence is sufficient to overturn the City's certification of the Mitigated Negative Declaration.

City Planner Laura Black's email provides conclusive evidence City Staff actively sought to suppress relevant information. The email, states, in its entirety:

> Hi Jennifer.
>
> I am working on the draft MND for the Hillel of UCSD project and was reviewing all the technical reports supporting the project.

> Upon closer review of the biology survey letter report (RECON, Sept. 25, 2003), the recommendations within the report don't make sense. 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.
>
> The City doesn't agree with the recommendation, by RECON, that a pre-construction (clearing of the 4 eucalyptus trees along LJ Village Drive) focus survey be conducted for potential raptor nests. Having been at the site and looking again at photos of the 4 eucalyptus trees on site, a focused survey is not required, nor should the construction activities be limited to Sept. 1 thru Jan. 31 st.
>
> Could you have RECON revise the recommendations of the biology report and then send me the revised report for my file? This request will not hold up the writing of the environmental document, but I would like to have the revised report before public review begins for the draft MND.
>
> As you are aware, the public is very interested in this project and all technical reports can be reviewed/copied by the public. That being said, a revised biology report is necessary for consistancy [sic] with the City's determination that no mitigation is required for biological resources (raptors).
>
> Please call me at 619.446.5346 if I have completely confused you or if you would like to discuss further.
>
> Thanks, Laura
>
> Laura C. Black
> Development Project Manager Development Services
> City of San Diego
> 1222 First Avenue, MS 501
> San Diego, CA 92101

(16 AR 6702.)

Obviously, Laura Black's request stating, "Could you have RECON revise the recommendations of the biology report and then send me the revised report for my file?" is conclusive evidence the City was attempting to suppress the report. The statement, "a revised biology report is necessary for consistancy [sic] with the City's determination that no mitigation is required for biological resources (raptors)," demonstrates the original RECON report contained substantial evidence the Project may have a significant impact on raptors. The fact the subsequent RECON report states, "This letter represents revisions based on comments provided by Jennifer Ayala at M.W. Steele Group, Inc." is conclusive

evidence the original RECON report was, in fact, suppressed. (3 AR 1108.)

To add insult to injury, Respondents' attempt to rely on the fact the City cut down four eucalyptus trees on Site 653, without conducting a raptor survey, to avoid liability. (Opp. Brief at 7:16-18.) The Respondents state, "There is no evidence that there were ever any raptor nests, and without suitable tress, there never could be." (Resp. Brief at 7:18-19.) Such position is absolutely outrageous.

First, suppressing relevant evidence is an abuse of discretion regardless of whether it would have changed the City Council's decision. Pub. Res. Code § 21005. Secondly, there is still one eucalyptus tree on Site 653.[1] Finally, according to the City, cutting down the trees was conveniently an "accident." (17 AR 7145.) Respondents cannot rely on the purposeful or negligent destruction of the trees to avoid preparing an EIR in this case. *See*, *Fox v. Hale & Norcross Silver Mining Co.*, 108 Cal. 369, 416 (1895)(*discussing* the consequences of spoiling evidence).

Of course, Laura Black's email begs the question of what other evidence was suppressed distorted or manipulated. Was it simply a coincidence the parking survey of Lot P-102 was performed on three dates when the La Jolla Playhouse was not in performance? (2 AR 886 .)[2] Was the City's refusal to disclose information about the construction schedule, or other information concerning potential impacts of construction an attempt to squelch debate on the topic? (1 AR 1 AR 159.) Considering Laura Blacks email, it must be assumed the entire process was designed to support the City's predetermined decision to proceed with a mitigated negative declaration.

B. Despite the Suppression of the Original RECON Report, the Record Demonstrates Substantial Evidence the Project May have a Significant Impact on Biological Resources.

Despite not having the original RECON report, Laura Black's email sufficiently reveals its contents to support Petitioners' fair argument the Project may have a significant impact on the environment. First, from the email, it is evident the biologist recommended "that a pre-construction (clearing of the 4 eucalyptus trees along LJ Village Drive) focus survey be conducted for potential raptor

[1] Petitioners make an offer of proof in the form of a current photograph of Site 653.

[2] UCSD's Community Planner also identified inconsistencies in the traffic study. (2 AR 886.)

nests" (16 AR 6702.) Secondly, the biologist recommended, "construction activities be limited to Sept. 1 thru Jan. 31st." (Id.) Third, the email states the revised biology report was "necessary for consistancy [sic] with the City's determination that no mitigation is required for biological resources (raptors)." (16 AR 6702.) Considering the its willful suppression, it must be assumed that the Original RECON Report was highly unfavorable to the City's finding of no significant impact.. Evid. Code § 413.

Respondents' reliance on Laura Black's assertion she "discussed the report with City staff whom have extensive biological knowledge" is completely irrelevant. (Resp. Brief at 7:1-3.) CEQA instructs the lead agency to prepare an EIR whenever there is a disagreement among experts over the significance of an effect on the environment. 14 CCR 15064(g); *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas*, 29 Cal. App. 4th 1597, 1607 (1994). Further, the validity of the second RECON report is clearly compromised by the City's request to revise the report for "consistancy [sic] with the City's determination that no mitigation is required." (16 AR 6702.)

Respondents' attack on Penny Bourke is absolutely ludicrous. The Respondents' position is that a biologist who toured Site 653 for one afternoon, knows infinitely more about the presence of wildlife than a neighbor who views Site 653 on a daily basis from her kitchen window. (2 AR 820; 3 AR 1108.) Perhaps if the question was whether the California Gnatcatcher was present on the site, Respondents would have a colorable argument. However, the average person can identify the difference between a hummingbird, raven, and hawk. Such rudimentary bird identification does not require special training. Finally, the fact she sees the hawks on a regular basis indicates a potential that raptors were nesting in the eucalyptus trees. Penny Bourke's personal observations, in conjunction with Laura Black's email, demonstrates a fair argument the Project may have a significant impact on the environment.

C. There is Substantial Evidence the Project may have a Significant Impact on Parking.

There is a fair argument the Project may have a significant adverse impact on parking based on the article by the Union Tribune and eye-witness testimony establishing the lack of effectiveness of off-site parking arrangements in similar cases.

The first piece of evidence the shared parking agreement may be ineffective is the newspaper

article published in the Union Tribune discussing a shared parking agreement for Thomas Jefferson School of Law. (13 AR 5560.) The article notes students continue to overwhelm neighborhood parking despite Thomas Jefferson School of Law: 1. obtaining an off-site parking lot 1/4 mile away, and; 2. paying student $5 per day to park at the off-site parking. Clearly, the Union-Tribune article constitutes "enough relevant information and reasonable inference" to support a fair argument the off-site parking plan for the Project may also be ineffective.

In addition, two members of the community attested to their personal observations of parking impacts caused by the Adat Yeshurun Temple, despite the existence of a shared parking agreement. (2 AR 736 & 868.) One member testified that the Adat Yeshurun congregation parked in the neighborhood despite the temple hiring six people to monitor parking and direct people to the off-site parking. (2 AR 736.) Relevant Personnel observations may constitute substantial evidence. *Pocket Protectors v. City of Sacramento*, 124 Cal. App. 4th 903, 928 (2004). Furthermore, nothing in the record or Opposition Brief indicates the City disputes the accuracy or credibility of such testimony. Thus, there is undisputed evidence in the record the shared parking plan at Adat Yeshurun, 1/4 mile away from the project, is ineffective despite efforts to monitor and direct traffic to the off-site parking.

Finally, it is undisputed that there is no permanent location for off-site parking. In fact, the MND, TDMP, or Resolutions and PDP fail to identify any proposed off-site parking locations. Respondents do not dispute such facts but instead argue there is no requirement for a permanent location for off-site parking.[3] (Opp. Brief at 22-23.) Respondents, again, miss the point. Without specifying the location of the off-site parking, the City Council cannot make an informed decision on the effectiveness of the off-site parking plan, nor whether a particular location may, itself, have significant impacts.

Thus, based on evidence that other off-site parking plans have been ineffective <u>despite</u> monetary encouragement (Thomas Jefferson), active monitoring and direction to off-site parking (Temple Adat Yeshurun), and further considering the location of the off-site parking is not identified, a "fair argument"

[3] The off-site parking for the Project is inconsistent with the parking requirements contained in the municipal code. Off-site parking is not allowed in single unit residential zones (SDMC § 142.0545; 7 AR 2505), must be within 600 feet of the premises (SDMC § 142.0535; 7 AR 2508), and cannot be reduced or eliminated for the life of the Project (1 AR 33; SDMC § 103.0305; 7 AR 2505.)

has been made that the Project may have a significant impact on parking in the neighborhood.

D. Hillel's Own Traffic Study Provides Substantial Evidence to Support a Fair Argument an Increase in Pedestrians may Significantly Impact Traffic.

The substantial evidence to support a fair argument that pedestrians traveling to the Project may cause a significant impact actually comes from Hillel's own traffic study. The Kimley-Horn & Associates traffic study asserts that only 38 students will drive to the Student Center for Friday Night Shabbat. (3 AR 1136.) The traffic study claims the majority of students will walk from Lot P-102. (3 AR 1136-37.) Using the factual claims contained in Hillel's own traffic study, it can be calculated that 120 student will be walking to the Hillel Student Center from UCSD. (3 AR 1134.) There is a fair argument based on the fact that 120 students will be pushing the walk signal between 5:30 and 6:30, and pushing the walk signal again when returning to UCSD may have a significant impact on traffic.

Interestingly, Respondents do not deny the traffic study failed to consider the impact caused by pedestrians. Instead they contend only "an expert in transportation or statical analysis" has the ability to determine the traffic study failed to analyze such impacts. (Resp. Brief at 11:15-17.) Surely, if the City had considered, analyzed and discounted such impact, it would have provided a citation to the Record. It cannot, and thus it must be assumed the City failed to analyze such potential impact. Evid. Code §§ 412, 413. It does not take an expert to conclude, based on the City's responses to comments, and on the lack of mention in the narrative of the traffic study, that the study failed to consider pedestrian impacts.

Furthermore, it is up to lead agency, not the public to prepare the proper studies. *Sundstrom v. County of Mendocino*, 202 Cal. App. 3d 296, 311 (1988). The City cannot hide behind its failure to gather relevant data to claim a lack of substantial evidence. *Id.* Because the City failed to investigate whether there may be a potential impact caused by pedestrians going to the Project, the normally low "fair argument standard" is even lower. *Id.*

Thus, considering the facts in Hillel's traffic report establish there may be 120 students crossing La Jolla Village Drive for Friday Night Shabbat and the admission by silence that the traffic study did not consider the potential impacts of such pedestrians pushing the "walk signal," a fair argument can be made the Project may have a significant impact on traffic caused by student crossing La Jolla Village Drive to attend Friday Night Shabbat.

E. Substantial Evidence Supports Petitioners Argument the Projedt May have a Significant Impact on Aesthetics.

Respondents attempt to minimize the community's objections based on aesthetics, claiming "Petitioners rely on a few public comments regarding the Project size and the Planning Commission's alleged finding of incompatibility with surrounding homes." (Resp. Brief at 12:18-26.) This completely misstates the extent of community opposition based on aesthetics. Literally thousands of people objected to the Project's compatibility with the residential neighborhood. (*See e.g.*, 11 AR 4674 et. seq..) The vast majority of letter, emails and comments opposing the Project objected to the size, scale, bulk or compatibility of the Project. (Too numerous to cite; *See, e.g.*, 11 AR 4615, 4626, 4628, 4644.) In addition, every single planning group which considered the project, including the City of San Diego's Planning Commission voted to deny the Project based on its lack of compatibility with the single family neighborhood. (4 AR 1430; 12 AR 5277.)

As discussed in Petitioners' Opening Brief, the public has good reason to be concerned the Hillel Student Center will change the residential character of the neighborhood. The Project stretches over three potential buildable lots, is surrounded almost exclusively by single family homes, and is four to six times the size of the other homes in the area. (10 AR 3967, 18 AR 7759-67.) Further, Site 653 guards the transition between UCSD's public uses and the neighborhood's residential use, so the character of the Site 653 is especially critical to the community.

This case is distinguishable from *Bowman v. City of Berkeley,* 122 Cal. App. 4th 572 (2004) relied upon by Respondents. In *Bowman*, the project was to demolish a vacant one-story building and replace it with a four-story senior complex in a mixed-used commercial district. *Id*. at 576. The building was vacant, in obvious disrepair, needed a new roof, and was considered an "attractive nuisance." *Id.* at 584-85. Further, the project in *Bowman* was approved and deemed compatible with the neighborhood by the City of Berkeley's Zoning Administration Board. *Id.* at 578. Finally, the petitioner in *Bowman* indicated it would accept a three story building. *Id.* at 588. This willingness to accept the aesthetic impacts of a three story building appears to have doomed petitioner's argument in the Court's eye. The Court concluded, "The aesthetic difference between a four-story and a three-story building on a commercial lot on a major thoroughfare in a developed urban area is not a significant environmental

impact, even under the fair argument standard." Id. at 592.

Unlike *Bowman,* the proposed Hillel Student Center will occupy a small open space parcel currently as the transition between UCSD and a single family residential neighborhood, not an area already occupied by a vacant and dilapidated building. Further, this Project is proposed to be located at the entrance of a single family neighborhood, not in the middle of a mixed-use commercial district as in *Bowman*. Finally, unlike *Bowman*, San Diego's Planning Commission specifically found the Project incompatible with the neighborhood. (5 AR 1945.)[4]

F. The City Failed to Consider the Potential Impacts Caused by Construction of the Hillel Center.

First, it must be noted the Project has substantially changed from what was originally described. Most notably, the underground parking was increased from 40 spaces to 68 spaces. (*Compare* 1 AR 30 *with* 1 AR 70.) The original subterranean garage would have been 17,000 square feet and required the excavation of 7,000 square feet of soil. (1 AR 80.) Obviously, the increase in the required number of parking spaces will in turn require a corresponding increase in the square footage of the garage. However, there is nothing in the MND, initial study or administrative record which describes the number of levels or square feet required to accommodate 68 spaces, nor how much excavation will be required. Failure to identify the size of the garage renders the Project description legally inadequate. *See*, *County of Inyo v. City of Los Angeles*, 71 Cal. App. 3d 185, 193 (1977)("An accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR.")

The initial study is also legally inadequate because it fails to evaluate the direct impacts caused by construction (dust, noise, and traffic). The CEQA guidelines specifically state, "Examples of direct physical changes in the environment are the dust, noise and traffic of heavy equipment that would result from construction of a sewage treatment plant." 14 CCR 15064(d)(1). The closest the initial study comes to admitting even a possibility of an inconvenience caused by construction, is the statement,

[4] Respondent's contention the Planning Commission denied the Project based on incompatible "use" not aesthetics, is truly splitting hairs. (Resp. Brief at 14-15.) The Planning Commission was clearly concerned with the impact the project would have on the community character (aesthetics) of the surrounding single family neighborhood. (5 AR 2031.)

"[s]ome minor noise during construction is anticipated." (1 AR 322-323.) But there is no discussion of what the City considers "minor noise," how long the construction noise would occur, or when it would occur. The initial study must provide sufficient information and raw data to determine the basis of findings in the initial study. *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo*, 172 Cal. App. 3d 151, 172 (1985). The initial study is legally inadequate.

The response to comments regarding construction impacts do nothing to remedy the lack of information in the initial study. In response to inquiries about construction, the City states "Construction timetable is not appropriate CEQA mitigation. The construction will be in conformance with regulations within the Land Development Code." (1 AR 159.) This is truly an amazing attitude in light of the anticipation of work potentially occurring at night! (1 AR 68-69.) The initial study and subsequent response to comments demonstrate a distinct lack of good faith effort to comply with CEQA. *Sundstrom v. County of Mendocino*, 202 Cal. App. 3d 296, 305 (1988).

Clearly, the failure to impose or outline mitigation measures to reduce the impacts of dust, noise and traffic impacts caused by building a 29,000 square foot Student Center and excavating over 7,000 cubic yards of soil directly across from single family residences, constitutes an abuse of discretion. An expert is not necessary to opine that commercial construction has the potential for creating significant noise, dust and traffic from heavy equipment. Substantially evidence exists to support a fair argument the construction will have a significant impact on the neighborhood.

III. CONCLUSION

Respondent's suppression of the original RECON report constitutes a per se violation of CEQA. Pub. Res. Code § 21005. City Staff cannot reject relevant information and withhold it from the public and decision makers based on a pre-determined decision to go forward with a Mitigated Negative Declaration. Furthermore, based upon the whole record there is substantial evidence to support a fair argument that the Project may have a significant impact on biology, parking, traffic, aesthetics and construction impacts (noise, dust and traffic). Petitioners respectfully request the Court to order the City to rescind the certification of the MND, rescind all permits, rescind the sale of Site 653.