SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

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| ERIC LARSEN AND STEPHANIE RAWLINGS,<br><br>Petitioners,<br><br>vs.<br><br>CITY OF ALBANY,<br><br>Respondent. | RG12-644349<br><br>ORDER DENYING PETITION FOR WRIT OF MANDATE AND STATEMENT OF DECISION<br><br>Date: May 16, 2013<br>Time: 1:30 pm<br>Dept.: 31 |

The Petition of Eric Larsen and Stephanie Rawlings (collectively "Petitioners") for a writ of mandate and for a motion to augment the record came on regularly for hearing on May 16, 2013, in Department 31 of this Court, Judge Evelio Grillo presiding.

**STATEMENT OF DECISION**

The Petition of Petitioners for a writ of mandate is DENIED.

BASIC FACTS.

The Project is the City of Albany (the "City")'s approval of the Regents' application for development of a 5.3 acre site with a 55,000 sft grocery store, 30,000 sft of retail space, and 175 units of senior housing within University Village, which property

is owned by the Regents of the University of California within the City (the "Project").[1] The Project is located on land that fronts on San Pablo Avenue and is divided into Block A (North of Monroe Street) and Block B (South of Monroe Street. (AR 235.) Block A is on part of the 15 acre Gill Tract. (AR 4348, 8304, 8349.) The 15 acre Gill Tract itself is divided into a 7 acre field that has been used by the Regents for agricultural research (the 7 Acre Field") and the balance that has housed research facilities. (AR 4436-4437, 8349.) The Project is not located on the 7 Acre Field.

The Project is located on San Pablo Avenue, which is a state highway and commercial corridor. (AR 4349, 8328, 8380, 8382.) The City has planned for significant retail development on San Pablo Ave since the 1990s. (AR 148, AR 4316-4335 (1993 San Pablo Ave. design guidelines and "Retail Boulevard"); AR4842-4913 (1997 San Pablo Ave Vision Plan).)

In January 1998, the Regents certified the University Village Master Plan EIR. (AR 204-205, 4339-4836.) The 1998 Master Plan EIR concerned the entire 77 acre University Village. The Master Plan EIR stated that the 7 Acre Field would remain an academic reserve site (AR 4343, 4366, 4368 (map), 4369, 4372 (map)) and that other property fronting on San Pablo Ave., Monroe Street, and 10th Street would be available for commercial development. (AR 234, 4369, 4386.) The draft 1998 Master Plan EIR anticipated 211,000 sft of retail on 5.1 acres fronting on San Pablo Avenue and Monroe Street. (AR 4446, 4451 fn 5, 4578.) This planned retail development was on a similar

[1] The Project would be developed by a third party and is outside the scope of the Regents' educational mission, so the Project is subject to the City's land use regulations. (AR 205.) When the Regents has developed land within the scope of its educational mission, the Regents has historically cooperated with the City's land use regulations. (AR 4351, 8267.)

footprint as the retail development in the Project. (Compare AR 4443 and 8304 (1998 land use concept) with AR 235 (Project location).)

In 2004, the Regents prepared a Subsequent Focused EIR to support an amendment to the Master Plan. (AR 8248-8481.) The Subsequent Focused EIR expanded the area to be considered for commercial and mixed use to include more San Pablo Ave. frontage. (AR 8305-8307, 9879 (maps); compare 9869 with 9870.) Specifically, the Subsequent Focused EIR examined the construction of up to 73,000 sft of retail in two mixed use buildings in the Step 3 Area (which is the subject of the Project.) (AR 8270, 8287, 8290, 8306, 9881.) The Subsequent Focused EIR stated "Up to 73,000 square feet of retail space would be developed along the San Pablo Avenue, Monroe Street, and 10th Street frontages. Retail uses would include a grocery store, shops, restaurants, and services selected to enhance the experience of living in the Village and appeal to local needs and interests." (AR 8294.) (See also AR 8328.) Regarding the 7 Acre Field, the Subsequent Focused EIR anticipated converting it into little league fields, a community center, open space, and some mixed use development. (AR 8291, 8293, 9877.) In June 30, 2004, the Regents approved the Subsequent Focused EIR. (AR 9889-9895.)

On March 29 or 31, 2008, the City circulated a Notice of Preparation for the Project. (AR 7, 1562.) On April 22, 2008, the City conducted an initial study and received public comment. (AR 7, 143-195.) On July 2, 2009, the City circulated the draft EIR. (AR 8, 196-455.) In February 2011, the City published the final EIR, which included the City's responses to comments. (AR 1558-1848.) From the start of the

administrative process though the certification of the final EIR, the City Planning Commission held 14 public hearings and the City Council held six public hearings.

The record reflects that the City made many modifications to the Project during the EIR process. (AR 2356-2359, 3324, 3479-3481.) Most pertinent to the issues presented, the City scaled back the size of the proposed grocery store by 15% to 20%. The draft EIR dated July 2009 anticipated a grocery store with a 44,000 sft ground floor with a 11,000 sft mezzanine area for a total of 55,000 sft. as well as 30,000 sft of retail space. (AR 204, 208, 246, 252, 291.) The project as approved permitted a grocery store with a 40,000 sft ground floor with a 5,000 sft mezzanine area for a total of 45,000 sft. as well as 26,200 sft of retail space. (AR 61, 134-142, 12921.) Despite these changes, the parties agree that for purposes of the CEQA analysis, the court considers the proposed grocery store of 55,000 sft. and the retail space of 30,000 sft. (Filings of Respondent and Petitioner on 5/17/13; AR 2359.)

On July 9, 2012, the City certified the EIR. (AR 7-52.) The City found that the Project was superior to the Existing Zoning Alternative (smaller grocery) because it would upgrade the commercial and mixed-use development on the San Pablo Avenue corridor and provide greater economic benefits to the City. (AR 22-23.) The City found that the Project would have a significant impact on transportation, air quality, climate change, noise, biological resources, and water quality, but it could mitigate those impacts. (AR 14-19.) The mitigation measures include the use of recycled or reused construction materials to the extent feasible, the use of energy and water efficient design to the extent feasible, (AR 26-27.)

The City made a statement of overriding considerations. (AR 29-34.) The City's statement of overriding considerations states that the Project's benefits outweigh the unavoidable adverse effects because it is consistent with the City's General Plan, will upgrade the commercial and mixed-use development on the San Pablo Avenue corridor, will provide housing opportunities for the elderly, disabled, and other persons with special housing needs, and will contribute to the physical and economic revitalization of the site. (AR 31-32.)

The City's certification states that the 7 Acre Field is not designated by the Farmland Mapping and Monitoring Program ("FMMP') as as prime farmland, unique farmland, or farmland of statewide importance and that the Project will not interfere with the Regents decisions regarding future use of the 7 Acre Field. (AR 17.) The City's certification also states that the project site is not a historical resource under CEQA. (AR 17.)

On July 9, 2012, the City also approved (1) a Planned Unit Development that included a 45,000 sft grocery market (AR 53-67, esp. AR 61 referencing sheet A0.4); (2) a Density Bonus for the senior residential housing (AR 68-75); and (3) a Development Agreement for the Regents' Project Development that included a 45,000 sft grocery market (AR 76-116, esp. AR 104); and (4) 142.) All of these resolutions stated that they were for the project described in the certified EIR. (AR 62, AR 72, AR 83.)

THE DECISIONMAKING PROCESS AND THE STANDARDS OF REVIEW.

Petitioners make five challenges to the City's certification of the EIR and each challenge relates to a different decision point and implicates a different standard of

review. Petitioners assert that the City (1) did not define the Project properly and engaged in piecemealing by failing to adequately consider foreseeable impacts to the 7 Acre Field; (2) failed to acknowledge the fair argument that the Project would have a significant impact on agricultural resources; (3) failed to consider a reasonable range of alternatives to the Project; (4) failed to adequately respond to comments raised during the review process; and (5) failed to adopt the Existing Zoning Alternative (Smaller Grocery Market) or to justify its decision to do so.

In the CEQA process, an agency first determines whether an action is a "project' under CEQA and defines the scope of the "project." (Pub. Res. Code. § 21065; 14 CCR § 15378.) The court reviews an agency's definition of the project as a matter of law. Petitioners' 1st argument is that the City did not define the Project properly and engaged in unlawful piecemealing.

An agency then conducts an initial study to determine whether there is a fair argument that the project will have a significant impact on the environment. The court reviews an agency's findings regarding the existence of a significant impact under the fair argument standard. Petitioners' 2nd argument that the City failed to acknowledge the fair argument that the Project would have a significant impact on agricultural resources.

An agency then conducts an EIR. In an EIR the agency must evaluate the proposed project and *potentially* feasible alternatives. (14 CCR § 15126.6(a).) Potentially feasible alternatives must meet most of the basic objectives of the project but need not satisfy *every key objective* of the project. (*California Native Plant Soc. v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 981, 991 ("*CNPS*".) The court reviews an agency's selection of potentially feasible alternatives under the fair argument standard.

Petitioners' 3rd argument is that the City failed to consider a reasonable range of alternatives to the Project.

The agency then discloses a draft EIR, conducts public hearings, and evaluates both the project and alternatives to the project. The court reviews an agency's omission of information under the independent review standard but reviews an agency's determinations regarding the amount or type of information that is disclosed under the substantial evidence standard. (*Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 101-102.) Petitioners' 4th argument is that the City failed to adequately respond to comments raised during the review process.

The agency then makes a decision. When it comes to certification of an EIR, the public agency's decision-making body evaluates whether the alternatives and mitigation options are *actually* feasible. (*CNPS*, 177 Cal.App.4th at 999; 14 CCR § 15091(a)(3).) An agency can certify an EIR for a a project with significant environmental impacts "only if the decision-making body finds (1) that identified mitigation measures and alternatives are infeasible and (2) that unavoidable impacts are acceptable because of overriding considerations." (*CNPS*, 177 Cal.App.4th at 982; 14 CCR § 15091, 15093.) The court reviews an agency's conclusions regarding the feasibility of alternatives under the substantial evidence standard. Petitioners' 5th argument is that the City failed to adopt a Smaller Grocery Market or justify its decision to do so.

PROJECT DEFINITION - PIECEMEALING.

"CEQA forbids 'piecemeal' review of the significant environmental impacts of a project. ... [A]n EIR must include an analysis of the environmental effects of future

expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects. ... [T]he facts of each case will determine whether and to what extent an EIR must analyze future expansion or other action." (*Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1222.) "The whole question is whether the project definition is correct." (*Id.* at 1223.) This involves a consideration of whether the potential future expansion is both "reasonably foreseeable" and is a "consequence" of the initial project. (*Id.* at 1223.) The court reviews whether a project is improper piecemealing as a matter of law. (*Id.* at 1224; *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 98.)

The 1998 Master Plan and the 2004 Subsequent Focused EIR both considered the entire University Village and made plans for the 7 Acre Field in conjunction with those overall plans. The Subsequent Focused EIR anticipated moving the Regent's agricultural research to another location and converting the 7 Acre Field to baseball fields and other recreational uses. (AR 8270, 8287, 8290, 8306, 9881.) If in the future the Regents elects to change the use of the 7 Acre Field from the uses approved in the Subsequent Focused EIR, then that change will be subject to future environmental review to determine whether the future use is exempt from CEQA review, can proceed with a negative declaration, or must proceed with an EIR. (Pub. Res. Code § 21166; 14 CCR § 15162.)

The City's decision not to consider possible future plans for the 7 Acre Field as part of the Project was not improper piecemealing. The record does not support

Petitioners' assertion that the Project is an initial step in a larger plan to convert the the 7 Acre Field into some non-agricultural use. The court considers three scenarios.

First, the Regents could continue using the 7 Acre Feld for its current institutional education purposes. If the Regents maintains the status quo consistent with the (superseded) 1998 Master Plan, then that would not be "reasonably foreseeable consequence" of the Project.

Second, the Regents could develop the 7 Acre Field consistent with the Subsequent Focused EIR, which anticipates moving the Regent's agricultural research to another location and converting the 7 Acre Field to baseball fields and other recreational uses. If the Regents uses the land as currently approved, then the City can "reasonably anticipate" that the 7 Acre Field will be converted into some non-agricultural use, but it will not be a "consequence" of the Project.

Third, the Regents could elect to deviate from the Subsequent Focused EIR and develop the land for either some educational purpose (classrooms, laboratories, student housing, etc.) or for a non-educational use. In either situation, the Regents would need to conduct environmental review if the change had significant consequences. (Pub. Res. Code § 21166; 14 CCR § 15162.) It is reasonably foreseeable that the Regents might want to develop the 7 Acre Field, but it is not currently reasonably foreseeable that the Regents will use the 7 Acre Field for some reasonably well defined "future expansion or other action." In *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 398, the court stated:

> We do not require prophecy. ... [We do not] require discussion in the EIR of specific future action that is merely contemplated or a gleam in a

> planner's eye. To do so would be inconsistent with the rule that mere feasibility and planning studies do not require an EIR. (Guidelines, § 15262.) A detailed environmental analysis of every precise use that may conceivably occur is not necessary at this stage.

Petitioners have not not identified any current and specific plans that the Regents has for developing the 7 Acre Field. (*Berkeley Keep Jets Over the Bay Committee v. Board of Port Com'rs* (2001) 91 Cal.App.4th 1344, 1361 [airport EIR could omit future projects that "existed only as concepts in long-range plans that were subject to constant revision"].) If the Regents were to want to develop the 7 Acre Field at some point in the future, then that would not be a "reasonably foreseeable consequence" of the Project.

Petitioner's theory that the use of land for the Project uses up the Regents' real estate in University Village and makes development of the 7 Acre Field more a "reasonably foreseeable consequence" of the Project stretches the idea of a "reasonably foreseeable consequence" past the breaking point. Any use of any real estate will limit the available real estate in the vicinity and therefore have some effect on future land use, but that does not require an EIR to consider all plausibly foreseeable effects.

Assuming that the Regents does have specific plans to develop the 7 Acre Field for classrooms, laboratories, or student housing, any such plans would be independent from the Project and its development of a grocery store, retail space, and senior housing. The hypothetical plans and the Project "perform entirely different, unrelated functions" and one does not "depend on" the development of the other. (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 101.)

INITIAL STUDY – WHETHER THERE IS A FAIR ARGUMENT THAT THE PROJECT WILL HAVE A SIGNIFICANT IMPACT ON AGRICULTURAL RESOURCES.

Petitioners assert that the EIR is deficient because the record discloses a fair argument that the Project will have a significant adverse impact on agricultural resources but the Initial Study and the EIR found the Project would have "no impact" on agricultural resources. As a matter of law, if an "agency's initial study of a project produces substantial evidence supporting a fair argument the project may have significant adverse effects, the agency must (assuming the project is not exempt from CEQA) prepare an EIR." (*Communities For A Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319; *Abatti v. Imperial Irr. Dist.* (2012) 205 Cal.App.4th 650, 653.)

In the Subsequent Focused EIR in January 2004, the Regents considered whether the 7 Acre Field that was used by the Regents for agricultural research was an "agricultural resource" as defined by the California Department of Conservation's Farmland Mapping and Monitoring Program ("FMMP"). The Regents concluded that the 7 Acre Field was not an "agricultural resource" because it was used by the Regents for research and therefore was an institutional use and, in addition, the site fell below the minimum mapping unit of 10 acres. (AR 8315-8318.)

In the City's Initial Study/Environmental Checklist in July 2007, the City followed the format of the optional Guideline in the CEQA regulations. (14 CCR § 15063(f); Guidelines, Appendix. G, § IX, subd. (b).) The optional form refers to the impact on "agricultural resource," and the City analyzed the impact on agricultural

resources. The City's "Initial Study/Environmental Checklist" concluded that the Project would have no impact on agricultural resource for two reasons: (1) the 7 Acre Field was not designated by the FMMP as prime farmland, unique farmland, or farmland of statewide importance and (2) the Project did not concern development on the 7 Acre Field. (AR 154-155.) The July 2009 draft EIR did not evaluate the Project's impact on "agricultural resources" because the initial report had concluded that there was no impact. (AR 206, 438, 439.) The draft EIR attached and disclosed the initial report, so the underlying analysis was distributed to the public.

The Final EIR in the responses to comments referenced back to the Initial Study and explained why the City concluded that the 7 Acre Field was not an agricultural resource. (AR 1667, 1668.) Getting past the definitional issue, the Final EIR in Response B7-11 also stated, "The project site does not currently produce any agricultural products. The project site previously included student housing and research structures, and has not been used to produce agricultural products in recent decades." (AR 1668.) The Final EIR also explained that the Project did not include any change in the the use of the 7 Acre Field. (AR 1807.)

Petitioners have not identified anything in CEQA suggesting that "agricultural resources" are entitled to any sort of special protection. The only reference to "agricultural resources" that the court could find in CEQA is in the form Initial Study document in the CEQA regulations, and that template is expressly optional. (14 CCR 15063(f).) This suggests that the City's obligation under CEQA to consider the current use of the 7 Acre Field is not heightened if the 7 Acre Field is an "agricultural resource."

Assuming that "agricultural resources" are provided protection under CEQA, then for CEQA purposes "agricultural resources" are defined under Pub. Res. Code § 21060.1. Petitioners have not identified evidence in the administrative record suggesting that the 7 Acre Field is an "agricultural resource" within the statutory definition. The Regents and the City addressed the definitional issue in the Initial Study/Environmental Checklist (AR 154-155), in the Draft EIR (AR 439). In addition, Petitioners are barred from asserting that the City erred in its definitional analysis because the issue was not raised in the administrative process. (*California Native Plant Soc. v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 615-619.)

Setting aside the definitional issue, Petitioners have not identified evidence in the administrative record suggesting that the 7 Acre Field is in fact used for agriculture even if it does not fit within the statutory definition. In the Final EIR, the City explained "The project site does not currently produce any agricultural products. The project site ... has not been used to produce agricultural products in recent decades." (AR 1668.)

The 7 Acre Field could still be protected as a historical agricultural resource even if it is not protected under CEQA as an "agricultural resource." (Pub. Res. Code § 21084.1; 14 CCR § 15064.5.) A "Historical resource" can include a "site, area, place ... which is .. significant in the ... agricultural ... annals of California." (Pub. Res. Code § 5020.1(j); 14 CCR § 15064.5(a)(3).) The Regents and the City addressed the historical value of the 7 Acre Field in the Initial Study/Environmental Checklist (AR 158-159) and in the Draft EIR (AR 439). These documents explained that the 2004 Subsequent Focused EIR had previously considered the historical and cultural value of the 7 Acre Field.

Assuming a fair argument that the 7 Acre Field were entitled to protection as statutory "agricultural resources," an agricultural use in fact, or a historical agricultural location, and that the historical value of the Field was not already considered in the 2004 Subsequent Focused EIR, the Project does not include any change in the the use of the 7 Acre Field. (AR 1807) (AR 144, 154, 1834, 1836, 2132-2133, 2508-2514.)

Therefore, the administrative record does not contain substantial evidence supporting a fair argument the project may have significant adverse effects on agricultural resources.

SELECTION OF POTENTIALLY FEASIBLE ALTERNATIVES FOR ANALYSIS IN THE EIR.

CEQA requires that the agency consider "a reasonable range of potentially feasible alternatives," to "foster informed decisionmaking and public participation." (Pub Res. Code § 21002; 14 CCR § 15126.6(a) and (f).) "Since the purpose of an alternatives analysis is to allow the decisionmaker to determine whether there is an environmentally superior alternative that will meet most of the project's objectives, the key to the selection of the range of alternatives is to identify alternatives that meet most of the project's objectives but have a reduced level of environmental impacts." (*Watsonville Pilots Ass'n v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1086-1089 .)

To start the process of identifying and evaluating alternatives, the lead agency must describe the project objectives. "A clearly written statement of objectives will help the lead agency develop a reasonable range of alternatives to evaluate in the EIR and will aid the decision makers in preparing findings.... The statement of objectives should

include the underlying purpose of the project." (14 CCR § 15124(b).) "Although a lead agency may not give a project's purpose an artificially narrow definition, a lead agency may structure its EIR alternative analysis around a reasonable definition of underlying purpose and need not study alternatives that cannot achieve that basic goal." (*Surfrider Foundation v. California Regional Water Quality Control Board, San Diego* (2012) 211 Cal.App.4th 557, 582.) An agency's identification of the "project objectives" must be supported by substantial evidence. (*Habitat and Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1299-1300.)

The draft EIR defined the project objectives as:

- Locate a mixed-use project on the San Pablo Avenue corridor within Block B of the project site.
- Build a grocery store within the San Pablo Avenue frontage of University Village located within Block A of the project site.
- Offer retail space and outdoor seating as a local amenity designed to connect with the surroundings and serve local residents and new residents of the project.
- Facilitate pedestrian/bicycle movement across San Pablo Avenue.
- Improve the visual quality of the site.
- Provide senior housing.
- Within the project site, provide a pedestrian/bicycle path along Codornices Creek.

(AR 241.) There is substantial evidence to support the City's identification of the project objectives.

The City examined alternatives and therefore proceeded as required by law. The court reviews the range of alternatives under the substantial evidence standard. "The selection will be upheld, unless the challenger demonstrates "that the alternatives are

manifestly unreasonable and that they do not contribute to a reasonable range of alternatives." (*CNPS*, 177 Cal.App.4th at 988.)

The Draft EIR presented the following four alternatives (AR 210):

1. The Project - A 55,000 sft grocery store, 30,000 sft of retail space, and 175 units of senior housing. (AR 208.)
2. The No Project alternative - Continuation of existing conditions (AR 430-432.)
3. The Existing Zoning alternative - A 15,000 sft grocery store, 16,000 sft of retail space, and 70 units of senior housing. (AR 432-435.)
4. The Reduced Residential alternative - A 55,000 sft grocery store, 30,000 sft of retail space, and 85 units of senior housing. (AR 435-436)

The draft EIR evaluated and compared these alternatives. (AR 430-436, 1763-1764.)

The purpose of identifying and evaluating "a reasonable range of potentially feasible alternatives" is to "foster informed decisionmaking and public participation." (Pub Res. Code § 21002; 14 CCR § 15126.6(a) and (f).) "What CEQA requires is "enough of a variation to allow informed decision-making." ... [The court] judge[s] the range of project alternatives in the EIR against "a rule of reason."" (*CNPS*, 177 Cal.App.4th at 988.) (See also *Habitat and Watershed Caretakers*, 213 Cal.App.4th 1277, 1302-1303.)

Petitioners assert that the Reduced Residential alternative was not a "potentially feasible alternative" because under 14 CCR 15041(c) the City is not permitted to reduce the environmental impact by reducing the proposed number of housing units. This is not entirely correct. 14 CCR 15041(c) states that an agency cannot reduce the proposed

number of housing units as a mitigation measure or alternative if there is another feasible, specific mitigation measure or alternative that would provide a comparable lessening of the significant effect. Therefore, the City could reasonably identify the Reduced Residential alternative as a "potentially feasible alternative" to evaluate whether it mitigated the effect on the environment and, if so, whether the benefits were greater than those of "another feasible, specific mitigation measure or alternative that would provide a comparable lessening of the significant effect." The fact that 14 CCR 15041(c) placed an additional hurdle to using a smaller number of housing units as a mitigation measure does not exclude that possibility as a "potentially feasible alternative." This additional hurdle, however, strengthens petitioner's argument that the Reduced Residential alternative was a sham alternative.

Petitioners assert that the City's disclosures and analysis were deficient because the City did not consider a Reduced Grocery Market alternative without reasonable explanation. (*Habitat and Watershed Caretakers*, 213 Cal.App.4th at 1300-1305 (agency failed to consider reduced development with limited water demands as a potentially feasible alternative); *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 876, 882-885 (agency failed to consider enclosed waste facility as a potentially feasible alternative); *Watsonville Pilots Ass'n*, 183 Cal.App.4th at 1086-1090 (agency failed to consider reduced development as a potentially feasible alternative).)

The court finds that the City's selection and evaluation of potentially feasible alternatives was reasonable and met the goal of fostering "informed decisionmaking and informed public participation." (*Cherry Valley Pass Acres and Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 348.) The potentially feasible alternatives"

included a continuum of development proposals from no development, to development under current zoning, to increased development, to the proposed Project. A review of these fostered "informed decisionmaking and informed public participation."

Petitioners argue that the City should have specifically considered a "small grocery market alternative" and note that a local grocer specifically proposed a 15,000 sft grocery store. (AR 11197, 14071.) The EIR was adequate without a separate evaluation of a "small grocery market alternative." An EIR is not required to separately evaluate each facet of the Project and each facet of each plausible alternative. (*California Native Plant Soc. v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 994.) "CEQA does not require a lead agency to conduct every test or perform all research, study, and experimentation recommended or demanded by commentors." (14 CCR § 15204(a).)

For example, in *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App.3d 1022, 1028-1029, the court held that an EIR that discussed housing density alternatives of 0, 7,500, 10,000, 20,000, and 25,000 dwelling units as not deficient because it failed to specifically discuss a 15,000 unit alternative. The court stated, "[I]t must be assumed that decision-makers and the public could make an informed comparison of the environmental effects of those various plans. It is not then unreasonable to conclude that an alternative not discussed in the EIR could be intelligently considered by studying the adequate descriptions of the plans that are discussed." (*Id.*)

In the context of evaluating the Existing Zoning Alternative, the City considered the environmental benefits of a small grocery market even though the City did not formally identify a "Small Grocery Market Alternative" as a potentially feasible

alternative. The EIR separately identified the traffic effects of the Project and the Existing Zoning alternative by grocery store, retail, and housing so that the City Council and the public could evaluate the traffic effects individually. (Compare AR 292 (trips under Proposal) with AR 434 (trips under Existing Zoning alternative).) The City's responses to comments responds to the small grocery market alternative. (AR 1764 (Response B15-6).) Finally, a small grocery market alternative was proposed repeatedly throughout the process. (City Council Meeting of 7/9/12 (AR 3891-3892, 3912); City Council Meeting of 1/17/12 (AR 3701-3702); City Council Meeting of 10/17/11 (AR 3639); City council Meeting of 7/18/11 (AR 3417); Planning & Zoning Meeting of 6/22/11 (AR 3283); Planning & Zoning Meeting of 5/24/11 (AR 3194); Planning & Zoning Meeting of 1/11/11 (AR 3122-3124); Planning & Zoning Meeting of 7/22/08 (AR 2921).) Therefore, consistent with the analysis in *Laguna Beach*, even though the City did not formally identify a "Small Grocery Market Alternative" as a potentially feasible alternative in the draft EIR, the City did consider the environmental benefits of a small grocery market in the EIR process.

The City ultimately found that all of the potentially feasible alternatives were infeasible, but an agency's decision to reject each of the plausible alternatives and to adopt the project as proposed or modified by itself does not demonstrate that the agency erred in it selection of alternatives. (*Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184, 198-199.) The analysis of a "potentially feasible alternative" serves its purpose if it permits informed agency decision-making and informed public participation. (*CNPS*, 177 Cal.App.4th at 988.)

PUBLIC DISCLOURE – WHETHER THE CITY RESPONDED ADEQUATELY TO COMMENTS RAISED DURING THE REVIEW PROCESS.

CEQA's disclosure provisions are designed to permit informed agency decision-making and informed public participation. The EIR must describe the proposed project and its environmental setting, state the objectives sought to be achieved, identify and analyze the significant effects on the environment, state how those impacts can be mitigated or avoided, and identify alternatives to the project, among other requirements. "[T]echnical perfection is not required; the courts have looked not for an exhaustive analysis but for adequacy, completeness and a good faith effort at full disclosure. … The burden of showing that the EIR is inadequate is on the party challenging the EIR." (*Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552, 1561.)

The environmental review process provides for public comment because comments can be "most helpful when they suggest additional specific alternatives or mitigation measures that would provide better ways to avoid or mitigate the significant environmental effects." (14 CCR § 15204(a).) "[A]n adequate EIR must respond to specific suggestions for mitigating a significant environmental impact unless the suggested mitigation is facially infeasible. While the response need not be exhaustive, it should evince good faith and a reasoned analysis." (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 360.) (See also 14 CCR § 15088(c); *Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1029 ("EIR must respond to specific suggestions for mitigating a significant environmental impact unless the suggested mitigation measure is facially infeasible").)

On issues of disclosure, "when a plaintiff asserts error based on the omission of information, independent review will apply if the information in question is required by CEQA and necessary to informed discussion. In contrast, if the asserted error concerns the amount or type of information that is not required by CEQA and necessary for an informed discussion, then the substantial evidence standard applies." (*Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 101-102.)

The City responded adequately to the comment of Carpenters' Local 713 that the City had not provided supporting documents promptly. (AR 1700.) On this point of procedure, the City explained that the request was made in August 2009 and any delay in the disclosure of the documents was not relevant given that the documents were disclosed and the CEQA process them proceeded for years. (AR 1736 (Response B12-7.)

The City correctly noted that one comment of Carpenters'' Local 713 was not properly directed to the Project. (AR 1696; AR 1735 (Response B12-2.)

The City responded adequately to the comment of Carpenters'' Local 713 that the Project would increase the intensity of uses on the site and set the stage for requests for higher intensity development on adjacent sites. (AR 1697.) The City's specific response to the comment was nonresponsive. (AR 1735 (Response B12-3.) That said, the concern with whether the Project will set the stage for potential requests for undefined development on non-specific adjacent sites is so speculative that the lack of a response did not diminish the public discussion.

The City responded adequately to the comment of Ed Fields that the decision to use the housing in the Project for seniors would put pressure on the Regents to put future

student housing in the 7 Acre Field. (AR 1758.) The City explained that the Project did not concern the 7 Acre Field. (AR 1764 (Response B15-7.)

The City responded adequately to the comment of Ed Fields that the City should consider a 15,000 sft grocery store. (AR 1758, AR 11197.) A small grocery store alternative was presented in the Draft EIR's discussion of the Existing Zoning Alternative, was addressed in the City's responses to the comments (AR 1764 (Response B15-6), and was discussed at meetings.

THE CITY'S DECISION TO CERTIFY THE EIR.

The court independently reviews any legal issues related to the City's decision to certify the EIR. The court reviews factual issues concerning the City's decision to certify the EIR under the substantial evidence standard. (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 275-276.)

Petitioners make the legal argument that an agency can consider "economic, legal, social, technological, or other considerations" only when making the evaluation of overriding considerations under Pub. Res. Code 21081(b) and 14 CCR 15093, and that the City failed to comply with the law by basing its analysis of alternatives on economic, social, and other policy considerations. In *CNPS*, the court stated that at the evaluation of alternatives stage an agency must consider alternatives and can reject alternatives only if they are "truly infeasible." The court then discussed the statement of overriding considerations and stated "While the mitigation and feasibility findings typically focus on the feasibility of specific proposed alternatives and mitigation measures, the statement of overriding considerations focuses on the larger, more general reasons for approving the

project, such as the need to create new jobs, provide housing, generate taxes, and the like." (*CNPS*, 177 Cal.App.4th at 982-983.) *CNPS* later affirmed that the evaluation of alternatives and the evaluation of overriding considerations are "two distinct steps," the former evaluating the proposed project against alternatives and the latter weighing the environmental effects of the proposed project against the benefits of the project. (177 Cal.App.4th at 1002.) (See also 14 CCR 15091(f) and 15093(c) (evaluation of alternatives and evaluation of overriding considerations are not substitutes for each other).)

The court finds that although the two steps of the analysis are distinct, the statute and the regulations expressly permit considering the same factors at both steps. At the first step, Pub. Res. Code 21081(a)(3) and 14 CCR 15091(a)(3), state that where an agency identifies a significant environmental effect the agency can consider whether project alternatives to avoid or mitigate the effects are infeasible due to "economic, legal, social, technological, or other considerations." (See also 14 CCR 15364.) Therefore, at the first step an agency can determine that a plausible alternative is infeasible because the proposed project does a better job of meeting the project objectives as measured by economic and social goals.

At the second step, Pub. Res. Code 21081(b), states that if an agency finds that alternatives and mitigation measures are infeasible due to policy reasons, then the agency must find that "specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment." Similarly, 14 CCR 15093(a), states that if an agency finds that alternatives and mitigation measures are infeasible due to policy reasons, then the agency must find that "specific overriding

economic, legal, social, technological, or other benefits ... of a proposal project outweigh the unavoidable adverse environmental effects." Therefore, at the second step an agency can determine that a proposed project should proceed despite its environmental effects because there it meets economic and social goals.

The distinction between the two steps is that at step one the alternatives are measured against the economic and social goals whereas at the second step the environmental effects of the project are measured against the economic and social goals.

Petitioners make the factual argument that the City's EIR is inadequate because it fails to explain and provide factual support for why the City approved the Project rather than a reduced Grocery Market alternative. "[An] EIR must contain facts and analysis, not just the agency's bare conclusions or opinions. ... An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project. ... It must contain 'sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project.' [Citation.] "[T]here must be a disclosure of the 'analytic route the ... agency traveled from evidence to action.'" (*Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 882-883) (See also *CNPS*, 177 Cal.App.4$^{th}$ at 982.)

The City's determination that the Existing Zoning Alternative (which included a small Grocery Market) was infeasible was supported by substantial evidence. The City Council found that the Existing Zoning Alternative was infeasible for primarily non-quantitative social and economic reasons, such as a desire for "significantly [more] retail and grocery space," and "promot[ing] the goals of the General Plan, including upgrading

commercial development on San Pablo Avenue." (AR 22-23.) The City can find a potentially feasible alternative to be infeasible based on economic, social, or other considerations. (Pub. Res. Code 21081(a)(3); 14 CCR 15091(a)(3).) Under these sections, "an alternative that 'is impractical or undesirable from a policy standpoint' may be rejected as infeasible." (*CNPS*, 177 Cal.App.4th at 1001.)

The City had been planning to promote commercial development on San Pablo Avenue since the 1990s . (AR 148, AR 4316-4335 (1993 San Pablo Ave. design guidelines and "Retail Boulevard"); AR4842-4913 (1997 San Pablo Ave Vision Plan).) The City articulated this policy in the 1998 Master Plan and in the 2004 Subsequent Focused EIR. The City also articulated the policy preference in the July 2009 Initial Study/Environmental Checklist (AR 148) and repeatedly throughout the Project's environmental review. (AR 2217, 2358, 3627-3628.) There is substantial evidence that the Project provided more commercial development on San Pablo Avenue than the Existing Zoning Alternative. Therefore, there is substantial evidence to support the City's decision that the Existing Zoning Alternative was infeasible for economic and social reasons.

Petitioners make the factual argument that the City's EIR is inadequate because it found the Existing Zoning Alternative to be infeasible based on the economic effect on the City. The City found the Existing Zoning Alternative to be infeasible in part because it "would not provide the same level of economic benefits to the City in terms of potential increased tax revenues and broadened employment opportunities." (AR 22-23.) The record reflects that the Proposal is expected to generate $466,000 in revenues, to cost $262,000 in services, and yield a net annual increase to the City of $204,000 per year

(AR 2360), as well as to generate approximately 320 jobs in the City (AR 3481, 3628). The record is, however, devoid of facts or analysis regarding what revenues or jobs any alterative would generate. The City did not provide any facts that support a comparative analysis between the alternatives. (*Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 883 ("when the cost of an alternative exceeds the cost of the proposed project, "it is the magnitude of the difference that will determine the feasibility of this alternative."").) The court could speculate that a 55,000 sft grocery store would generate more sales tax revenue and employ more people than a 15,000 sft grocery store, but that speculation would be no substitute for CEQA's mandated disclosure of the City's analytic route from evidence to action. There is no substantial evidence to support the City's decision that the Existing Zoning Alternative was infeasible because the Project would provide more tax revenue to the City or generate more jobs in the City.

Petitioners make the implied factual argument that the City's EIR is inadequate because it found the Existing Zoning Alternative to be infeasible based on the economic effect on the proposed grocery store and/or retailers. (*Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 883-884; *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1400-1401.) The record is devoid of facts or analysis regarding whether, or how, the alternatives would affect the ability of any grocery store and/or retailers to operate profitably at the Project location. To the extent that the City's decision was inferentially based on whether the Existing Zoning Alternative would permit the proposed grocery store and/or retailers to operate profitably, there is no substantial evidence to support that decision.

The court notes this case presents what must for petitioners be the frustrating fact pattern where a public agency discloses an EIR for a project, identifies potentially feasible alternatives to the project, finds a potentially feasible alternative to be a superior environmental alternative, and then certifies the EIR for the project as proposed because it does a better job of meeting the project objectives. This is, however, a potential and permitted result of the environmental review of alternatives. (*CNPS*, 177 Cal.App.4th at 1001-1003; *City of Del Mar v. City of San Diego* (1982) 133 Cal.App.3d 401, 416-417.)

The court is aware of the potential scenario where an agency could purposefully select "potentially feasible alternatives" that do not meet important project objectives, evaluate the alternatives, find that the alternatives to be infeasible, and then certify an EIR without engaging in a genuine environmental analysis. This would not be permitted. "The purpose of an EIR is *not* to identify alleged alternatives that meet few if any of the project's objectives so that these alleged alternatives may be readily eliminated." (*Watsonville Pilots Ass'n v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1089.) More generally, an EIR should not be just an exercise in generating paper to describe a journey whose destination was already predetermined. (*City of Santee v. County of San Diego* (2010) 186 Cal.App.4th 55, 62; 14 CCR 15003(g).)

The alternatives analysis in the City's EIR permitted the City Council to determine whether there were environmentally superior alternatives that would meet most of a project's objectives and to meaningfully evaluate those alternatives. The EIR presented alternatives with (1) no grocery store, a 15,000 sft grocery store and a 55,000 sft grocery story; (2) no new retail space, 16,000 sft of retail space, and 30,000 sft of retail space; and (3) no new housing and 70, 85, and 175 units of senior housing. These

presented a reasonable range of options for informed discussion of the City's economic and social goals and the environmental impacts of the various alternatives. In the EIR process the Project changed so that the Project ultimately approved for development was a 45,000 sft grocery store (compare AR246 with AR104, and see also AR 4082), had 26,200 sft of retail space (compare AR246-247 with AR104), dedicated land along the two creeks to parkland (AR 2357, 2690), and reduced the height from five to four stories (AR 2356).[2] The City used the EIR process as a vehicle for identifying environmental impacts, discussing alternatives, and identifying potential mitigation measures. The facts of this case are distinctly different from the potential scenario where an agency identifies alternatives that meet few of the project's objectives so the agency can eliminate those alternatives to reach a pre-determined result.

EVIDENCE.

The court GRANTS Petitioners' request to take judicial notice of the decision in Sierra Club v. Tahoe Regional Planning Board. (Appendix 1-114)

The court DENIES Petitioners' request to take judicial notice of the content of certain websites. (Appendix 115-123.)

The court DENIES Petitioners' request to augment the record with the declarations of petitioners Larsen and Rawlings.

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[2] The Project as approved in the Development Agreement is different from the Project as described in the certified EIR – e.g., both the grocery market and the retail space have fewer square feet. The court does not address what effect, if any, this might have on future development of the property.

FURTHER PROCEEDINGS.

Respondents are to prepare and submit a proposed judgment after review by Petitioners under C.R.C. 3.1312.

DATED: _____ _____

Evelio Grillo
Judge of the Superior Court