

No. 2d Civ. No B189603
Los Angeles Sup. Ct. Case Nos. BS 093502 (Lead Case), BS 093507
(Related Case)

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION THREE**

CITY OF SANTA MONICA, BALLONA WETLANDS LAND TRUST,
ANTHONY MORALES, SURFRIDER FOUNDATION,

Appellants,

v.

CITY OF LOS ANGELES, a Municipal Corporation,
and DOES 1 through X,

Respondents

(Los Angeles Sup. Ct. Case No. BS 093502)

BALLONA ECOSYSTEM EDUCATION PROJECT (“BEEP”),
a non-profit corporation,

Appellant,

v.

CITY OF LOS ANGELES, a Municipal Corporation, and DOES 1-X,
Respondents

(Los Angeles Sup. Ct. Case No. BS 093507)

PLAYA CAPITAL COMPANY LLC, and DOES XI-XX,

(Real Party in Interest in Both Cases)

Appeal From a Judgment of the Superior Court of the State of California
County of Los Angeles, Case Nos. BS 093502 and BS 093507

The Honorable William F. Highberger presiding

**APPELLANT BALLONA ECOSYSTEM EDUCATION PROJECT’S
OPENING BRIEF**

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I. INTRODUCTION

Appellant/plaintiff Ballona Ecosystem Education Project (“BEEP”) appeals the trial court’s judgment in favor of defendants/Respondents City of Los Angeles and Real Party in Interest/ Respondents Playa Capital Company LLC. (hereinafter collectively “Respondents”). Appellant incorporates the opening brief filed by appellants in the consolidated case on appeal (Los Angeles Sup Ct Case # BS 093502) as it relates to analysis of the “no project” alternative.

In October, 2002, Respondent Playa Capital Company LLC filed an application with the City of Los Angeles to develop 111 acres of the Ballona Wetlands site as part of its “Phase II” development of a larger 460 acre project. (23:5850-5851, 5854-5855) (Citations to the Joint Appendix on appeal will take the form of “Volume # JA Page #”, or JA Exh. #, citations to the 140 volume administrative record certified to the trial court shall take the format of “Volume # : Page #”). After producing a draft Environmental Impact Report and conducting a number of public hearings on the matter, the City certified the final EIR and adopted a Statement of Overriding Considerations in September of 2004. (135:38002-121). Appellant Ballona Ecosystem Education project had actively participated in the environmental review process, and on November 8, 2004 filed a petition for a writ of mandamus with the Los Angeles Superior Court seeking to enjoin respondents from proceeding with the proposed Phase II development of the Playa Vista site. (JA, Exh.4) The petition alleged that there were numerous defects in the final Environmental Impact Report issued with respect to the development, including an improper and misleading project description and inadequate and factually incorrect analysis of project impacts and mitigation measures. The petition also alleged that the Statement of Overriding Considerations issued concurrently

with the final EIR was inadequately supported and impermissible given the deficient analysis of mitigation measures. The petition was consolidated with a petition filed by the City of Santa Monica, the Surfrider Foundation, the Ballona Wetlands Land Trust, and Anthony Morales. A five day trial on the merits was held in August of 2005. On January 10, 2006, Judge Highberger of the Los Angeles Municipal Court, Division 32 denied appellants' petition. (JA, Exh 152) This appeal arises from that judgment.

II. STATEMENT OF ISSUES

- 1) Whether Respondents failed to proceed in the manner required by law by providing a misleading project description.
- 2) Whether Respondents' finding that traffic impacts are fully mitigated by additional bus lines is supported by substantial evidence.
- 3) Whether Respondents failed to proceed in the manner required by law in refusing to consider the impacts of approving Phase II prior to determining whether Condition 116 of the vesting tentative tract map for Phase I has been met.
- 4) Whether Respondents failed to proceed in the manner required by law by providing a misleading description and analysis of impacts associated with the "no project" alternatives.
- 5) Whether Respondents failed to proceed in the manner required by law in adopting an abbreviated statement of overriding considerations.

III. STATEMENT OF FACTS

A. Description of the Parties

Petitioner and Appellant Ballona Ecosystem Education Project (“BEEP”) is an environmental advocacy organization dedicated to raising public awareness of issues related to the development of the Ballona Wetlands site and to advocating on the public’s behalf with respect to those issues. BEEP is organized as a California non-profit corporation. Respondent is the CITY OF LOS ANGELES (hereinafter “City”). Respondent and Real Party in Interest is PLAYA CAPITAL COMPANY, LLC, a Delaware limited liability company (hereinafter “Playa”).

B. The Project

The Playa Vista Project site is located on what was once part of the greater Ballona Wetlands Ecosystem. (94:26175-176.). The site is located between the State-owned Ballona Wetlands (an ecological reserve) on the west, the 405-freeway on the east, the Westchester Bluffs to the south, and the City of Los Angeles’ Mar Vista community to the north. (2:283 and 2:277.) The parcel being developed for the project, known as “Area D”¹, is approximately 461 acres. Development of this site has proceeded in two stages, known as Phase I and Phase II, and is one of the largest residential and commercial developments ever proposed in the history of the City of Los Angeles. (135:38005). Phase I of the project was previously approved by the City and is directly adjacent to Phase II on the east and west boundaries. (2:277 and 2:280). The Phase I development proposal covers approximately 350 acres of the Area D parcel, and will consist of 3,246 dwelling units, 3,206,950 square feet of office, 35,000 square feet of retail,

¹ The “Areas” known as ‘A’ and ‘B’ to the State of California in 2003, and the area known as Area “C” was transferred to the State 1988.

and 120,000 square feet of “community serving” space. (113:31729). Playa is proposing to develop the remaining 111 acre portion of Area D during Phase II, and is seeking to build an additional 2,600 dwelling units, 175,000 square feet of office space, 150,000 square feet of retail space and 40,000 square feet of community-serving uses. (23:5850-5853) This development proposal for Phase II is the subject of the underlying petition to the court.

C. The Phase II Environmental Impact Report

In October, 2002, Playa filed an application with the City for the Phase II project. (23:5854-5855). The City determined the project required the preparation of an Environmental Impact Report. (2:325 [Initial Study]; 2:269-96 [Environmental Assessment Form].) On November 13, 2002, the City published a Notice of Preparation (“NOP”) for the Phase II Draft EIR and gave notice of a public scoping hearing to take public comment on the appropriate scope of the Draft EIR. (2:458-79 (NOP); 3:689-700 (NOP); 23:5855.) Beginning on August 21, 2003, the City circulated for public review the Draft EIR, for a 120-day comment period ending December 22, 2003. (91:2520). The Final EIR was released in April, 2004. Thereafter, the City held several public hearings on the Project.

On September 22, 2004, the Planning and Land Use Committee of the Los Angeles City Council (“PLUM”) held a hearing on the Project and approved it, certifying the EIR, and adopting the CEQA findings, mitigation monitoring and reporting program. (135:38002-121). The Committee also adopted a Statement of Overriding Considerations to approve the project despite remaining significant environmental impacts. *Id.* The committee also approved a development agreement, a Specific Plan amendment, and other discretionary approvals necessary for the project. *Id.* On October 7, 2004, the City filed notice of these determinations.

Provisions of the EIR and the related findings and approvals relevant to this appeal are discussed in more detail below.

IV. STATEMENT OF THE CASE

Appellant filed a Petition for Writ of Mandate on November 8, 2004, in the Los Angeles County Superior Court based on the defects in the EIR and related approvals of the project described below. (JA, Exh.4). The petition for writ of mandate was set for bench trial beginning August 1, 2005, and concluding August 5, 2005. The court issued a Tentative Statement of Decision on November 28, 2005, nearly 4 months after the conclusion of the trial. (14 JA 3461.) The majority (all but the last 2 pages) of the court's decision addressed issues raised by the other appellants in the consolidated case, Case No. BS 093502. The court's decision did not substantively address the issues regarding traffic mitigation bus line funding, the analysis of no project alternatives, or the failure of the EIR to analyze impacts related to Tentative Tract Map Condition 116 raised by appellant at trial or in this appeal (Issues 2 through 4). The trial court issued its final Statement of Decision on January 10, 2006. (15 JA 3576.) A Notice of Entry of Judgment was filed and served on January 10, 2006. (15 JA 3569.) A timely Notice of Appeal and Notice of Election to Proceed under CRC 5.1 was filed on March 8, 2006. (JA Exh. 153)

V. STATEMENT OF APPEALABILITY

Since a final judgment on the merits of the petition has been rendered, the trial court's judgment is appealable. (Cal. Civ. Proc. § 904.1(a)(1))

VI. STANDARD OF REVIEW

An appellate court's review of trial court decisions in CEQA matters is de novo. "In a mandate proceeding to review an agency's decision for compliance with CEQA, the scope and standard of our review are the same as the trial court's, and the lower court's findings are not binding on us." *Save Our Peninsula Committee v. Monterey County Board of Sup.* (2001) 87 Cal. App. 4th 99,117. "We may not, in sum, substitute our judgment for that of the people and their local representatives. We can and must, however, scrupulously enforce all legislatively mandated CEQA requirements." (*Citizens of Goleta Valley v. Board of Sup.* (1990) 52 Cal. 3d 553, 564.)

A. Abuse of Discretion

The standard of review in an action to set aside an agency determination under CEQA is governed by Cal. Pub. Res. Code § 21168 in administrative mandamus proceedings, and § 21168.5 in traditional mandamus actions. The distinction between these two provisions "is rarely significant. In either case, the issue before the trial court is whether the agency abused its discretion. "Abuse of discretion is shown if (1) the agency has not proceeded in a manner required by law, or (2) the determination is not supported by substantial evidence." (*Gentry v. City of Murrieta* (1995) 36 Cal. App. 4th 1359, 1375; see also *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal. 4th 559, 573; *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal. 3d 376, 392 n.5.

B. Substantial Evidence

Generally challenges to the scope of the analysis and the conclusions drawn in an Environmental Impact Report are governed by the substantial

evidence standard of review. (Federation of Hillside and Canyon Associations v. City of Los Angeles (2000) 83 Cal. App. 4th 1252, 1259.) Substantial evidence challenges are resolved much as substantial evidence claims in any other setting: a reviewing court will resolve reasonable doubts in favor of the administrative decision, and will not set aside an agency's determination on the ground that the opposite conclusion would have been equally or more reasonable. (Laurel Heights Improvement Assn. v. Regents of Univ. of Cal. (1988) 47 Cal. 3d 376, 392 -93; San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus (1994) 27 Cal. App. 4th 713, 722; Rio Vista Farm Bureau Center v. County of Solano (1992) 5 Cal. App. 4th 351, 369.)

However, this deference is not without limits. CEQA defines "substantial evidence" to expressly limit the type of evidence that an agency can rely upon:

Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly inaccurate or erroneous, or evidence of social or economic impacts which do not contribute to, or are not caused by, physical impacts on the environment, is not substantial evidence. Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.

(Pub. Res. Code §21082.2(c).)

Therefore, when conclusions reached by an agency are based on inaccurate, erroneous, or speculative information, those conclusions are not supported by "substantial evidence". See *Federation* at 1259.

Thus, while agency studies are generally afforded deference, a "clearly inadequate or unsupported study is entitled to no judicial deference." (*Berkeley Keep Jets Over the Bay Comm. v. Board of Port Comms.* (2001) 91 Cal. App. 4th 1344, 1355.)

C. Failure to Proceed In a Manner Required By Law

A claim that an agency failed to proceed in a manner required by law is a very different question than whether its conclusions are supported by substantial evidence. The claims asserted by Appellant here regarding Respondents' failure to provide an adequate project description, failure to adequately analyze "no project" alternatives, failure to provide an adequate Statement of Overriding Considerations, and failure to analyze the impact of approving the project prior to analyzing the traffic impacts of Phase I pursuant to Condition 116 of the tentative tract map all involve the question of whether the agency proceeded in the manner required by law, rather than whether its various conclusions are supported by substantial evidence. Noncompliance with substantive requirements of CEQA, such as failing to address a subject required to be included in an EIR, or noncompliance with information disclosure provisions "which precludes relevant information from being presented to the public agency ... may constitute prejudicial abuse of discretion within the meaning of Sections 21168 and 21168.5, regardless of whether or not a different outcome would have resulted if the public agency had complied with those provisions." (Pub. Res. Code § 21005, subd. (a).) In other words, when an agency fails to proceed as required by CEQA, and the failure deprives the public and the decision makers with significant information, a harmless error analysis is inapplicable. The failure to comply with the law subverts the purposes of CEQA if it omits material necessary to informed decisionmaking and informed public participation. Case law is clear that, in such cases, the error is prejudicial. (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal. 4th 1215, 1236-67; *Fall River Wild Trout Foundation v. County of Shasta* (1999) 70 Cal. App. 4th 482, 491-93; *Kings County Farm Bureau v. City of Hanford*

(1990) 221 Cal. App. 3d 692, 712.)

When deciding issues of omitted material, “[t]he trial court may not exercise its independent judgment on the omitted material by determining whether the ultimate decision of the lead agency would have been affected had the law been followed.” (*Rural Landowners Assoc. v. Lodi City Council* (1983) 143 Cal. App. 3d 1013, 1023 (reversing trial court decision which determined the comments of the state agencies “would not have made any difference to the city council”). In criticizing the trial court for focusing on the “consideration of prejudice on the result” the appellate court in the *Rural Landowners* case ruled:

It was impossible for the trial court to know what effect these expert criticisms would have had on public comments, presentations and official reaction. Its independent judgment that the information was of “no legal significance” amounts to a “post hoc rationalization” of a decision already made, a practice which the courts have roundly condemned. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 81.)

(*Rural Landowners*, supra, 143 Cal. App. 3d at 1021.)

Examples of challenges which are analyzed under the “required by law” standard include the failure to provide an adequate project description (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal. App. 4th 713, 723-29. *County of Inyo v. City of Los Angeles*, (1977) 71 Cal. App. 3d 185, 192-193); failure to comply with information disclosure/omission of relevant data which precludes informed decisionmaking (*Bakersfield Citizens*, supra, 124 Cal. App. 4th at 1197-98), failure to provide adequate analysis of project benefits versus impacts in a Statement of Overriding Considerations (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004), 116 Cal. App. 4th 1099, 1111-1112), and failure to provide sufficient information to adequately analyze alternatives, (*Friends of Eel River v. Sonoma County Water*

Agency, 108 Cal. App. 4th 859, 873; San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino (1984) 155 Cal. App. 3d 738, 750-751

VII. ARGUMENT

A. Respondents Failed to Proceed as Required by Law by Providing a Misleading Project Description

An EIR is intended “to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.” (No Oil, Inc. v. City of Los Angeles (1974) 13 Cal.3d 68, 86.) It is “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible official to environmental changes before they have reached ecological points of no return.” (County of Inyo v. Yorty (1973) 32 Cal.App.3d 795, 810.) Thus, CEQA’s investigatory and disclosure requirements must be carefully guarded. “If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees.” (Laurel Heights I, at 392, citing People v. County of Kern (1974) 39 Cal.App.3d 830, 842; 14 Cal. Code Regs. § 15003(e) “hereinafter, 14 Cal. Code Regs. shall be referred to as “Guidelines”) “The EIR is intended to furnish both the road map and the environmental price tag for a project, so that the decision maker and the public both know, before the journey begins, just where the journey will lead, and how much they-and the environment-will have to give up in order to take that journey.” (Natural Resources Defense Council, Inc. v. City of Los Angeles, (2002) 103 Cal. App. 4th 268, 271.)

CEQA requires that every EIR provide a “project description”

section, the purpose of which is to provide an “accurate view of the project [so that] affected outsiders and public decision-makers [may] balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal (i.e., the “no project” alternative) and weigh other alternatives in the balance. An accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR.” Guidelines, §15124, County of Inyo v. City of Los Angeles, (1977) 71 Cal. App. 3d 185, 192-193. An integral part of the required project description is a “list of permits and other approvals required to implement the project.” Guidelines, § 15124 (d)(1)(B). The project description must also include a discussion of “any inconsistencies between the proposed project and applicable general plans and regional plans.” (Guidelines, § 15125(d)).

Omitting information regarding an integral component of a project in the project description is a failure to proceed as required by law. Santiago County Water Dist. v. County of Orange (1981) 118 Cal.App.3d 818, 829; Whitman v. Board of Supervisors (1979) 88 Cal.App.3d 397, 414-415. Providing false or misleading information regarding the project description is, without question, a prejudicial abuse of discretion. San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus (1994), 27 Cal. App. 4th 713, 723-729; Kings County Farm Bureau v. City of Hanford, (1990) 221 Cal.App.3d 692, 718, (“The misleading nature of the discussion and the failure to include relevant evidence ... renders the EIR inadequate as an informational document.”) Appellant contends that Respondents omitted vital information regarding the increase in the developments entitlements and density for the proposed project, and in fact supplied intentionally misleading information to make it appear that the project would lead to a substantial decrease in permitted development.

1) Zoning And Entitlement Changes Required For The Phase II Development

The permissible development of the Phase II site is governed by the Area D Specific Plan adopted by the City of Los Angeles in 1985 concurrently with a zoning plan for the area that together set the maximum amount of entitlements for various land uses and set zoning restrictions for where those entitlements could be placed within Area D. 25:6512-6514. This Specific Plan and zoning restrictions regulates what can be built within the Phase I and Phase II developments at Playa Vista that are at issue here.

The entitlements granted by the City were very generous: “entitlements received for Phase I were greater than expected...” according to a Playa Vista business plan prepared for project investors (135:38133 paragraph 1). Under the specific plan, Playa was granted entitlements to build 2,050,000 square feet of C zoned commercial office space, 2,950,000 square feet of M(PV) zoned office space, 650,000 square feet of retail space, 3,426 residential units and 300 hotel rooms. (23:6516) The zoning plan accompanying these entitlements only allowed Playa to place R zoned residential units and M(PV) zoned office space in the Phase II development area, and required the rest of the entitlements to be placed in the Phase I development area. (23:6515). However, of the 2.95 million square feet of office space available for development in the M(PV) zoned area, 2.84 million was used up in Phase I, leaving only 108,050 square feet of office space available for development in the M zone of Phase II. (26:7216). Playa also used up its entire entitlement of residential units in Phase I, leaving nothing for its development of Phase II. *Id.*

Thus, the way Playa Vista chose to develop Phase I exhausted its

available entitlements to build almost any additional office, retail or residential units in Phase II. The uncontested fact is that under the actual remaining entitlements and zoning applicable to the Phase II site, Playa Vista would only be permitted to build 108,050 square feet of M-zoned office space in Phase 2, as all other uses that could have been built in the M or residential zoned areas of Phase 2 had been used up in Phase I. While there were additional commercial or retail entitlements that could have been built in C-zoned land on Phase I, none of Phase 2 was zoned “C” or commercial. (23:6515)

This project therefore actually required a significant upzoning and plan amendment in order to occur, which obviously has a significant impact on land use. In order to proceed with the project as proposed, Playa Vista needed to amend the Specific Plan for Area D to increase its residential allotment by 2,600 residential units and rezone the Phase 2 area so that it could build nearly three times as much office space as the zoning allowed at the time. The total increase in density and square footage, depending on the size of each residential unit, could be nearly 40 times the amount currently permitted for the Phase II area.² The traffic generated from a project using the existing entitlements would have totaled 1568 daily trips, (70:19209). The approved project’s traffic totals 24,220 daily trip ends, (23:5925), a 15-fold increase. Since the increase in permitted development and change of zoning are a substantial deviation from the development permitted by the current specific plan and zoning regulations, the project description section was required by law to describe this upzoning. (Guidelines, §§ 15124 (d)(1)(B), 15125(d)). None of these facts are

² 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.

substantially in dispute, the only real dispute is over whether it was misleading for Respondents misleadingly to describe the project as a decrease in permitted development rather than an enormous increase. The overwhelming weight of the evidence shows that it was.

2) The Project Description's Treatment Of Entitlement And Zoning Changes

The project description for the Phase II EIR can be found at pages 150-181 of the EIR (23:6000-6035). As discussed above, CEQA required Respondents to include a clear discussion of both the permits and other approvals required to proceed with the project as well as a discussion of any inconsistencies between the proposed project and the applicable general and regional plans. (Guidelines, §§ 15124 , 15125(d)). However, despite the significant size of the required Plan Amendments, the project description is void of any discussion of the upzoning. No specific mention is made of any of these facts set forth above, only the vague allusion that “[i]mplementation of the project as proposed requires ... amendments to the existing Area D Specific Plan which would modify the land uses and densities currently allowed.” (23:6019). There is nothing in this section detailing what, specifically, Playa Vista is requesting in terms of entitlement and zoning changes, or why it must request it. (23:6019-6020). Instead, the Project Description leaves the reader with the impression that proposed development is a substantial decrease in what could otherwise be built. Further, the Respondents claim, in both the Statement of Overriding Considerations and the CEQA findings, that the project will not result in any significant impacts to land use. 124 AR 34835, 123 AR 34685.

In fact, throughout the record, 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” (114:32000, end of paragraph 4). “It also would reduce significantly or eliminate current entitlements allowed under the Playa Vista Specific Plan.” (117:32813 paragraph 2). “With the amendments to the Specific Plan, the Proposed Project would offer a substantial reduction in density as compared to existing entitlements.” (119:33434 last paragraph, 33435 para 2, 33437 para 1.)

What the City and Playa claimed was “permitted” development was not actually allowed on the Phase 2 site. The Respondents have repeatedly described their project as a downzoning, stating that their project complied with the existing allowed land uses, and that they were further choosing to build significantly less than what was presently allowed. Throughout the EIR, as well as the staff reports and testimony in the record, the project is described as resulting in a substantial decrease in permitted development. (95:26590 last sentence) The amendments would “reduce the amount of new office, light industrial or similar uses permitted after the First Phase Project development...”(11:2529 box #2); “reduce the square feet of commercial and industrial floor area permitted...” (118:33237 para. 2). Never is it stated that the entitlements being eliminated could not be built in the Phase 2 site anyway.

Further obfuscating the issue, when appellants attempted to point out in the comment process 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 Muhlsten told the City Planning Commission, “Mr. Frankel indicated that this project was a large upzoning of the

property; that is just not correct.” (120:33839, lines 2-3). 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.” (94:26184, response 30-30). Also see 94:26159-26160 response 30-5 for same response by the City; 113:31785 Petitioner’s comment letter on Final EIR “...massive upzoning and plan amendments needed to allow Phase 2 to happen...”; (115:32348). Petitioners appeal letter “...amendments do not comply with CEQA...”; (120:33721 lines 1-15). Petitioner’s testimony to Planning Commission “In fact, this is a huge increase from the current zoning that’s allowed in the Phase II area...I don’t know why the Planning department doesn’t want you to know this fact.”. *Id.*

The issue of whether the project presents an increase in permitted development or a decrease would clearly be of substantial importance to the public and decisionmakers in reaching appropriate decisions regarding the project. It seems clear from the above that Respondents were intentionally seeking to veil the fact that Playa Vista is seeking to build substantially more than it is currently permitted to build on the Phase 2 site.

Respondents at best omitted, and at worst intentionally concealed, important and material information regarding this issue in the EIR, and responded misleadingly to comments regarding the issue. This defect is fatal to the EIR, and requires its invalidation. *San Joaquin Raptor/Wildlife Rescue Center at 729; Kings County Farm Bureau at 718; Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829; *Whitman v. Board of Supervisors* (1979) 88 Cal.App.3d 397, 414-415, *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 118 (“When the informational requirements of

CEQA are not complied with, an agency has failed to proceed in 'a manner required by law' and has therefore abused its discretion.”).

B. Respondents' Finding That Traffic Impacts Are Fully Mitigated by Additional Bus Lines Is Not Supported by Substantial Evidence.

The traffic impacts associated with the Phase II development are one of the most controversial impacts of the proposed development. The project is expected to add approximately 24,220 car trip ends per day to the roads in the surrounding area. 23:5925 The traffic study conducted by respondents predicts that the additional automobile traffic will lead to significant impacts requiring mitigation measures at 54 intersections in the area. 118:33001-33006. The City states that all traffic impacts from the additional 24,000 car trips per day will be mitigated to a level of insignificance through adjustment of traffic signal computers, a few small road widenings and intersection restripings, and the addition of 5 buses to the Culver City bus lines. Due to this claim of full mitigation, the City did not need to adopt a Statement of Overriding Considerations for this issue, (124:34788).

Almost half of the significantly impacted intersections (27 out of 54) will be mitigated with additional buses, 18 of which by the additions to the Culver City Bus Lines. (A list of all intersection mitigations is at 118 AR 33001-33006). Ten additional intersections will be mitigated by re-programming traffic signals to give priority to bus transit. (Compare the map of all of the public transit-based mitigations on 26:6786 to the map of all other traffic mitigations at 26:6787.) Since the Culver City Bus Line mitigation measure constitutes mitigation for one third of the project's

traffic impacted intersections, it is unquestionably vital to the city's finding that project related traffic impacts have been "fully mitigated".

However, in order to justify a finding of full mitigation, the City must, by substantial evidence, demonstrate that the mitigation measure is "feasible and enforceable". (CEQA Guidelines, § 15126.4(a)(1)-(2)), *Napa Citizens for Honest Government v Board of Supervisors* (2001) 91 Cal. App. 4th 342, 360, *Federation of Hillside and Canyon Associations v. City of Los Angeles*, (2000) ("Federation") 83 Cal. App. 4th 1252, 1260. "'Feasible' means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (Pub. Resources Code, § 21061.1.) Respondents bear the burden of demonstrating that funding for this mitigation measure is adequate in order to support a finding that the measure is "feasible." *Napa Citizens for Honest Government v Board of Supervisors* (2001) 91 Cal. App. 4th 342, 363-365. As demonstrated at trial, funding for this mitigation measure is substantially inadequate, and thus there is not substantial evidence to support the City's finding that the measure is feasible and along with the other mitigation measures constitutes full mitigation for the project's traffic impacts.

The bus mitigation measure envisions Playa Vista purchasing 5 buses for Culver City and paying for all of the Operation and Maintenance costs of those buses for a period of three years, after which Playa Vista's obligation to fund such costs drops to 15% for the following 7 years. (118:32976). However, the EIR and the traffic study upon which it is based assumed that Playa Vista would pay the full operation and maintenance costs for the initial three year period, and then "compensate for the unsubsidized portion" of costs for the remaining seven years. (26:6791, 70:19148, last para.). Clearly, the EIR and the traffic study

assumed that Playa Vista would be providing whatever funding in excess of farebox revenue or other subsidies was required to keep the buses operating. Obviously, that is not what the actual contract requires.

According to Playa Vista's contract with Culver City (118:32976), operation and maintenance costs are calculated according to a formula that presumes that four of the buses will operate no more than 7.5 hours a day, 250 days a year at a presumed cost of \$85 per hour.³ The remaining bus is expected to operate no more than 12.5 hours a day, 250 days a year at \$85 per hour. *Id.* Assuming the buses run at these capacities, the total operation and maintenance cost of running the buses would be \$903,125, with Playa Vista's 15% share being \$135,469, leaving \$767,656 per year in costs unaccounted for, which amounts to \$5,373,592 over the course of seven years. There are *no* ridership or other studies cited by respondents to indicate that ridership will in fact amount to \$767,656 per year in revenues, and *no* provision whatsoever in the contract for how the bus lines will be funded should ridership not be sufficient to continue operation. There is thus *no* evidence which respondents can rely on to make the finding required by CEQA that this mitigation measure is feasible, let alone enforceable, and thus "required in, or incorporated into, the project". *Federation of Hillside and Canyon Associations v. City of Los Angeles*, (2000) 83 Cal. App. 4th 1252, 1260.

There is therefore no substantial evidence to support the finding that project related impacts have been "fully mitigated", and the failure to provide such evidence in support of such a crucial finding requires invalidation of the finding. *Federation* at 1266. Since the addition of the

³ It is important to note that there is *no data* in the record to support the conclusion that this formula approximates the actual operation and maintenance costs of running the additional bus lines, nor is there *any* provision in the contract for how excess costs are to be paid if actual operation and maintenance costs exceed these estimates.

Culver City bus lines constitutes mitigation for at least one third of the traffic impacts, the failure of this measure would likely result in substantial environmental impacts, and thus the court should order that activity on the current project be suspended until Respondents comply with CEQA. Federation at 1266 (“if the court finds that a specific project activity will prejudice the consideration or implementation of mitigation measures or project alternatives and could result in an adverse physical environmental change, [the court must] mandate that the agency and any real party in interest suspend specific activity until the agency complies with CEQA.”)

C. Respondents Failed to Proceed as Required by Law in Refusing to Consider the Impacts of Approving Phase 2 Prior Determining Whether Condition 116 of the Vesting Tentative Tract Map for Phase I Has Been Met.

During the approval process of the Phase I Project, in response to concerns that traffic impacts of the office space development of Phase I had been underestimated by Respondents, the Los Angeles City Council inserted a Condition 116 into the Vesting Tentative Tract Map for Phase I. (118:33094) This condition requires that in the event the actual p.m. peak hour trips produced by the Phase I office space development exceeds 1493, the office space entitlement permitted to Playa Vista for the Phase II project will be reduced. (92:25674).

Applying a common sense interpretation to this condition, the determination of whether the goal has been met cannot be made until Phase I is built out. Accordingly, additional office use entitlement cannot be issued until it has been determined that Condition 116 has been satisfied. Any other interpretation would render this provision meaningless, violating well established rules of statutory construction. *Newton v. Clemons* (2003) 110 Cal.App.4th 1, 17 [standard rule of statutory construction is to avoid a

construction which renders a portion of the statutory language meaningless].

Respondents' reply to this issue in response to public comments was to state that this condition is not triggered precisely because the Phase I project is not built out. (92:25675). Again, this interpretation would essentially nullify the provision and thus is disfavored. *Newton, supra*, 110 Cal. App. 4th at 17. Alternatively, in its brief, Playa argues that while Condition 116 refers to a peak-hour trip cap of 1493 (92:25675), Playa's response brief claims that Condition 116 only limits development after a peak-hour trip generation of 3,700. (JA, Exh 68, Playa Capital's Opposition to Federation's Opening Brief at 20) Because the meaning of this condition is ambiguous based on the City's and Playa Capital's reading of it, the Court must look to the original legislative intent behind the imposition of the Condition.

The testimony of City Councilwoman Ruth Galanter at whose behest Condition 116 was added, is contained at 118:33094. She stated "Nearly one year ago I proposed that Playa Vista be built in phases so that if the first stage causes any negative impacts, those impacts *must* be eliminated before a future phase could be built." [Emphasis added]. Furthermore, testimony by Councilman Antonio Villaraigosa at the Council's hearing on September 29, 2004 also reiterated this intent: "...a number of us made a commitment that we wouldn't move forward with Playa Vista II until we knew what the full impacts—the transportation, the environmental impacts were at Playa Vista I." 136:38343. It is clear, considering these statements by the drafter of the condition and other members of the Council, that the intent of Condition 116 was to insure that Phase I impacts would need to be fully evaluated before granting approval for Phase II. Since proceeding with the development of Phase II before determining whether Condition

116 had been complied with essentially eliminates a means of mitigating Phase I traffic impacts, the effect of this decision on cumulative traffic impacts of the Phase I and Phase II projects should have been analyzed in the Phase II EIR. Guidelines, §§15130(a), 15065(c), *Bozung v. Local Agency Formation Com.*, (1975) 13 Cal.3d 263, 283 (evaluating “cumulative impact of all projects in the region” a “vital provision” of CEQA)

Finally, case law is clear that mitigating conditions placed on tract maps must be enforceable. “Mitigating conditions are not mere expressions of hope. [Guidelines] Section 21002.1, subdivision (b) states: ‘Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so.’ Furthermore, ‘[a] public agency shall provide that measures to mitigate or avoid significant effects on the environment are fully enforceable through permit conditions, agreements, or other measures.’ [Guidelines 21081.6(b).] ‘The purpose of these requirements is to ensure that feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded.’” *Lincoln Place Tenants Association v. City of Los Angeles*, (2005) 130 Cal. App. 4th 1491, 1508.

D. Respondents Failed to Proceed as Required by Law by Providing a Misleading Description and Impact Analysis For The “No Project” Alternatives.

“An EIR is required to “ensure that all reasonable alternatives to proposed projects are thoroughly assessed by the responsible official.” *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 197. Therefore, “[a]n EIR must ‘[d]escribe a range of reasonable alternatives to the project or to the location of the project, which could feasibly attain the basic objectives

of the project and evaluate the comparative merits of the alternatives.' (Guidelines, § 15126, subd. (d).)" Friends of Eel River v. Sonoma County Water Agency, 108 Cal. App. 4th 859, 872. The EIR must include an analysis of "no project" alternatives that compare the environmental impacts, if any, associated with a decision not to proceed with the project. (Guidelines § 15126.6(e)). Pursuant to CEQA Guidelines § 15126.6(e)(1), "[t]he purpose of describing and analyzing a no project alternative is to allow decisionmakers to compare the impacts of approving the proposed project with the impacts of not approving the proposed project." This discussion of such an alternative must be "meaningful" and must "contain analysis sufficient to allow informed decision making." (Friends of Eel River at 873, Laurel Heights at 403-404.) The analysis is also meant to provide the public with sufficient information to evaluate the project and hold their representative accountable. Laurel Heights at 404 ("The Regents miss the critical point that the public must be equally informed. Without meaningful analysis of alternatives in the EIR, neither the courts nor the public can fulfill their proper roles in the CEQA process"); Planning and Conservation League vs. Department of Water Resources, (2000) 83 Cal. App. 4th 892, 918 "What the public requested, and CEQA demanded, was an objective recitation of the environmental impact. . . The response . . . failed to provide the public agencies that would use the EIR to decide whether or not to amend their contracts, and their constituencies, with a straightforward analysis of the environmental consequences.") Appellant contends that Respondents misleadingly attributed "significant impacts" to the no-project alternatives that are flatly contradicted by the evidence in the record in an attempt to make the decision not to proceed with the proposed development appear to have environmental impacts similar to, or even worse than, a decision to proceed with the project as planned.

1.) Alternative 1 : No Project – No Development

Respondents misleadingly described the impacts associated with Alternative 1 in order to make proceeding with the proposed project appear more attractive to the decisionmakers an to the public. In particular, the impacts analysis concludes that the No Project Alternative will result in adverse environmental impacts “by omission” because privately funded remediation of soil and groundwater contamination will not occur unless the project proceeds. (91:25221). Since the property is subject to a clean up and abatement order that *requires* complete remediation of soil and groundwater contamination of the site, this statement is clearly untrue. (104:29162-29174). Playa Vista is obligated to remediate the site whether or not the project is allowed to proceed as described. (104:29169-29173, Order Provisions 1-15). The unquestionable fact is that full remediation of the site is required, and that the alternatives analysis is incorrect and substantially misleading on this issue in a manner that is aimed at encouraging the decisionmakers and the public to approve the project. By falsely claiming that environmental contamination at the site would never be cleaned up if the development was not allowed to go forward, Playa attempted to lead the decsionmakers and the public to believe that environmental harm would result from *not* proceeding with the project, a contention which it knew simply was not true. On this basis alone, the EIR should be invalidated for failure to adequately analyze and describe alternatives to the project as required by law. (Guidelines § 15126.6(e), Friends of Eel River at 873, Laurel Heights at 403-404.)

2.) Alternative 2 : No Project – Development Permitted
By Existing Specific Plan And Zoning

As with Alternative 1, the City unreasonably rejected Alternative 2

by asserting, inter alia, that building according to present zoning would create significant traffic, regional construction emission, construction noise and solid waste and other impacts (Staff report, 115:32271 para. 1). In assessing the impacts associated with Alternative 2, Respondents concluded that developing according to existing entitlements and zoning would continue to “generate significant impacts on traffic”. (91:25221). In fact, Playa Vista’s own traffic study showed that this alternative would not create significant traffic impacts (70:19210 last para.) “It can be observed from this table that the alternative does not produce any significant impacts at any of the analysis locations”[emphasis added]. The study, not surprisingly, concluded that since the alternative would only produce 1,568 daily trip ends, as opposed to over 24,000 for the proposed project, that traffic impacts would be reduced by over 90%. Id. This is confirmed in the traffic impact appendix’s table of intersection impacts, (70:19212-19214 (under “imp” column, all are “n” meaning “none)), and in the EIR at 28:7236. Respondents, perhaps hesitant to admit the fact that the increase in entitlements and zoning changes they were seeking would lead to *substantially* larger traffic impacts, chose to describe the impacts associated with Alternative 2 as “significant” in direct contradiction of the findings of their own study. Since this conclusion is flatly contradicted by *their own traffic study*, the rejection of this alternative is made without the support of substantial evidence. Cal. Pub. Res. Code § 21082.2(c); Guidelines § 15384 (“evidence which is clearly inaccurate or erroneous... is not substantial evidence”).

Further, because “significance” is the standard at which it is determined than an impact should be avoided, Playa is in effect claiming that any increase in traffic caused by the Alternative 2 rules the alternative out, without any consideration of whether the reduced *extent* of the impact

merits adoption over the project proposal and without any consideration of the effect of reasonable mitigation measures on such impacts. An EIR's analysis of alternatives "must produce information sufficient to permit a reasonable choice of alternatives so far as environmental impacts are concerned." *San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal. App. 3d 738, 750-751. The City's summary rejection of this alternative without a reasonable analysis of its true impacts does not provide "information sufficient to permit a reasonable choice."

The same faulty analysis is made in relation to solid waste impact. Even though building a project consistent with the existing zoning entitlements, which is what Alternative 2 entails, would produce *98.3% less* trash than the approved project (28:7230), the EIR still concludes that "any exacerbation in demand is considered significant", (28:7236). Applying this standard, any project that adds any more trash or traffic, no matter how small, should be rejected. Furthermore, the analysis fails to consider the mitigating effect of "waste diversion", which is the recycling that is mandated by State law. (28:7231 "impact comparisons for all topics other than traffic and circulation are based on impacts prior to mitigation"). Current recycling rates in L.A. City are 50.7% of the waste stream. (27:7064), which would conceivably reduce the amount of solid waste generated by the no project alternative to less than 1 percent of the amount generated by the project. Characterizing this impact to be "significant" or similar to the impact caused by proceeding with the project is clearly intended to be misleading. Similarly, the finding that impacts related to construction noise and regional construction emissions, are also biased by the failure to consider whether the same mitigation measures used for the proposed project would reduce the impacts to insignificance. The finding

that Alternative 2 would “continue” to result in “significant impacts” is clearly misleading, since it appears that in fact Alternative 2 would not likely cause any significant environmental impacts at all, particularly if mitigation measures were considered, as CEQA requires.

In *San Joaquin Raptor*, supra, 27 Cal.App.4th 713, 738, the court invalidated an EIR in part because of its flawed alternatives analysis, stating that, “the “discussion of alternatives does not foster ‘informed decision making’ [citation]” because it is “devoid of substantive factual information from which one could reach an intelligent decision as to the environmental consequences and relative merits of the available alternatives to the proposed project. ... [Citation.]” Here, as there, “[b]ecause the discussion of alternatives omitted relevant, crucial information, it subverted the purposes of CEQA and is legally inadequate.” (Id. at 738-739.)

E. Respondents Did Not Proceed in the Manner Required by Law in Adopting a Statement of Overriding Considerations

If, after adopting all feasible mitigation measures or alternatives to a proposed project, there remain significant, unmitigated environmental impacts from the project, the project may nonetheless be approved if 1) the agency performs a balancing of the economic, legal, social, technological or other benefits of the project against its unavoidable environmental impacts and finds that the project’s benefits outweigh its adverse impacts, and 2) the agency prepares a written Statement of Overriding Considerations (“SOC”) that “reflect[s] the ultimate balancing of competing public objectives” and states the “specific reasons to support its action”. Guidelines, § 15093(a), 15021(d). This statement of reasons should be at least as thorough, and

arguably more so, than the “statement of reasons” required by Cal. Pub. Res. Code § 21100(c) explaining why a potential environmental impact is not considered “significant.” Such statements require more than “bare conclusions” and must provide sufficient information for a reviewing court to determine if an agency abused its discretion in the reaching its ultimate determination. *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) (“Amador Waterways”), 116 Cal. App. 4th 1099, 1111-1112.

On July 8, 2004, after certifying the EIR and acknowledging that there remained a number of significant environmental impacts, the City of Los Angeles adopted a five page Statement of Overriding Consideration (“SOC”) so that the project could proceed as planned. (122:34429). However, the SOC in this case is, at barely five pages long, consists solely of a list of 27 “project benefits”. The SOC is insufficient since it is simply a list of “bare conclusions” and is devoid of an analysis that adequately “reflect[s] the ultimate balancing of competing public objectives”. There is no indication of how the balancing was conducted, what factors weighed either way in making the balancing determination, or, significantly, even what evidence was relied on to reach the ultimate decision that the project’s benefits made the unavoidable impacts worth proceeding with. It is impossible to say for certain that a balancing analysis was even conducted, and thus it is impossible for the court to determine whether the agency abused its discretion in reaching the ultimate decision to proceed.

The one to two sentence descriptions of 27 proposed project benefits simply do not provide the written statement of reasons that reflects the agency’s balancing analysis. It is clear that CEQA envisions more than this. It does not require a “brief description of benefits that outweigh project impacts”, it requires a statement of “*specific reasons*” which from

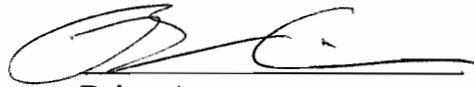
the plain language of the statute implies some reasoning or analysis to support the ultimate finding that the benefits of the project outweigh its impacts. Guidelines, § 15093(a), 15021(d), Amador Waterways at 1111-1112 (“bare conclusions” are not sufficient to provide the “statement of reasons . . . necessary to assure meaningful judicial review in the event, as here, the EIR is challenged in court.”), Guidelines, § 15093(a), 15021(d). There can be no credible argument that such analysis has been provided by the SOC in this case. One of the purposes of requiring such an analysis in the SOC is to avoid this precise situation, where the public, the advocates, and the Court are left to speculate as to how Respondents may have balanced competing benefits and impacts, what factors they considered to be important, and most importantly, what evidence they actually relied on in reaching their ultimate conclusion. *Id.* There is also a strong public policy reason to require such a written analysis since it allows the public to see how its appointed decisionmakers value important competing interests in making decisions that will have substantial impacts on the thousands of people who live in close vicinity to this project. *Karlson v. Camarillo*, (1980) 100 Cal. App. 3d 789 , 807 (EIR must contain information sufficient to “serve the informational purpose of the report to the governmental body which will act and the public which will respond to the action through the political process.”)(Emphasis added); *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal. 3d 376, 392. (“Because the EIR must be certified or rejected by public officials, it is a document of accountability.”) By failing to provide an adequate written statement that “reflect[s] the ultimate balancing of competing public objectives” and states the “specific reasons to support its action” respondents have failed to proceed as required by law, committing a prejudicial abuse of discretion for which invalidation of the EIR is the appropriate remedy. Amador

Waterways at 1112.

VIII. CONCLUSION

For the foregoing reasons, Respondents committed a prejudicial abuse of discretion by failing to proceed as required by law and by making findings unsupported by substantial evidence. Appellant therefore respectfully requests that the Environmental Impact Report be invalidated as set forth above, and that respondents be ordered to cease activity on the project until they have complied with the requirements of CEQA.

Date: 10/12/06

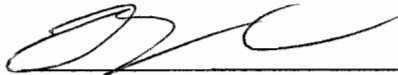


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CERTIFICATE OF WORD COUNT

The text of this brief consists of 8,436 words as counted by the Microsoft Office Word 2003 program used to create it.

Date: 10/12/06



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PROOF OF SERVICE

I, BRIAN D. ACREE, declare:

I am, and was at the time of the service hereinafter mentioned over the age of eighteen and not a party to the above-entitled cause. My business address is 370 Grand Avenue, Suite 5, Oakland CA 94610 On October 12, 2006, I served the following documents described as:

**APPELLANT BALLONA ECOSYSTEM EDUCATION
PROJECT'S OPENING BRIEF**

by serving a true and correct copy in the following manner.

_____ Via United States Postal Service. The sealed envelope was placed for collection and delivery on the above date following ordinary business practices in Oakland, California. The envelope was addressed as follows:

 / Via over night delivery to the following listed parties. The sealed envelope was placed for collection and delivery on the above date following ordinary business practices. The envelope was addressed as follows:

_____ By Facsimile Service to the following listed parties. The transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine.

_____ By Personal Service. I personally delivered the sealed envelope to the following address:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on October 12 2006 in Oakland, California.



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