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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT

FOUR SIDED PROPERTIES, LLC,,

Petitioner and Plaintiff,

vs.

CITY OF LOS ANGELES; WEST LOS ANGELES AREA PLANNING COMMISSION OF THE CITY OF LOS ANGELES, and DOES 1-25, inclusive,

Respondents and Defendants.

BRENTWOOD RESIDENTS COALITION and BRENTWOOD HOMEOWNERS' ASSOCIATION,

Intervenors

CASE NO. BS128425

INTERVENORS' CEQA BRIEF; DECLARATION OF THOMAS R. FREEMAN

Date: April 29, 2011
Time: 9:30
Dept.: 85

Assigned to Hon. James C. Chalfant, Dept. 85

Action Filed: September 9, 2010

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I. THE APPLICABLE CEQA PRINCIPLES.

A. An EIR Is Required for Discretionary Projects That *May* Have Significant Environmental Impacts.

CEQA applies to *discretionary projects*, i.e., "projects which require the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity." *CEQA Guidelines*, §§15357, 15002(l). Petitioner concedes that a CUB application is "discretionary." *Reporter's Transcript*, pp. 47-48 (*Exhibit 8*). That is because issuance of a CUB requires "the exercise of judgment or deliberation" and, if approved, conditions may be imposed to reduce adverse impacts. *Friends of Westwood, Inc. v. City of Los Angeles*, 191 Cal.App.3d 259, 271-273 (1987).

An MND, as prepared in this case, is inadequate if the record contains substantial evidence that the project may have a significant impact on the environment. *Guidelines*, §15369.5. Where substantial evidence in the record supports a "fair argument" that the project, as mitigated, "may have significant environmental effects," an EIR is required *Community for a Better Env. v. So. Coast Air Quality Mngt. Dist.*, 48 Cal.4th 310, 315 (2010). The record here supports a "fair argument" that the project may have a significant impact, rendering the MND inadequate. *Id.* at 319-320.

B. Baseline for Assessing the Significance of a Project's Impacts is the *Existing* Condition, Not Hypothetical *Allowable* Conditions.

The CEQA "baseline" against which a project's potential impacts are measured is "the existing physical conditions in the affected area, that is, the real conditions on the ground, rather than the level of development that could or should have been present according to a plan or regulation." *Community*, 48 Cal.4th at 320 (applying *Guidelines*, §15125(a)). A project's potential impacts must be "compared to the *actual environmental conditions* existing at the time of CEQA analysis, rather than to *allowable conditions* defined by a plan or regulatory framework." *Id.* at 321.

In *Community for a Better Environment*, 48 Cal.4th 310, the agency issued discretionary permits for an oil refinery emitting the same level of nitrogen oxide as *permitted* under existing regulations but at levels greater than had been previously emitted. The MND for the project focused on the incremental difference between the *allowable* and *proposed* volume of emissions instead of the difference between the *current* and *proposed* levels. *Id.* at 317-318. Petitioner in this case has made the same argument – that baseline is the hypothetical by-right use of the property, in this case as a

restaurant. *Reporter's Transcript*, pp. 46-47. But in *Community*, the Supreme Court held that the *actual conditions* at the time of environmental review is the baseline, explaining that "[a]n approach using hypothetical allowable conditions as the baseline results in 'illusory' comparisons that 'can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts,' a result at direct odds with CEQA's intent." *Id.* at 322. The MND in *Community* was therefore deficient because it set baseline at *allowable* emission levels instead of the actual levels (*Id.* at 321-322 & fn.6 (citing numerous cases)), just as the MND in this case is invalid because it is based on the *allowable* use of the property as a restaurant.

C. CEQA *Supplements* the Agency's Discretionary Power to Prevent Significant Environmental Impacts.

The CEQA definition of "baseline" makes sense because CEQA supplements the authority of local agencies by empowering them to deny (or compel mitigation of) a discretionary project whenever a fair argument can be made that the incremental difference between the project's potential environmental impacts and the current conditions (not a hypothetical by-right use) may be significant, even if no such authority is granted by the underlying zoning law.

Where CEQA applies, authority under non-CEQA law to deny a discretionary project is *supplemented* by CEQA, which authorizes project denial due to significant environmental impacts: "A public agency may disapprove a project if necessary in order to avoid one or more significant effects on the environment that would occur if the project were approved as proposed." *Guidelines*, §15042; *Guidelines* §15002(h)(5); *Native Sun/Lyon Comm. v. City*, 15 Cal.App. 4th 892, 907 (1993). Similarly, as the Guidelines explain, agency authority to require project mitigation is also bolstered by CEQA: "Where another law [such as municipal zoning law] grants an agency discretionary powers, CEQA *supplements* those discretionary powers by authorizing the agency to use the discretionary powers to mitigate or avoid significant effects on the environment when it is feasible to do so with respect to projects subject to the powers of the agency." *Guidelines*, §15040(c).

The CEQA-supplemented authority thereby empowers agencies to deny discretionary permits on an *environmental basis* not authorized by the underlying law – to avoid significant impacts as measured against the *existing-conditions* baseline. The allowable impacts of a hypothetical

by-right use – such as the traffic or parking impacts of a non-existing, hypothetical restaurant – are immaterial to the equation in assessing the environmental impact of a proposed restaurant seeking a CUB approval. Baseline does not account for what *could have been done by right*, it is limited to that which *exists at the time of environmental review. Community*, 48 Cal.4th at 322-324. Thus, the CEQA-imposed "cost" of seeking a discretionary permit is the risk of denial unless the project's foreseeable impacts can be mitigated to insignificance. *Guidelines*, §§15042, 15002(h)(5).

II. APPLICATION OF CEQA PRINCIPLES.

A. The *Fig & Olive* "Project" Includes Offsite Parking.

CEQA defines a "project" as "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. . . ." *Guidelines*, §15378(a). Petitioner argues that the "project" is limited to the conditional use being sought – *i.e.*, the right to serve alcohol. But a "project" is not limited to the governmental approval being sought. *Guidelines*, §15378(c). It includes all "reasonably foreseeable consequences" of the project, which includes any foreseeable parking, traffic or noise impacts. *Laurel Heights Imp. Assoc. v. Regents of Univ. of Calif.*, 47 Cal.3d 376, 395 (1998).

The *Fig & Olive* project clearly encompasses the parking-related impacts of a 158-seat alcohol-serving restaurant with *no onsite parking* in an area that lacks adequate parking for *existing* needs. The MND defines the *Fig & Olive* project as follows:

> "A Conditional Use Permit request to allow the sale of a full line of alcoholic beverages for on-site consumption in conjunction with a proposed 3,900 square-foot, 182 seat restaurant (Fig & Olive), operating between 8:00 AM to 12:30 AM Sunday through Wednesday, and 8:00 AM to 2:00 AM Thursday through Saturday, with alcohol sales occurring during hours of operation." *AR 0749.*

There are only *five* parking spaces for all *seven* of the tenants spaces within the 8,465 square foot commercial building (*AR 0859, 1832*), including existing tenant *Lululemon*, which is already using the five parking spaces. *AR 1818.* The MND project description further states:

> "Additionally, the applicant is seeking a Zone Variance to provide the 39 required parking spaces off-site, within 750 feet of the project site by lease agreement in lieu of covenant and agreement as required by the LAMC." *Id.*

While *Fig & Olive* later dropped the Zone Variance request, the project still requires offsite park-

ing to accommodate patrons and employees. Further, this need is recognized in the CUB issued by the ZA, which requires that "60 parking spaces shall be provided only for restaurant patrons and employees at the public parking garage at 11835-11837 – 11847 Gorham Avenue." *AR 0849.* These 60 parking spaces are *21 more than the code-required 39 spaces*, reflecting the foreseeable need for more than code-required parking to accommodate the proposed alcohol-serving restaurant.

The project definition encompasses offsite parking because parking-related impacts are "reasonably foreseeable" given the absence of any onsite parking for the 158-seat restaurant in an area already lacking adequate public parking. *Laurel Heights*, 47 Cal.3d at 395-396. Moreover, the offsite parking was not just *foreseeable*, it was actually foreseen, specifically identified in the project description, and made a *condition of approval.* CEQA requires review of all foreseeable project impacts, including those due to project conditions. *Tuolumne Co. Citizens v. City of Sonora*, 155 Cal.App.4th 1214, 1230-1231 (2007) (holding that conditional requirements are part of "project").

B. The Applicable Land-Use Policies and Baseline Conditions.

1. Land use policies. The significance of a project's impacts must be measured in light of the controlling land-use policies. *Guidelines*, §15125(d). Spillover traffic and parking impacts are clearly identified as significant in the area where the *Fig & Olive* restaurant would be located. The Brentwood-Pacific Palisades Community Plan, which constitutes the Land Use Element of the General Plan for this area of the City, serves as "the constitution" for land use planning and future development in the area. *Lesher Comm., Inc. v. City of Walnut*, 52 Cal.3d 553, 570-571 (1990). The Community Plan precludes commercial land uses that create spillover parking or traffic impacts in residential neighborhoods. *Community Plan, pp. I-3, I-4*. This mandate is a corollary of Community Plan Objective 1-3, which is "to preserve and enhance the varied and distinct residential character and integrity of existing residential neighborhoods." *Community Plan, p. III-4*. And within the San Vicente Scenic Corridor, the Specific Plan Guidelines identify the "ultimate goal for the San Vicente Corridor [as] the creation of a cohesive, pedestrian-friendly environment which complements the adjacent residential uses and provides basic [local-serving] community services." *San Vicente Specific Plan Guidelines*, p. 7.

2. Baseline. The "baseline" against which the offsite parking impacts must be

measured is *either* by use of the property as (1) a gym with *onsite parking* provided directly behind the building *or* (2) an empty lot because the property has not been occupied for four years. The prior tenant, Pro Gym, "operated for many years on the premises until April 2007." *AR 1214*. As the president and manager of the former tenant stated, "When Pro Gym occupied the premises at 11920 San Vicente, we provided on-site parking for all our customers." *AR 1214*. Whether baseline is Pro Gym's use or as an empty lot, the baseline condition is the same -- *no* offsite valet parking. Thus, the baseline for measuring the project's offsite parking impacts is *zero*.

3. The tipping point. The significance of spillover impacts due to the offsite parking is heightened because the neighborhoods that would be impacted have already reached the "tipping point" with respect to these spillover parking, traffic and noise impacts. In *Gray v. Co. of Madera*, 167 Cal.App.4th 1099, 1123 (2008), the court recognized that, although an increase in ambient noise of less than 3 decibels is commonly recognized as insignificant, CEQA requires that environmental significance be considered in light of cumulative noise levels, which could render an otherwise insignificant increase significant if the area is already at the "tipping point" where even a slight increase could have a potentially significant impact.

The record here contains substantial evidence that even a slight increase in parking congestion, traffic circulation, and noise in the residential areas adjacent to the project site, the offsite parking garage, and the valet circulation route, would be significant. Residents testified that their neighborhoods were already subject to tremendous spillover impacts. Mitch Paradise, who has lived within two blocks of the project site for 23 years, testified that there is "a serious loss of street parking" in the area and, as a result, his driveway and those of his neighbors "are constantly being blocked by the front or back end of cars that are either ignoring the painted red corner or just feel like parking there." *AR 1989-1990*. Based on his 23 years as a resident, he continued: "You have to understand that a lot of the cars that are going to visit this restaurant are not going to be valeted . . . . They will be parked all over the neighborhood." *AR 1990*. The spillover traffic, in addition to spillover parking, has also pushed the residential neighborhood to the tipping point: "You have a gridlock that is forming in this neighborhood at all times of day, not just in the rush hour period, which is absolutely awful." *AR 1990*.

1 Fred Freeman, who resides in the condominium where the offsite parking would be lo-
2 cated, complained of "a commercial intrusion into [his] residential neighborhood," where the
3 spillover is "disturb[ing] the peace and quiet of the residents there." *AR 1992.* Jill Duffy, who
4 lives on Westgate (see maps attached as *Exhibit 1*), testified that within the past year, she has re-
5 ceived nine parking tickets "because I was unable to find an adequate parking place in time to
6 avoid a ticket, particularly due to my illness; but just simply because the parking in the area is in-
7 credibly difficult." *AR 1984.* Ken Marks, a longtime resident in a multi-family unit in the area, tes-
8 tified that "traffic is the major issue" because "the infrastructure will not support the traffic pat-
9 terns proposed by the Applicant" and, in asking that the APC "help us alleviate this traffic prob-
10 lem," he emphasized that "the restaurant is fine, but it needs to be in a situation that we don't
11 have valet parkers," especially when they "go through neighborhoods." *AR 1986, 0290-0292.* The
12 current traffic conditions are illustrated by photographs taken by Donald Keller (*AR 1113-1130,*
13 attached as *Exhibit 2*), who testified that the valet route is "fraught with difficulties" – including
14 spillover traffic and parking congestion as well as safety hazards. *AR 1974-1975.*
15 Nasmi Gatami, the owner of *Early World*, a small family-style restaurant a few doors west
16 of the project site, who has owned or managed the restaurant since 1974, testified that "traffic
17 and parking congestion in the immediate area has been a growing problem." *AR 1979. Early*
18 *World* provides free onsite parking behind the restaurant, but for the past several years "we have
19 experienced occasional problems with people using our parking spaces while visiting residents in
20 the adjacent neighborhood, where there is too little street parking." *AR 1979.* He stated that "the
21 proposed Fig and Olive Restaurant, with 158 seats, dozens of employees, and no onsite parking
22 . . . will make parking much more difficult for my staff and customers." *AR 1979-1980.* The man-
23 ager of Pro Gym, which is located on the same block as the project site, complained about safety
24 concerns due to the valet route requiring a left turn from the project site onto Montana Ave.,
25 which "will cause problems for our members, who must access our parking lot off Montana, di-
26 rectly to the west [of] the Fig & Olive driveway" because "traffic on Montana, near the [project
27 site] driveway will bottleneck, blocking our members traveling to and from the gym's parking lot,
28 and create traffic hazards for them, as dangerous left turns are made across Montana." *See AR*

1 *1180* ("It is reprehensible that this would be considered when parking is already a problem . . .
2 [w]e struggle every day to find parking as it is!); *See also AR 0479, 0487, 0501, 0507, 0524, 0569,*
3 *0595, 0603, 0607, 0654, 1182* (further testimony of "tipping point" conditions); *AR 1988; 1023-*
4 *1024* (objections of Saltair Neighbors); *0930-0934* (objections of BHA).

5 **C. Substantial Record Evidence Demonstrates That Potentially Significant Impacts Were Not Analyzed In the MND.**

6

7 **1.** **Spillover parking & traffic impacts**. Petitioner's plan, as stated in the
8 MND, the CUB conditions, and presented to the APC, is to provide *no onsite parking* for the res-
9 taurant and, instead, offer valet service for all restaurant patrons, whose vehicles, along with all
10 employees' vehicles, will be parked in a privately-owned public parking garage on Gorham Ave.
11 (the "Gorham Garage") within a residentially-zoned neighborhood. *AR 0749*.

12 The MND, however, contains none of the information necessary to analyze (or mitigate)
13 the environmental impacts of offsite parking. On that basis, land-use consultant Howard Robin-
14 son explained that the MND was deficient because the applicant failed to submit a "route map,"
15 identifying the valet circulation route between the restaurant and garage, or a "valet plan," identi-
16 fying the location of the valet drop-off/pick-up locations, thereby making it impossible to assess
17 the impacts or propose mitigation measures. *AR 0216-0219, 0979*, attached as *Exhibit 7*. Similarly,
18 expert witness David Shender of Linscott Law & Greenspan, Engineers, established the MND's
19 invalidity because the valet operation "would cause significant traffic impacts to the local streets
20 and the alley adjacent to the Westgate Condominium Complex," thereby necessitating preparation
21 of an EIR in place of the deficient MND. *AR 0220-0228*, attached as *Exhibit 3*.

22 Intervenors appealed the ZA's subsequent issuance of a CUB and specifically objected that
23 the MND was inadequate for failure to disclose, consider or mitigate the potentially significant
24 impacts resulting from the offsite parking. *AR 0978-0983* (BRC Appeal); *AR 0934* (BHA Appeal),
25 attached as *Exhibits 5* and *6*. Shender submitted another expert report, demonstrating that the
26 MND was deficient for failure to consider impacts of the valet routes – routes that had still not
27 been disclosed in any public document or forum, much less analyzed in the MND as required un-
28 der CEQA – and demonstrating that all *possible* valet routes would have significant impacts requir-

ing environmental review. *AR 1578-1582*, attached as *Exhibit 4*.

Shender prepared several exhibits illustrating the likely traffic routes through the residential neighborhoods between the project site and parking garage. *AR 1583-1587,* attached as *Exhibit 1*. Later, at the APC hearing, the applicant's expert witness disclosed (for the first time) that the valet circulation route would be exclusively along the residential streets, avoiding San Vicente, thereby maximizing the impact on the residential neighbors. *AR 2026*. Shender's diagrams of the potential valet routes (*Exhibit 1*) demonstrate that the valet traffic circulation would inevitably create spillover impacts into the residential areas. Shender testified that "the MND is clearly inadequate because it did not consider the traffic effects associated with vehicles traveling between the restaurant site" and "the public parking." *AR 1969*. He explained that, given the many driving restrictions between the restaurant and parking sites, "it is quite a circuitous route that these valet attendants would have to take." *AR 1969*. Pointing to the diagrams (*Exhibit 1*), Shender stated that, "as you can see, the valet vehicles will be traveling adjacent to residential units, on its way to and from the restaurant site" and, based on the variety of potential routes, "the travel routes will basically total anywhere from two-thirds to three-quarters of a mile on residential streets, traveling between the restaurant site and the public parking." *AR 1969-1970*. But "there was never any analysis done with the original approval of the structures [Gorham Garage and the condominium], to accommodate public parking for an offsite use, and there was certainly no analysis done that it could potentially be used for valet service." *AR 1970; 1567-1568*. Consequently, "all these trips on the local residential streets will be new trips." *AR 1970*.

Offsite valet parking would result in approximately *440 new round trips per day* between the restaurant and parking structure, compared to the baseline of *zero* valet trips, an increase "well in excess of the City's significant impact threshold." *AR 0228, 1581*. This potentially significant impact was not disclosed, analyzed or mitigated in the MND, rendering it invalid. *AR 0227-0228*.

The offsite parking plan created another potentially significant impact not disclosed in the MND: The displacement of *60 vehicles* from the Gorham Garage to make room for the *Fig & Olive* vehicles. *AR 1970-1971*; *AR 0979-0981* (BRC Appeal), *1975-1977* (BRC Testimony). As described in Shender's second report, the Gorham Garage currently provides public parking for patrons and

1 employees of the businesses immediately to the north of the Garage, thereby relieving the local
2 residential neighbors from spillover parking and traffic circulation burdens due to those busi-
3 nesses. Use of the Gorham Garage for *Fig & Olive*'s parking would displace 60 vehicles, further
4 burdening the residential neighborhoods. *AR 1579-1580; 1970-1971*. This is particularly signifi-
5 cant because the Gorham Garage was build for the purpose of preventing a "shortage of public
6 parking" by accommodating patrons and employees of San Vicente businesses to the north, not
7 businesses (like *Fig & Olive*) located to the west. *AR 0980-0981, 1579-1580*.

8 **2. <u>Noise impacts</u>.**

9 *Fig & Olive* is oriented towards Montana Ave., not San Vicente Blvd., facing dozens of
10 multifamily residential units across Montana. *Exhibit 1*. The driveway and valet stand likewise face
11 the Montana Ave. residential units and the valet plan calls for vehicles shuttled to the offsite park-
12 ing to exit onto Montana, taking a left turn in front of the residential units. The outdoor patios
13 are also oriented to Montana Ave., in violation of the Specific Plan requirement that patios be lo-
14 cated either within enclosed courtyards or oriented towards San Vicente, which the adjacent resi-
15 dents from noise intrusion. *Specific Plan Guidelines*, p. 9. That is also why the Police Department,
16 which is responsible for enforcing noise restrictions, explicitly requested that if a CUB is issued,
17 over its objection, it be conditioned upon a prohibition against outdoor patios. *AR 0189*. Noise
18 from the outdoor dining, the valet stand, the valet parking, and patrons and employees retrieving
19 their vehicles from the public streets, will inevitably interfere with the residential neighbors' peace
20 and tranquility. *AR 0930-0932; 1497-1498*.

21 **D. A CUB Cannot Be Issued Apart From CEQA-Compliant Environmental Review, Which Did Not Occur.**
22

23 A discretionary permit application cannot be considered (much less granted) apart from a
24 CEQA-compliant environmental document. *Save Tara v. City of West Hollywood*, 45 Cal.4th 116, 130
25 (2008). To do so would defeat CEQA's central purpose, "to compel government to make deci-
26 sions with environmental consequences in mind." *Bozung v. Local Agency Formation Com.*, 13 Cal.3d
27 263, 283 (1975). Thus, as the Guidelines state, "*[b]efore* granting any approval of a project subject
28 to CEQA, every Lead Agency or Responsible Agency shall consider a final EIR or Negative Dec-

laration or another document authorized by these Guidelines to be used in the place of an EIR or Negative Declaration." *Guidelines*, §15004(a). This means that, "at a minimum an EIR [or other appropriate environmental review] must be performed *before* a project is approved, for '[i]f postapproval environmental review were allowed, EIR's would likely become nothing more than *post hoc* rationalizations to support action already taken.'" *Save Tara,* 45 Cal.4th at 130. Petitioner's CUB application was not accompanied by a CEQA-compliant environmental review document.

III. THE MND'S INADEQUACY WAS ADMINISTRATIVELY RAISED.

To avoid waiver, "the alleged grounds for noncompliance" with CEQA must be "presented to the agency orally or in writing by any person during the public comment period." *Res. Code* §21177(a). Sections 15204(b), (c) of the Guidelines instruct those objecting to an MND to: "(1) Identify the specific effect, (2) explain why they believe the effect would occur, (3) explain why they believe the effect would be significant," and submit data, facts, expert opinions and proffer reasonable assumptions based on submitted facts.

Intervenors easily satisfied this requirement by (1) identifying traffic, parking and noise impacts from offsite parking and patio usage, as the specific effects; (2) providing substantial evidence that these effects would occur upon project approval; and (3) demonstrating the significance of these effects in comparison to the established baseline conditions (*i.e.,* no offsite valet parking, no patio usage, no displacement of vehicles from Gorham Garage.). See *Exhibits* 3-7, which clearly identifies and demonstrates all these elements in detail. Nothing more is required:

> [L]ess specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding. This is because "'[i]n administrative proceedings, [parties] generally are not represented by counsel. To hold such parties to knowledge of the technical rules of evidence and to the penalty of waiver for failure to make a timely and specific objection would be unfair to them.' It is no hardship, however, to require a layman **to make known what facts are contested.**" *Citizens Assoc. v. Co. of Inyo*, 172 Cal.App.3d 151, 163 (1985) (citations omitted).

Conclusion. The MND does not analyze parking, traffic or noise impacts due to the offsite parking or outdoor patios. The APC's rejection of the MND as inadequate must therefore be affirmed because substantial record evidence supports a "fair argument" that these impacts are significant, especially given the baseline and "tipping point" conditions. Inadequacy of the MND thereby precludes issuance of a CUB without the prior or simultaneous consideration of an EIR.

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2 DATED: May 19, 2011
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