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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

FEDERATION OF HILLSIDE AND CANYON ASSOCIATIONS, a non-profit corporation, COALITION AGAINST THE PIPELINE ("CAP"), an unincorporated association, BALLONA ECOSYSTEM EDUCATION PROJECT ("BEEP"), a non-profit corporation, ENVIRONMENTALISM THROUGH INSPIRATION AND NON-VIOLENT ACTION ("ETINA"), a non-profit corporation,

Petitioners,

vs.

THE CITY OF LOS ANGELES; THE CITY COUNCIL OF THE CITY OF LOS ANGELES, DOES 1-10

Respondents.

PLAYA CAPITAL COMPANY LLC, a Delaware limited liability company,

Real Party in Interest

CASE NO.: **BS 093507**
[Related to Case No. BS093502]

PETITIONERS' REPLY IN SUPPORT OF POST-TRIAL BRIEF

Assigned for all Purposes:
Honorable W. Highberger, Dept. 32

Action Commenced: November 8, 2004

Trial Date: August 1-5, 2005

I. RESPONDENTS AFFIRMATIVELY MISLED THE PUBLIC AND THE DECISIONMAKERS REGARDING THE FACT THAT THE PROPOSED DEVELOPMENT IS A SUBSTANTIAL INCREASE OVER WHAT IS CURRENTLY PERMITTED. 1

II. RESPONDENTS HAVE PRODUCED NO SUBSTANTIAL EVIDENCE TO SUPPORT THE EIR'S FINDING THAT THE BUS MITIGATION MEASURE IS FULLY FUNDED OR ENFORCEABLE........................ 3

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I. Respondents Affirmatively Misled The Public And The Decisionmakers Regarding The Fact That The Proposed Development Is A Substantial Increase Over What Is Currently Permitted.

While it may be, as Playa Capital LLC (hereinafter "Playa") insists, that CEQA requires "no more than a general" project description, it is clear that CEQA does, at the very least, require the project description to be *accurate* and *honest*. *County of Inyo v. City of Los Angeles* (1977), 71 Cal. App. 3d 185,199, *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994), 27 Cal. App. 4th 713, 723-729. Describing an upzoning as a downzoning is unquestionably a blatant deception. It is undisputed that only 108,050 sq. ft. of office space are allowed to be built on the Phase 2 site due to the "horse-trading" which exhausted all other available entitlements in the 1993 and 1995 first phase projects, and that the proposed amount of development far exceeds that limit. However, each time Petitioners attempted to point out that the project was calling for an increase in permitted development disguised as a reduction of mythical entitlements, Respondents denied that an upzoning was occurring. For example, Playa Capital's attorney George Mihlsten told the City Planning Commission, "Mr. Frankel indicated that this project was a large upzoning of the property; that is just not correct." AR 120:33839. To the comment on the draft EIR that "the applicant is seeking a mammoth increase in entitlements—about 20 times what the current zoning allows under the Specific Plan", the City's response was "the Proposed Project would not increase entitlements about 20 times as suggested by the commentor." AR 95:26184. In fact, based on an average square footage for the 2600 residential units of 1500 square feet per unit, the residential square footage is likely to total 3,900,000. Add this to the 325,000 square feet of office and retail space, and the total approved project is likely to reach 4,225,000 square feet. Compare this to the existing entitlement of 108,050 square feet, and the increase is 39-fold. For the City to claim that even a 20-fold increase was not happening is preposterous and deceptive.

In the EIR, Respondents had ample opportunity to explain the true effect of the zone changes. Instead, they chose to obfuscate, at times making it seem like no zoning change was needed at all. For example, in a table titled "Land Use Implications of Proposed Development" (AR 25:6533), it is stated "The proposed project's office, retail and community service uses could be developed as proposed, pursuant to the provisions of the existing Specific Plan." As discussed above, this is not true. At every turn, Playa and the City discussed the proposed project as a reduction in permitted development, rather

than honestly addressing the fact that it required a large increase. "[T]he proposed project represents a substantial decrease in traffic generation when compared to the existing Specific Plan and General Plan land use designations" (emph. added) (AR 114:32000). "It also would reduce significantly or eliminate current entitlements allowed under the Playa Vista Specific Plan." AR 117:32813 (Emphasis added). "With the amendments to the Specific Plan, the Proposed Project would offer a substantial reduction in density as compared to existing entitlements." AR 119:33434 (Emphasis added). Each one of these statement ignores the zoning requirements that restrict where the Specific Plan entitlements may be built. Further, the entitlements they describe as being reduced by the proposed project had *already* been "horse-traded" away in 1993 and 1995, and *could no longer be built* anywhere in Phase 2.

Playa continues to contend that EIR described the project accurately in comparison to the previous development proposals for the area. This is irrelevant. The only relevant issue is the "existing" entitlement and zoning limitations for the area encompassing Phase 2, an issue which the City and Playa put substantial effort into misleading the public and decision makers. While there have been reductions in what the landowner originally hoped to build on the phase II site, the fact remains that since 1995, the zoning entitlements would not have allowed them to build what they had planned for this area. Just because Playa had been hoping to build a larger project does not justify that wish being used as a baseline for land use impacts analysis.

This is not a case where the EIR omitted information of an insubstantial nature. Here both the City and the Playa have attempted to affirmatively mislead the public and the decisionmakers into believing that the Playa is proposing to build substantially less in Phase 2 than it is permitted to, when the exact opposite is true.[1] This leads the reader of the EIR to believe that the consequence of not approving the proposed project will be that a substantially larger development will occur, with accordingly larger environmental impacts. Clearly, providing false or misleading information regarding a significant fact in the project description is, without question, a prejudicial abuse of discretion. *San Joaquin Raptor/Wildlife Rescue Center* at 723-729; *Kings County Farm Bureau v. City of Hanford,*

[1] Playa repeatedly insists that the discussion of project alternatives briefly but accurately described the current zoning and entitlement restrictions. Putting aside the question of whether one should have to look to the project's alternatives to find an accurate description of the project, it does not make up for the fact that Respondents affirmatively attempted to mislead the public and the decision makers on this issue on so many occasions.

1 (1990) 221 Cal.App.3d 692, 718, ("The misleading nature of the discussion and the failure to include
2 relevant evidence ... renders the EIR inadequate as an informational document.")

3 II. **Respondents Have Produced No Substantial Evidence To Support The EIR's Finding That The Bus Mitigation Measure Is Fully Funded Or Enforceable.**
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5 Playa mischaracterizes the requirements of the Trip Verification Study in its contract with Culver
6 City. The contract does not "impose project reductions" on Playa if trip limits are exceeded. Playa may
7 *elect* to reduce development *or may* be required to pay a one time "mitigation fee" (which, of course,
8 would do nothing to alleviate impacts from the failure of bus mitigation to intersections outside of
9 Culver City). AR 118:32976. Even assuming, *arguendo*, that this provision would provide sufficient
10 mitigation in case the bus measure failed, the Trip Verification Study on which it relies will only be
11 conducted once. AR 118:32982. If the bus mitigation fails for lack of funding before the study is
12 conducted, impacts from the failure would go unaddressed until the study is conducted, and if it failed
13 after the study was conducted, impacts would *never* be addressed. Further, this provision would only be
14 triggered in the first place if trip ends exceed the EIR estimates, and would only generally address
15 mitigation for those additional trip ends. It does not provide any specific mitigation for the 18
16 intersections that would be significantly impacted if the bus measure fails. This provision clearly was
17 only meant as a check on the EIRs calculation of daily trip ends resulting from the development, it was
18 not meant as substitute or "catch-all" mitigation if other measures failed, nor was it ever discussed as
19 such in the EIR.

20 Nowhere in their opposition briefs or at trial did Respondents point to any evidence refuting
21 evidence put forward by petitioners showing that the traffic mitigation measures discussed in the EIR for
22 the expected impacts are underfunded. Nor does it deny that both the Draft EIR and the Traffic Study
23 relied on the presumption that Playa would "compensate for the unsubsidized portion" of the operation
24 and maintenance costs rather than pay only 15% of those costs. In short, Playa has failed to produce any
25 substantial evidence to support the finding of full mitigation.

26 III. **The Discussion of the No Project Alternatives was Biased, Misleading and Inaccurate**
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28 The "no project" alternative "provides the decision makers and the public with specific
information about the environment if the project is not approved. It is a factually based forecast of the

1 environmental impacts of preserving the status quo." *Planning and Conservation League v. Department*
2 *of Water Resources,* (2000), 83 Cal. App. 4th 892, 917-918. The EIR in this case impermissibly
3 attempts to skew the "forecast of the environmental impacts" by dishonestly attributing significant
4 impacts to the "no project" alternatives that are flatly contradicted by the evidence in the record.

5 With respect to Alternative 1, Playa claims in its opposition that the excavation that will take
6 place as part of its development will allow for a complete remediation of the site that otherwise would
7 not occur.[2] This statement is simply not correct. The Clean Up and Abatement order requires nothing
8 less than "complete site-wide soil and groundwater assessment and remediation" AR 104:29170
9 Condition 1(c)(2). It is utterly irrelevant that as part of the development of the site, Playa may excavate
10 and dispose of soil, or make soil testing easier by removing buildings. That does not change the fact that
11 Playa is required to completely assess and remediate contamination at the site, whether or not it
12 develops the site. The simple fact of the matter is that "complete site-wide soil and groundwater
13 assessment and remediation" is required whether or not Playa chooses to develop the site, and that
14 statements claiming otherwise are untrue, and obviously present a misleading "forecast of the
15 environmental impacts of preserving the status quo." The same can be said of description of the
16 "significant impacts" ascribed by the EIR to Alternative 2. The only evidence in the record regarding
17 the traffic impacts of Alternative 2 is the Traffic Study, which found that the alternative would "not
18 produce any significant traffic impacts" (AR 71:19210-19214). The evidence in the record also shows
19 that Alternative 2 would generate almost 99% less solid waste. AR 28:7230. The City's attempt to
20 mislead the readers of the EIR on these issues is a failure to proceed as required by law.

21 **IV. Playa Urges An Interpretation Of Condition 116 That Renders It Meaningless.**

22 Playa urges the court to adopt an interpretation of the Condition 116 that would render the
23 condition meaningless and unenforceable. Playa argues that "there is no language on the face of
24 Condition 116 that requires the First Phase to be completed before the Village can be approved." Playa
25 Opp at 4. However, once the Vesting Tentative Tract Map for Phase 2 is approved, it provides Playa
26 with a right to proceed with development as detailed in the tract map. Cal. Gov. Code § 66498.1. Since
27

28 [2] The evidence in the record suggests that the excavation and removal of buildings on the site would be of little help in remediating soil and groundwater contamination since, as the citation to the record in Playa's *own brief* concludes "Past investigations do not suggest that a source of contamination . . . may be present beneath the subject buildings" AR 25:6618.

1 it will be too late once Phase 2 is approved to reduce development if Condition 116 is violated, the
2 interpretation that Playa is urging the Court to adopt would render Condition 116 unenforceable. Such a
3 construction is disfavored under the law. *Newton v. Clemons* (2003) 110 Cal.App.4th 1, 17

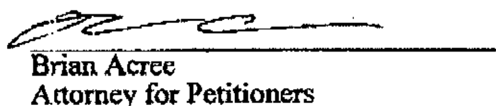
4 **IV. <u>The City Failed To Proceed As Required By Law By Failing To Provide A Written Statement Setting Forth The Specific Reasons For Proceeding With The Proposed</u>**
5 **<u>Project Despite Its Unmitigated Impacts.</u>**

6 Playa's response brief confuses the required Statement of Findings regarding impacts, mitigation
7 measures and project alternatives with the *separately required*[3] Statement of Overriding Considerations
8 in an attempt to make the analysis that was provided in the SOC seem larger than it really is. The cases
9 cited by Playa in response to this argument both involved attacks on whether there was substantial
10 evidence to support findings in the respective EIRs, not whether the SOC's in those cases contained a
11 sufficient written analysis of the required balancing.[4] These cases did not address the issue raised by
12 petitioners, that the statement was devoid of the written analysis required by law. The case more
13 directly on point is *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) ("*Amador*
14 *Waterways*"), 116 Cal. App. 4th 1099, which in analyzing whether a statement of reasons supporting a
15 finding that a potential impact was not significant, made the following observation:

16 > A statement of reasons is necessary to assure meaningful judicial review in the event, as here, the EIR is challenged in court. "Mere conclusions simply provide no vehicle for judicial review." ...
17 > Thus, the absence of the required statement of reasons prevents us from determining whether the Agency abused its discretion in the manner plaintiff claims. That absence itself, however,
18 > demonstrates an abuse *Id. At 1111-1112* (Citations Omitted)

19 Here, the SOC provides nothing more than its "mere conclusions" that the benefits of the project
20 outweigh its impacts. It thus fails to provide detail sufficient for the Court or the public to determine if
21 the balancing proceeded as required by law or deviated from the requirements of the law in a manner
22 that constitutes abuse of discretion. For that reason alone, the SOC is inadequate.

23 Date:



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26 [3] The Statement of Findings is required regardless of whether the agency decides to prepare an SOC, and serves the wholly different function of summarizing the evidence regarding the impacts, mitigation measures, and alternatives to the project Cal. Pub. Res. Code 21081, Guidelines 15091 (a), (b), (f); 15093.
27
28 [4] Indeed, the quote cited by Playa from *Defend the Bay v. City of Irvine* regarding balancing, "[w]e are not dealing with assaying of minerals here" was taken out of context. The Court in that case was referring to a statement in a General Plan requiring a "balance" of jobs and housing and whether respondent's determination of how those factors should be balanced should be deferred to over petitioner's. The Court was not referring to the written account of the balancing required to be undertaken in an SOC. 119 Cal. App 4th 1261, 1269.

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PROOF OF SERVICE

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I, Bradley C. Michaud, declare:

4 I am employed in the County of Los Angeles, State of California. My business address is
5 1685 Main Street, Santa Monica, California 90401. I am over the age of eighteen years and not a party to the action in which this service is made.

6 On **August 26, 2005** I served the document(s) described as **PETITIONERS' REPLY IN**
7 **SUPPORT OF POST-TRIAL BRIEF** on the interested parties in this action by enclosing the document(s) in a sealed envelope addressed as follows:

8
9 **[SEE ATTACHED SERVICE LIST]**

10
11 ☒ BY MAIL: I am "readily familiar" with this firm's practice for the collection and the processing of correspondence for mailing with the United States Postal Service. In the
12 ordinary course of business, the correspondence would be deposited with the United States Postal Service at 1685 Main Street, Santa Monica, California 90401, with postage thereon
13 fully prepaid the same day on which the correspondence was placed for collection and mailing at the firm. Following ordinary business practices, I placed for collection and mailing
14 with the United States Postal Service such envelope at 1685 Main Street, Santa Monica, California 90401.

15 ☐ BY FEDERAL EXPRESS ☐ UPS NEXT DAY AIR ☐ OVERNIGHT DELIVERY: I deposited such envelope in a facility regularly maintained by ☐ FEDERAL EXPRESS ☐
16 UPS ☐ Overnight Delivery [specify name of service:] with delivery fees fully provided for or delivered the envelope to a courier or driver of ☐ FEDERAL EXPRESS ☐ UPS ☐
17 OVERNIGHT DELIVERY [specify name of service:] authorized to receive documents at 1685 Main Street, Santa Monica, California 90401, with delivery fees fully provided for.

18
19 ☒ BY FACSIMILE: I telecopied a copy of said document(s) to the following addressee(s) at the following number(s) in accordance with the written confirmation of counsel in this action.

20 ☒ [State] I declare under penalty of perjury under the laws of the State of California that
21 the above is true and correct.

22 ☐ [Federal] I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

23
24 Executed on **August 26, 2005**, at Santa Monica, California.

25 Bradley C. Michaud

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