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16 SUPERIOR COURT OF THE STATE OF CALIFORNIA

17 COUNTY OF SAN DIEGO

18  
19 TAXPAYERS FOR RESPONSIBLE LAND  
20 USE et al.,

21 Plaintiffs and Petitioners,

22 v.

23 CITY OF SAN DIEGO et al.,

24 Defendants and Respondents.

25  
26 HILLEL OF SAN DIEGO et al.

27 Real Parties-in-Interest.  
28

No. GIC867378

**RESPONDENTS' AND REAL PARTY-IN-  
INTEREST'S CONSOLIDATED BRIEF IN  
OPPOSITION TO PETITION FOR WRITS  
OF MANDATE (CAL. CIV. PROC. CODE  
SECTIONS 1085 AND 1094.5)**

Date: March 1, 2007.

Time: 1:30 p.m.

Dept: 74

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

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1     **I.     INTRODUCTION**

2             Despite the quantity of issues raised, petitioners do not make one colorable argument.  
3     Petitioners are not entitled to a writ of mandate because they fail to demonstrate a prejudicial  
4     abuse of discretion. Under both California Code of Civil Procedure sections 1085 and 1094.5, it  
5     is petitioners' burden to show that the agency acted outside its authority or clearly abused its  
6     discretion. The only issue for the Court is whether petitioners have met their burden. They have  
7     not. The petition should be denied.

8     **II.    FACTUAL BACKGROUND**

9             Hillel of San Diego ("Hillel") provides religious services, student programs, educational  
10    resources and facilities to the Jewish college community of San Diego. (AR 03709, 01128.) The  
11    City of San Diego ("the City") sold a small vacant parcel of city-owned land commonly known  
12    as Site 653 to Hillel; the sale closed December 26, 2006. (AR 00048-50; Request For Judicial  
13    Notice ("RJN") Ex. 1.) Hillel acquired Site 653 to build a religious center for Jewish students  
14    attending the University of California at San Diego ("UCSD"). (AR 01128, 03710.) Nationally,  
15    the Hillel organization operates similar student religious centers near several university locations  
16    including the Universities of California at Los Angeles, Berkeley and Santa Barbara. (AR 01130-  
17    31.) Site 653 is ideal for a Hillel center because it is across the street from UCSD and students –  
18    most of whom do not own cars – will be able to walk from campus. (AR 03707.)

19            Site 653 is a vacant triangular-shaped remnant parcel located at the intersections of La  
20    Jolla Village Drive, La Jolla Scenic Drive North and La Jolla Scenic Way, south of the UCSD  
21    campus. (AR 00048.) The parcel is approximately 15,341 square-feet and an adjoining partial  
22    paper street, when vacated, will add 17,923 square feet to assemble a contiguous parcel totaling  
23    33,264 square feet. (AR 01335.) Site 653 is zoned single-family residential ("SF") in the La  
24    Jolla Shores Planned District ("PDO") within the La Jolla Community Plan. (AR 00017.) SF  
25    zoning permits religious uses. (AR 00017, 03709.) Several religious organizations operate  
26    student religious centers in nearby SF zoned neighborhoods surrounding UCSD. (AR 03710.)

27            On April 12, 2000, the City's Land Use & Housing Committee authorized the City's Real  
28    Estate Assets Department ("READ") to issue a request for proposal ("RFP") for the sale or lease

1 of Site 653 (AR 00048, 01336.) The RFP was issued with higher priority for student  
2 organizations based at UCSD. (AR 00048, 01336). City Staff received two responses to the  
3 RFP: (1) Hillel's proposal to develop and operate a student religious facility; and (2) a proposal to  
4 maintain the site as undeveloped landscaped area. (AR 01336.) A committee reviewed the  
5 proposals and recommended the City accept Hillel's. (*Id.*) On November 11, 2000, the Council  
6 authorized READ to enter into exclusive negotiations with Hillel for the lease or sale of Site 653.  
7 (*Id.*) Although Resolution R-294224 states "for the ground lease of Site 653" (AR 07929), the  
8 transcripts of the November 11, 2000, City Council ("Council") session clearly indicate that a  
9 resolution authorizing exclusive negotiations for a lease *or sale* was discussed and approved.  
10 (*E.g.*, AR 01336, 01775-77, 03708).

11 On May 9, 2006, the Council held a public session in La Jolla to vote on the Hillel Project.  
12 City Staff recommended the Council adopt resolutions to: (1) certify that MND No. 6098 has  
13 been completed in compliance with CEQA; (2) grant Planned Development Permit No. 158095  
14 and Site Development Permit No. 158094; (3) grant Lot-Line Adjustment Parcel Map No.  
15 188004; (4) approve vacating a portion of La Jolla Scenic Drive North, a portion of La Jolla  
16 Scenic Drive and a portion of Torrey Pines Road, and dedicate General Utility Easements over  
17 portions of the vacated public-right-of-way to the Hillel Project; and (5) authorize the Mayor to  
18 execute a Real Estate Purchase and Sale Agreement and Grant Deed with Hillel for the sale of  
19 Site 653. (AR 01335, 01651-52 01656.) Council entertained testimony from City Staff, Hillel  
20 Project proponents and project opponents (AR 01668-69, 01674-78.) The Council voted 6-2 to  
21 adopt each proposed resolution relating to the Hillel Project and authorized the sale of Site 653 to  
22 Hillel. (AR 00007-08, 00015-23, 00040-41, 00048-50, 00054-56.)

23 The approved Hillel Project consists of two phases. Phase I is the continued use of 8976  
24 Cliffridge Avenue for Hillel's religious offices until Phase II is complete. (AR 00016.) Phase II  
25 is the development of a one-story, 12,100 square-foot religious center, and a 17,000 square-foot  
26 subterranean garage to accommodate 68 on-site parking spaces. (*Id.*) Additionally, 10,000  
27 square feet of the Hillel project area will be landscaped and maintained by Hillel to create a  
28 neighborhood amenity with pedestrian and bicycle paths for public use. (AR 00017, 03710-11.)

1 **III. PETITIONERS ARE NOT ENTITLED TO A WRIT OF MANDATE UNDER CALIFORNIA CODE**  
2 **OF CIVIL PROCEDURE SECTION 1085.**

3 Petitioners allege the City's sale of Site 653 to Hillel "violated mandatory procedures  
4 prescribed by the Municipal Code and City Council Policies." (Points & Authorities In Support  
5 Of Petition For Writs of Mandate ("Writ P&As") at 3:22-23.) On this allegation, petitioners seek  
6 a writ of mandate under California Code of Civil Procedure section 1085 ("Section 1085").<sup>1</sup> This  
7 Court should deny the Section 1085 claim because petitioners: (1) ignore the appropriate legal  
8 standard under Section 1085; (2) do not establish a duty owed by the Council that it has not fully  
9 complied with; and (3) do not show the Council acted arbitrarily or capriciously, or abused its  
10 discretion when it authorized the sale of Site 653 to Hillel and adopted Resolution R-301436.

11 **A. Section 1085 Is Limited To Enforcing Ministerial Duties Required By Law**  
12 **And May Not Be Used To Control An Agency's Exercise Of Discretion.**

13 Noticeably absent from petitioners' brief is the applicable legal standard of review under  
14 Section 1085. Judicial review under Section 1085 is limited and an agency's actions are entitled  
15 to great deference. *Ridgecrest Charter Sch. v. Sierra Sands Unified Sch. Dist.*, 130 Cal. App. 4th  
16 986, 1003 (2005). Section 1085 authorizes courts to issue a writ of mandate "to compel the  
17 performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or  
18 station ..." CAL. CIV. PROC. CODE § 1085. Mandamus may also be used "to attack, review, set  
19 aside, void or annul a determination, finding, or decision of a public agency" for noncompliance  
20 with a statute. *W. States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 567 (1995).

21 Two requirements are essential to issue a writ under Section 1085: "(1) *a clear, present*  
22 *and usually ministerial duty* upon the part of the respondent; and (2) a clear, present and  
23 beneficial right in the petitioner to the performance of that duty." *People ex rel. Younger v.*  
24 *County of El Dorado*, 5 Cal. 3d 480, 491 (1971) (emphasis added). Mandate is unavailable where  
25 the alleged ministerial duty is contrary to the law defining the duty. *Moran v. Cal. Dept. of Motor*  
26 *Vehicles*, 139 Cal. App. 4th 688, 691 (2006) (citation omitted) (noting mandate does not lie to  
enforce an act not required by law). Indeed, mandamus cannot compel an agency to perform a

27 <sup>1</sup> Hillel and Respondents object to petitioners' use of Section 1085 as improper, and ask that the Court deny the writ  
28 on this basis alone. Where a petitioner seeks the wrong writ to review an administrative action, a court may deny the  
writ outright and affirm the agency's action. See Cal. Jur. 3d, Administrative Law, sec. 644.



1 duty that does not exist. *Excelsior Coll. v. Cal. Bd. of Registered Nursing*, 136 Cal. App. 4th  
2 1218, 1236-38 (2006) (affirming dismissal because statute did not confer the alleged duty).

3 Where a statute leaves room for discretion, a petitioner must show the agency “acted  
4 arbitrarily, beyond the bounds of reason or in derogation of the applicable legal standards.”  
5 *Marvin Lieblein, Inc. v. Shewry*, 137 Cal. App. 4th 700, 713 (2006) (citations and quotations  
6 omitted). In other words, review is limited to whether respondents’ actions were “arbitrary,  
7 capricious, entirely lacking in evidentiary support or contrary to required legal procedures.” *Id.*

8 **B. The Court Should Dismiss Petitioners’ Section 1085 Claim Because It Asks**  
9 **The Court To Enforce A Duty That Does Not Exist.**

10 To obtain a writ under Section 1085, petitioners must establish “a clear, present duty upon  
11 the part of the respondent.” See *Excelsior Coll. v. Cal. Bd. of Registered Nursing*, 136 Cal. App.  
12 4th 1218, 1236-37 (2006). They have not. Although petitioners claim the San Diego Municipal  
13 Code requires that “prior to the City negotiating a sale of its property, *the Council must adopt a*  
14 *resolution identifying the negotiation process*” (Writ. Pet. at 5:14-15 (emphasis added)),  
15 petitioners *do not* and *cannot* show a code section that embodies such a requirement.

16 Petitioners note that San Diego Municipal Code section 22.0902 (“SDMC 22.0902”)  
17 “establishes mandatory procedures for the sale of City property.” (Writ P&As at 3:27-4:1.)  
18 While this may be true, SDMC 22.0902 does not create petitioners’ alleged “mandatory duty” to  
19 adopt an additional resolution identifying the negotiation process – prior to the resolution  
20 authorizing the sale. SDMC 22.0902 only requires that “the Council *shall sell* the real property  
21 of the City ... *in pursuance of a resolution...*” Even so, petitioners assert that SDMC 22.0902  
22 requires the Council to “adopt a resolution that identifies the negotiation process” prior to the City  
23 engaging in any negotiations, and that the Council was required to adopt such a resolution before  
24 May 9, 2006. (Writ P&As at 5:1.) The text of SDMC 22.0902 does not support this assertion.

25 **1. SDMC 22.0902 Applies Only To The “Sales Of Real Property” And**  
26 **Thus Requires Only A Resolution Authorizing The Sale Of Site 653.**

27 SDMC 22.0902 is titled “*Sales of Real Property*” and states:

28 No real property belonging to the City shall be sold except in pursuance of a  
resolution passed by an affirmative vote of five members of the Council, which  
shall contain the following:

- 1 (a) The reason for selling such real property;
- 2 (b) A description of the real property to be sold;
- 3 (c) A statement of the value of such property as disclosed by an appraisal  
4 made by a qualified real estate appraiser, who may be a professional  
5 appraiser or a qualified employee of the City of San Diego, together with  
6 the minimum amount the Council will consider for the sale of each such  
7 property;
- 8 (d) A statement that the City may at its discretion pay a real estate broker's  
9 commission under the provisions of Section 22.0905 for the sale of such  
10 real property;
- 11 (e) A statement that the property will be sold by negotiation or by public  
12 auction, or by sealed bids, or by a combination of public auction, and  
13 sealed bid; providing, however, that in the event that such property is to be  
14 sold by negotiation, then the reasons therefore shall be included in the  
15 resolution."

16 Notably, SDMC 22.0902 does not specify a time limit for issuing the sale resolution or require  
17 additional or prior resolutions. SDMC 22.0902 only requires the Council to authorize the sale of  
18 City-owned real property by resolution *prior to the ultimate sale*: "[n]o real property belonging to  
19 the City shall be *sold* except in pursuance of a resolution passed ..." (Emphasis added.)

20 Thus, petitioners *manufacture* the alleged duty they ask the Court to enforce. SDMC  
21 22.0902 does not require an additional resolution prior to entering into any kind of negotiation for  
22 the sale of City property. Mandate cannot compel an agency to perform a duty that does not  
23 exist. *Excelsior College*, 136 Cal. App. 4th at 1236-38. Where (as here) the petition alleges a  
24 duty that simply does not exist, the petition must be denied. *See id.*

## 25 2. Council Resolution R-301436 Authorizing The Sale Of Site 653 To 26 Hillel Fully Complies With SDMC 22.0902's Requirements.

27 On May 9, 2006, the Council, with six affirmative votes, passed Resolution R-301436  
28 authorizing the sale of Site 653 to Hillel. (AR 00048-50, 01678.) Resolution R-301436 satisfies  
each of SDMC 22.0902's requirements. First, it cannot be disputed that Resolution R-301463  
was adopted *prior* to the sale of Site 653 – Resolution R-301436 was adopted on May 9, 2006,  
and the sale of Site 653 to Hillel closed over seven months later on December 26, 2006. (AR  
00048; RJN Ex. 1.) Second, Resolution R-301436 describes the property to be sold: "vacant  
triangular shaped approximately 15,341 square-foot parcel . . . known as Site 653." (AR 00048.)

1 Third, Resolution R-301436 states the reasons the property was to be sold by negotiation:

2 WHEREAS, on April 12, 2000, the Land Use & Housing Committee authorized  
3 the Real Estate Assets Department [READ] staff to issue a request for proposal  
4 [RFP] for the potential sale or lease of Site 653 with a higher priority to be given  
5 to student organizations based at UCSD; and

6 WHEREAS, Hillel of San Diego, who proposed to develop and operate a facility  
7 serving the UCSD Jewish student community, responded to the RFP, along with  
8 one other respondent; and

9 WHEREAS, Hillel of San Diego was selected by the committee reviewing the  
10 proposals; and

11 WHEREAS, on November 20, 2000, the City Council authorized READ staff to  
12 enter into exclusive negotiations with Hillel of San Diego;

13 (AR 00048.) Finally, Resolution R-301436 states that an independent appraisal was performed  
14 valuing the property at \$940,000.00. (AR 00048; *see also* 12 AR 03765 (appraisal review and  
15 approval).) Thus, contrary to petitioners' argument, the City lawfully sold Site 653 to Hillel in  
16 pursuance of Resolution R-301436, which was adopted prior to the negotiated sale of the property  
17 that closed seven months later. Because the resolution authorizing the sale of Site 653 complies  
18 with SDMC 22.0902, petitioners fail to establish a duty owed by the Council with which it did  
19 not comply. In the absence of an enforceable duty, the Section 1085 claim must be denied.

20 **C. The Court Should Dismiss Petitioners' Section 1085 Claim Because Mandate  
21 May Not Be Used To Control The Council's Discretion.**

22 Petitioners allege "Council Policies establish mandatory procedures." (Writ P&As at 6:7.)  
23 Not true. Conspicuously, petitioners cite no authority for that proposition and, not surprisingly,  
24 no such authority exists. The truth is quite to the contrary; council policies are general and  
25 advisory, and provide guidance for the exercise of discretion only. In fact, the text of Council  
26 Policy 700-10 specifically states: "[i]t is the purpose of this policy ... *to provide guidance* for the  
27 auction, negotiated sale, or exchange of City-owned real estate...." (NOL Ex. 1, Council Policy  
28 700-10 at 1 (emphasis added).) Thus, Council Policy 700-10 is not mandatory as petitioners  
allege – it simply provides guidelines for the Council to use in exercising its discretion.

1 **1. Petitioners Fail To Show An Arbitrary Or Capricious Abuse of  
2 Discretion Under Council Policy 700-10.**

3 Mandamus under Section 1085 "may not be invoked to control an exercise of discretion."

1 *Ridgecrest*, 130 Cal. App. 4th at 1002. Because Council Policy 700-10 is discretionary, judicial  
2 review is limited to determining whether the action was “arbitrary, capricious, entirely lacking in  
3 evidentiary support or contrary to required legal procedures.” *Marvin Lieblein*, 137 Cal. App. 4th  
4 at 713 (citation omitted). In other words, to obtain a writ under Section 1085, petitioners are  
5 required to point to evidence in the record that the Council “acted arbitrarily, beyond the bounds  
6 of reason or in derogation of the applicable legal standards.” *Id.* This they have failed to do.

7 **2. The Council’s Decision To Authorize The Sale of Site 653 To Hillel Is**  
8 **Consistent With Council Policy 700-10.**

9 Moreover, the Council complied with its Council Policy 700-10. (*See, e.g.*, AR 05194.)  
10 As discussed above, Council Resolution R-301436 satisfies Section 22.0902. And, contrary to  
11 petitioners’ false statement that “the Council failed to require a ‘right to repurchase or a reversion  
12 upon a condition subsequent” (Writ P&As at 6:17), the Real Estate Purchase and Sale Agreement  
13 executed between the City and Hillel does, in fact, contain a right of reversion upon a condition  
14 subsequent. (AR Ex. 1054 at 08326, ¶17.) Further, there is a development commitment, as  
15 evidenced in the Hillel Project development permits. (AR 00016-22.) The City determined that  
16 development permits were the necessary processes and thus a conditional use permit was not  
17 appropriate. (*See* AR 01431, 01436.) Because the Council complied with Council Policy 700-10  
18 and its action is supported by the record, petitioners have not shown the Council “acted  
19 arbitrarily, beyond the bounds of reason or in derogation of the applicable legal standards.”  
20 Without proof of a clear abuse of discretion, petitioners’ Section 1085 claim must be denied.

21 **IV. PETITIONERS ARE NOT ENTITLED TO A WRIT OF MANDATE UNDER CALIFORNIA CODE**  
22 **OF CIVIL PROCEDURE SECTION 1094.5**

23 Petitioners argue that the City should be “ordered, through writs of administrative  
24 mandate, to rescind the adjudicative decisions by which it vacated portions of the public right-of-  
25 way adjacent to Site 653, granted Hillel’s development permits, and approved Hillel’s requested  
26 lot-line adjustment.” (Writ P&As at 6:22-24.) This argument fails because petitioners do not  
27 show the Council prejudicially abused its discretion in approving the public right-of-way vacation  
28 or the Hillel Project development permits. In the absence of a prejudicial abuse of discretion,  
petitioners’ Section 1094.5 claim must be denied.

1           **A. The Council's Approval Of The Hillel Project Is Entitled To Deference And**  
2           **May Not Be Disturbed Unless Petitioners Prove A Prejudicial Abuse Of**  
3           **Discretion.**

4           Similar to review under Section 1085, judicial review of quasi-judicial agency action  
5           under Section 1904.5 is limited and deferential to the agency. Under Section 1094.5, the inquiry  
6           is "whether the respondent has proceeded without or in excess of its jurisdiction; whether there  
7           was a fair trial; and whether there was any prejudicial abuse of discretion." CAL. CIV. PROC.  
8           CODE § 1094.5(b). To establish an abuse of discretion, petitioners must show "the respondent has  
9           not proceeded in the manner required by law, the order or decision is not supported by the  
10          findings, or the findings are not supported by the evidence." *Id.* Where (as here) it is claimed the  
11          findings are not supported by the evidence, the Court's review is limited to determining whether  
12          the agency's findings are supported by substantial evidence, in light of the entire administrative  
13          record. CAL. CIV. PROC. CODE § 1094.5(c); *see also Saad v. City of Berkeley*, 24 Cal. App. 4th  
14          1206, 1212 (1994) (citations and quotations omitted). Further, it is petitioners' burden to show  
15          there is "no substantial evidence whatsoever to support [the agency's] findings." *Id.*

16          The deferential substantial evidence standard of review requires the Court to consider all  
17          relevant evidence in the administrative record and resolve all doubts in favor of the agency's  
18          findings and decision. *Harris v. City of Costa Mesa*, 25 Cal. App. 4th 963, 969 (1994) (citation  
19          omitted). The Court may not disregard or overturn a finding just because a contrary finding could  
20          be considered equally or even more reasonable. *McMillan v. Am. Gen. Fin. Corp.*, 60 Cal App.  
21          3d 175, 182 n.6 (1976). Under Section 1094.5, the agency's decision is presumed to be correct; it  
22          is petitioners' burden to prove otherwise. *Id.*; *see also San Franciscans Upholding the Downtown*  
23          *Plan v. City and County of San Francisco*, 102 Cal. App. 4th 656, 674 (2002). They have not.

24           **B. Petitioners Seek The Wrong Writ To Review Resolution R-301435 Because**  
25           **Street Vacations Are Quasi-Legislative Acts Reviewable Under Section 1085.**

26          Petitioners seek the *wrong writ* to challenge the Council's decision to vacate the public  
27          right-of-way and adopt Resolution R-301435.<sup>2</sup> Judicial review of street-vacation decisions is  
28          proper under Section 1085. *Citizens for Improved Sorrento Access, Inc. v. City of San Diego*, 118

<sup>2</sup> Again, because petitioners seek the wrong writ, the Court may deny it outright. *See* footnote 1, *supra*.

1 Cal. App. 4th 808, 814 & n.3 (2004) (holding judicial review of street vacation determinations is  
2 “highly deferential” and governed by Section 1085); *Heist v. County of Colusa*, 163 Cal. App. 3d  
3 841, 845-48 (1984). As discussed above, review under Section 1085 is “limited to an inquiry into  
4 whether the action was arbitrary, capricious or entirely lacking in evidentiary support.” *Citizens*  
5 *for Improved Sorrento Access*, 118 Cal. App. 4th at 814 (citation omitted). The petitioners’ brief  
6 is wholly absent of any evidence to show that the Council’s decision to vacate the public right-of-  
7 way was arbitrary, capricious or entirely lacking in evidentiary support. Thus, petitioners are not  
8 entitled to relief under Section 1085 – even if they would have pled the right claim. Assuming,  
9 *arguendo*, Section 1094.5 governs review of Resolution R-401435, the deferential abuse of  
10 discretion standard applies. Under either standard, petitioners fail to show entitlement to a writ.

11 **C. The Council Did Not Abuse Its Discretion In Adopting Resolution R-301435**  
12 **Vacating The Public Right-Of-Way.**

13 Petitioners argue that “the City abused its discretion in approving Hillel’s requested street  
14 and right-of-way vacation because: (1) its findings are inadequate under [*Topanga Ass’n for a*  
15 *Scenic Cmty. v. County of Los Angeles*, 11 Cal. 3d 506, 514 (1974) (“*Topanga*)], (2) its findings  
16 are not supported by the evidence, and (3) it failed to make a required finding.” (Writ P&As at  
17 8:2-4.) Each of petitioners’ three reasons are without merit. First, the Council’s findings are, in  
18 fact, adequate under *Topanga* and its progeny. Second, the Council’s findings are supported by  
19 substantial evidence. And third, the City made every required finding under SDMC 125.0941;  
20 petitioners’ semantic misreading of the Resolution’s use of the word “or” is misguided.

21 **1. The Council’s Findings Are Adequate And Support Its Decision To**  
22 **Vacate The Public Right-Of-Way.**

23 Petitioners ask the Court to grossly expand *Topanga’s* holding to support their argument  
24 that the City’s findings in Resolution R-301435 are inadequate. Petitioners’ claim that  
25 “[*Topanga*] holds findings like those offered by the City are inadequate as a matter of law.”  
26 (Writ P&As at 9:7-8.) Petitioners overstate, however, what is required under *Topanga* and  
27 misrepresent its holding. *Topanga* stands for the straightforward proposition that an agency’s  
28 adjudicatory decision *must render findings* – “regardless of whether the local ordinance  
commands that the [agency] set forth findings.” *Topanga*, 11 Cal. 3d at 513-14. Notably,

1 *Topanga* involved a situation where the agency at issue, a planning commission, relied on a  
2 summary data report and did not make *any* findings. *Id.* at 519. *Topanga* also disapproves of the  
3 practice of “setting forth findings *solely* in the language of the applicable legislation.” *Id.* at 516  
4 n.16 (emphasis added). But *Topanga* does not support petitioners’ exaggerated proposition that  
5 “findings like those offered by the City are inadequate as a matter of law.” (Writ P&As at 9:7-8.)

6 Rather, *Topanga* requires that findings “expose the [agency’s] mode of analysis” to an  
7 extent “sufficient both to enable the parties to determine whether and on what basis they should  
8 seek review, and in the event of review, *to apprise a reviewing court of the basis for the board’s*  
9 *action.*” *Topanga*, 11 Cal. 3d at 514, 516 n.16. The Council’s findings satisfy this requirement.

10 The Council’s findings in Resolution R-301435 are not “solely the language of the  
11 applicable legislation.” Petitioners’ characterization that the findings “merely recite applicable  
12 language of the Municipal Code” (Writ P&As at 8:27) is false. Although the Council’s findings  
13 use the language of SDMC 125.0941 to explain the Council’s decision, using language of a  
14 statute in and of itself does not invalidate an agency’s findings. *Dore v. County of Ventura*, 23  
15 Cal. App. 4th 320, 328 (1994). As long as findings “bridge the analytic gap between the raw  
16 evidence and the ultimate decision ... the findings need not be stated with the precision required  
17 in judicial proceedings.” *Craik v. County of Santa Cruz*, 81 Cal. App. 4th 880, 884 (2000)  
18 (quoting and citing *Topanga*, 11 Cal. 3d at 515).

19 Resolution R-301435’s findings, in fact, demonstrate the Council’s reasons for reaching  
20 its decision – sufficient to apprise this Court of the basis for the Council’s action. To illustrate,  
21 under SDMC 125.0941(a), the Council explicitly found that the right-of-way is not needed for (1)  
22 a public street, (2) a bikeway, or (3) open space purposes. (AR 00040.) Under SDMC  
23 125.0941(b), the Council found that the public will benefit from: “improved utilization of the  
24 land.” (*Id.*) Under SDMC 125.0941(c), the Council found that “the vacation is consistent with  
25 the General Plan or an approved Community Plan.” (*Id.*) Under SDMC 125.0941(d), the Council  
26 found that the “public street system” for which the right-of-way was originally acquired will not  
27 be detrimentally affected by the vacation. (*Id.*) These findings are sufficient under *Topanga* to  
28 support the Council’s decision and, thus, petitioners have not shown an abuse of discretion.

1                   2.       **The Council's Findings Are Supported By Substantial Evidence.**

2                   Petitioners do not meet their burden under Section 1094.5 to prove that there is "*no*  
3 *substantial evidence whatsoever*" in the record to support the Council's findings. *See Saad*, 24  
4 Cal. App. 4th at 1212. Petitioners' brief cites documents authored by Sherri Lightner –  
5 petitioners' primary member – to argue that the Council's decision to vacate the public right-of-  
6 way is unsupported. (*See AR Exs. 60, 63.*) But a review of the record *not* generated by  
7 petitioners demonstrates substantial evidence to support Resolution R-301435's findings:

- 8                   • *There is no present or prospective use for the public street system for which the right-*  
9 *of-way was originally acquired, or for any other public use of a like nature that can be*  
10 *anticipated in that the right of way is not needed for public street, bikeway, or open*  
11 *space purposes.*
- 12                   ➤ the public right-of-way being vacated is "un-improved and excess right-of-way for  
13 a future widening that will never be necessary" (AR 01575)
  - 14                   ➤ "all plans to improve this portion of the right-of-way and connect it to the street  
15 system have been long abandoned" (AR 03732)
  - 16                   ➤ "the City of San Diego Bicycle Master Plan does not identify it for a future Class  
17 II bike lane" and "a Class II bike lane is typical for major streets ... [t]his street is  
18 shown as a local street in the Community Plan" (AR 01511)
  - 19                   ➤ Park and Rec. does "not consider this a desirable open space parcel" (AR 08073)
  - 20                   ➤ *See also* AR 01510-12, 01434, 01835-36, 03709, 03732, 04479, 04496, 05271-73,  
21 05824-25, 08073, 00902, 00932
- 22                   • *The public will benefit from the vacation through improved utilization of land.*
- 23                   ➤ "the proposed street vacation will allow Hillel to transform the unused right-of-  
24 way into a landscaped public amenity with pedestrian walkways and a bicycle  
25 path" (AR 05825)
  - 26                   ➤ the vacated land will be "landscaped and maintained by Hillel and made available  
27 for public use" and "ultimately be developed with trees, landscaping and walking  
28 paths" (AR 05165, 05825)
  - *See also* AR 03710-11, 03732, 04479, 04496, 00931, 00989
- *The vacation is consistent with the General Plan or an approved Community Plan.*
- "all plans to improve this portion of the right-of-way and connect it to the street  
                  system have been long abandoned" (AR 03732)
  - the project "implements policies of the La Jolla Community Plan which  
                  recommend enhanced pedestrian-orientation" (AR 01435)
  - "by incorporating the cited design features and the conditions regarding operation  
                  of the center, the project implements the policies of the La Jolla Community Plan  
                  and would not adversely affect the residential land use designation" (AR 01511)



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➤ See also AR 01435, 04479, 04496, 01511, 00902, 00932

• ***The public street system for which the right-of-way was originally acquired will not be detrimentally affected by this vacation.***

➤ the proposed vacation “is unimproved and excess public right-of-way” originally obtained for “a future widening that will never be necessary” (AR 01434, 01575)

➤ “all plans to connect this portion of La Jolla Scenic Drive to La Jolla Village Drive were abandoned” and left “this remnant parcel;” “access between La Jolla Scenic Drive and Torrey Pines Road has been relinquished” (AR 05160, 05165, 05825)

➤ See also AR 03732, 04479, 04496, 00902, 00932

Under Section 1094.5, the issue is whether the agency’s decision is supported by substantial evidence – *not* whether evidence contrary to the agency’s decision exists somewhere in the record. As shown, the Council’s decision to vacate the public right-of-way is supported by substantial evidence. *Petitioners’ citation to contrary evidence does not prove otherwise* and thus petitioners have failed to meet their burden under Section 1094.5.

**3. The Council Made Every Finding Required Under SDMC 125.0941 To Approve Vacating The Public Right-Of-Way.**

Petitioners argue the Council failed to make a required finding because “through its use of the disjunctive ‘or,’ the City chose not to find that the vacation is consistent with both the General Plan *and* the Community Plan.” (Writ P&As at 11:18-19 (emphasis in original).) This argument borders on absurd. SDMC 125.0941(c) requires the Council to find that “[t]he vacation does not adversely affect any applicable *land use plan*.” The code defines “*land use plans*” as “the Progress Guide and General Plan and adopted community plans, specific plans, precise plans, and sub-area plans.” SDMC § 113.0103. This definition articulates that the general term includes various plans; it does not create a requirement under SDMC 125.0941(c) that the Council never use the word “or.” The Council found “the vacation is consistent with the General Plan or an approved Community Plan.” (AR 00040.) This finding is consistent with SDMC 125.0941(c) and supported in the record. (See § IV,C(3) above.) Moreover, using the word “or” is not failure to make the finding at all, and it certainly is not an abuse of discretion under Section 1094.5.

**D. The Council Did Not Abuse Its Discretion In Adopting Resolution R-301433 Approving The Hillel Project’s Development Permits.**

Petitioners also attack the Council’s findings in adopting Resolution R-301433, which

1 approved the Hillel Project's Site Development Permit ("SDP") and Planned Development Permit  
2 ("PDP"). Petitioners, again, claim the "findings are deficient" under Section 1094.5 and "the  
3 City, in approving Hillel's SDP/PDP, prejudicially abused its discretion." (Writ P&As at 12:5-6.)  
4 But petitioners fail to establish a lack of substantial evidence in the record and thus have not met  
5 their burden to prove an abuse of discretion under Section 1094.5.

6 Section 1094.5 review is limited to whether the agency's findings are supported by  
7 substantial evidence and this Court may not overturn an agency's finding just because a contrary  
8 finding could be have been made. *McMillan*, 60 Cal App. 3d at 182 n.6. Thus, petitioners'  
9 repeated citation to its *members' own criticisms* of the Project are irrelevant; it does not matter  
10 whether a decision in petitioners' favor could have been made. *See id.* Petitioners conveniently  
11 ignore the remaining evidence in the record – *i.e.*, evidence not generated by petitioners  
12 themselves. A more candid and thorough review of the record demonstrates substantial evidence  
13 supporting the Council's decision to approve Hillel's permits. (See Sections IV, D(1)-(3), below.)  
14 Because the Council's findings are supported by substantial evidence, the action approving the  
15 Hillel Project's SDP and PDP may not be disturbed. *See Harris*, 25 Cal. App. 4th at 969.

16 **I. Substantial Evidence Support's The Council's Finding That Phase I Is**  
17 **A Permissible Use In The SF Zone Of The La Jolla Shores PDO.**

18 The purpose of a SDP and a PDP is to apply "site-specific conditions," and "allow an  
19 *applicant* to request greater flexibility from the strict application of the regulations" and  
20 "encourage imaginative and innovative planning." (SDMC §§ 126.0501, 126.0601; AR 05821,  
21 05844, 05993.) The development permit process is intended to "assure that the *development*  
22 achieves the purpose and intent of the applicable *land use plan* and that it would be preferable to  
23 what would be achieved by strict conformance with the regulations." (SDMC § 126.0601.) The  
24 decision to approve a project SDP or PDP is discretionary. (*Id.*; AR 00016.)

25 To approve Hillel's SDP and PDP, the Council was required to find the proposed  
26 development "will not adversely affect the applicable *land use plan*." (SDMC §§ 126.0504(a)(1),  
27 126.0604(a)(1)), and "will comply with the [applicable] regulations of the Land Development  
28 Code" (SDMC §§ 126.0504(a)(3), 126.0604(a)(3)). The Hillel Project is located in the SF zone

1 of the La Jolla Shores PDO, which permits uses such as “churches, temples or buildings of a  
2 permanent nature, used for primarily religious purposes.” (AR 00015-17; SDMC 103.0304.1(e).)  
3 Phase I is the continued use of a 8976 Cliffridge Avenue for religious offices until the occupancy  
4 of the Phase II center is approved. (AR 01399, 01433.) Phase I use is for temporary “religious  
5 offices” and administration, and is for “primarily religious purposes,” including religious  
6 counseling and bible study. (AR 00016-22, 07653.) Justly, the Council found Phase I’s religious  
7 use is consistent with the PDO and Community Plan. This finding is substantially supported.<sup>3</sup>

8 Neither the City nor Hillel have taken the position that Phase I use is for “business and  
9 professional offices.” Petitioners’ claim “[t]he City and Hillel in fact admit Phase I is a ‘business  
10 and professional offices’ use” (Writ P&As at 12:20) is absolutely false. Hillel is a religious non-  
11 profit providing religious services for students. Hillel’s Phase I use is to facilitate administration  
12 of its religious non-profit and is for “primarily religious purposes,” including “religious  
13 counseling and one-on-one bible study” (AR 07653) – this is *not* business or professional use.  
14 There is a difference between ‘religious office use’ and ‘religious assembly use’ for the purpose  
15 of determining parking – but this does not affect Phase I’s consistency with the SF zone because  
16 the use remains “primarily [for] religious purposes.” The Council did not abuse its discretion.

17 **2. Substantial Evidence Supports The Council’s Finding That Phase I**  
18 **Will Comply With The Land Development Code.**

19 Again, the required parking finding for Phase I does not contradict the finding that the  
20 religious nature of the use is consistent with and permitted in the SF zone. Petitioners’ attempt to  
21 establish an inconsistency between the parking and the zoning determinations mixes apples and  
22 oranges. Petitioners argue that the parking for Phase I should have been determined according to  
23 the ratio for “*churches* and places of religious assembly.” (Writ P&As at 13:11.) Although  
24 Phase I use is for “primarily religious purposes” and is permitted in the SF zone, it is not a  
25 “*church*” as defined by the code and it is not being used for religious assembly. (See SDMC §  
26 113.0103.) Thus, the parking ratio used to determine required parking for Phase II – likely  
27 designed to accommodate large congregations – does not apply to Phase I.

28 <sup>3</sup> (AR 00016-22, 00900, 00963, 01432-34, 01437, 01510, 05821-24, 01568-70, 01574, 01773, 01931, 03709-10,  
03731, 04478, 04495, 05821, 05891, 07180-84, 07653, 07891-92.)

1                   **3. Substantial Evidence Supports The Council's Finding That Phase II**  
2                   **Will Comply With The Land Development Code.**

3                   Under the SDP and PDP, Hillel is required to provide the exact number of parking spaces  
4                   required by the LDC – 135 – 68 in a subterranean garage, and 67 provided off-site. (SDMC  
5                   142.0530, table 142-05F; AR 00015-22.) Further, the Council approved Hillel's requested  
6                   deviations to allow for use of a shared parking agreement and locating the off-site parking more  
7                   than 600 feet from the site. (AR 01436, 01572-73.) Petitioners outright *ignore* the fact that Hillel  
8                   specifically requested discretionary deviations from SDMC 142.0545. The discretionary PDP  
9                   process "allows for the decision maker to consider granting these deviations." (AR 01436,  
10                  01572.) Hillel requested a deviation through its PDP precisely because SDMC 142.0545(a)  
11                  prohibits shared parking in the SF zone. (*Id.*) Hillel also requested a deviation from SDMC  
12                  142.0545(a)(2) because it will be *beneficial* to locate the off-site parking more than 600 feet from  
13                  the project site. (AR 00017-20, 01436, 01572.) It is irrelevant that shared parking is generally  
14                  not permitted in the SF zone; the Court may disregard petitioners' brief from 13:20 to 15:16. The  
15                  Council's decision to approve the deviations is supported by the unique characteristics of the Site  
16                  and the project's needs. (AR 00019-20.) Resolution R-301433's findings are substantially  
17                  supported. (*See, e.g.*, AR 01436, 01780-84, 03619.) The Council has discretion to approve  
18                  deviations; petitioners do not show any evidence of an abuse of that discretion.

19                  **V. CONCLUSION**

20                  To obtain relief under either writ, it is petitioners' burden to prove the Council abused its  
21                  authority or its discretion. They have not. The Council's approval of the Hillel Project is  
22                  supported by substantial evidence and should be upheld. The petition should be denied.

23                  Dated: February 2, 2007

                  Dated: February 2, 2007

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