2nd App. Dist. Case No. B229036

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT DIVISION 2

FOUR SIDED PROPERTIES, LLC

Petitioner-Respondent,

vs.

CITY OF LOS ANGELES, ET AL.

Respondent.

BRENTWOOD RESIDENTS COALITION;
BRENTWOOD HOMEOWNERS ASSOCIATION

Intervention Applicants-Appellants

APPELLANTS' OPENING BRIEF

Appeal From Los Angeles Superior Court Case No. BS123704
Honorable Mel Red Recana

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION 2	Court of Appeal Case Number: B229036
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): THOMAS R. FREEMAN - SBN 135392 BIRD, MARELLA, BOXER, WOLPERT, NESSIM, DROOKS & LINCENBERG 1875 Century Park East, 23rd Floor Los Angeles, CA 90067 TELEPHONE NO.: (310) 201-2100 FAX NO. (Optional): (310) 201-2110 E-MAIL ADDRESS (Optional): trf@birdmarella.com ATTORNEY FOR (Name): Intervention Applicants-Appellants BHA/BRC	Superior Court Case Number: BS123704
~~APPELLANT~~/PETITIONER: Four Sided Properties, LLC RESPONDENT/~~REAL PARTY IN INTEREST~~: City of Los Angeles, et al.	FOR COURT USE ONLY

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*): Appellants BHA/BRC

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (*Explain*):
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: July 5, 2011

THOMAS R. FREEMAN
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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1. Whether community organizations who prevailed during administrative land-use proceedings and then relied upon the Office of the City Attorney to defend that final municipal determination against the developer's subsequent writ of mandate action should be allowed to intervene immediately *after* the trial court grants a motion to issue the writ, upon learning that the City Attorney unexpectedly failed to make a single argument in support of the administrative determination, even though the City Attorney is required to defend the final municipal determination.

2. Would failure to permit intervention under these circumstances undermine the integrity of the municipality's administrative process by allowing the City Attorney to forfeit the public's rights under local land-use laws by its inaction? Precluding intervention would effectively empower the City Attorney to veto municipal decisions based on impermissible factors such as the Office's belief that the challenged decision is unwise as a matter of policy or that the Office's limited resources would be better spent on other matters.

3. Would failure to permit intervention also implicate the public's rights under the California Environmental Quality Act ("CEQA") where, as here, the City Attorney failed to mention that the administrative decision-maker expressed concern that the development project had been piecemealed, which would likely have triggered CEQA-mandated environmental review if the underlying permit was deemed otherwise proper? Because CEQA was not mentioned by the City Attorney, the court, in granting the writ, compelled issuance of the permit without even considering the need for CEQA review.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Administrative Process

1. The Department of Building and Safety required only 5 parking spaces instead of the 57 parking spaces required under current code

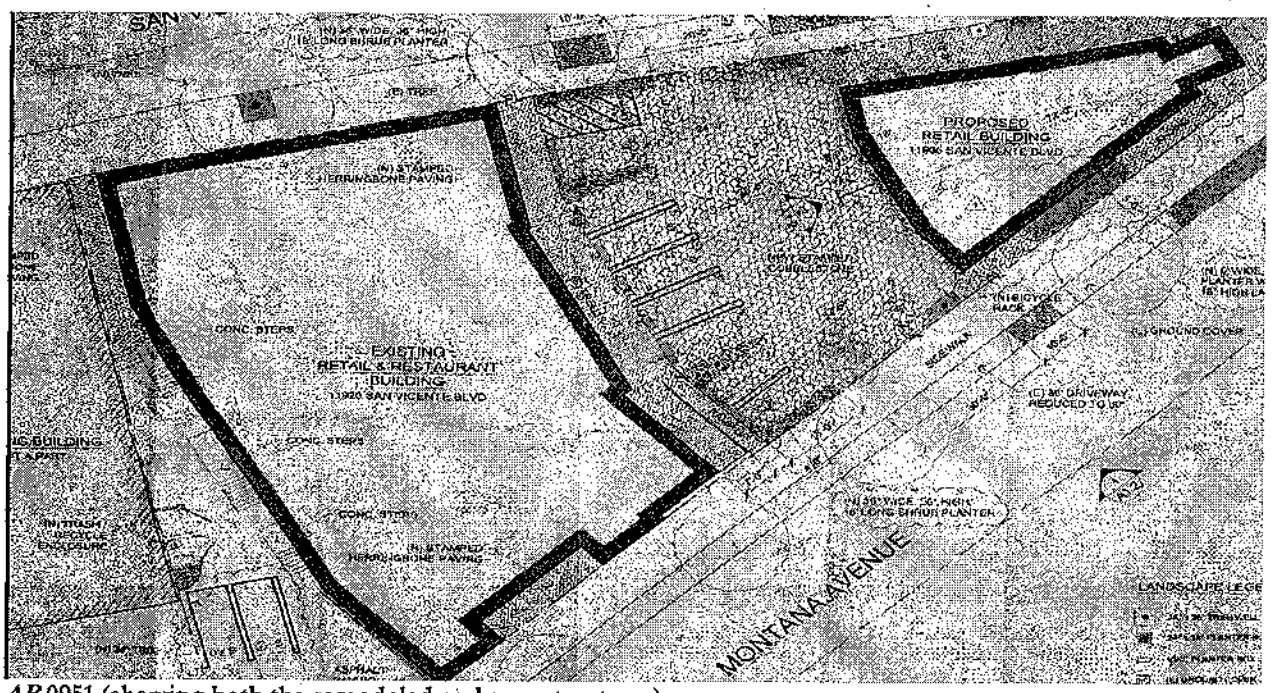
Petitioner Four Sided Properties LLC purchased two commercially-zoned properties at the southwest corner of San Vicente Blvd. and Montana Ave. in the Los Angeles neighborhood of Brentwood (the "Project Site"). *Appellants' Appendix ("AA")*, 2. The corner property, 11906 San Vicente Blvd., was a vacant lot at the time of purchase. The adjacent property, 11920 San Vicente Blvd., was the site of a beautiful, 75-year old building with three commercial tenants. *Administrative Record ("AR")* 0596-0597.

The building at 11920 San Vicente Blvd. was known in the community as the "Terra Cotta" building because the most visible tenant was a high-end home furnishings and accessories store named "Terra Cotta," which had been operating at the location for more than 20 years. *AR* 0596. The other tenants were "Pro Gym," a health club, and "CAZ Hair Salon," which had operated on the premises for 18 years. *AR* 0588, 0598. Four Sided, however, effectively forced the long-term tenants out by doubling and tripling the rent. *AR* 0597-0597, 0598. Pro Gym vacated the building in April 2007 and, by August 31, 2007, all of the remaining tenants had moved out, leaving the building vacant. *AR* 0588, 0596-0597, 0598.

Four Sided's plan was to create a Mini-Shopping Center with two commercial structures and common driveway/parking spanning its newly-acquired adjacent properties. But initially Four Sided sought approval for its planned remodel of the existing building separate

from the consideration of the planned second structure. During an October 15, 2008 public hearing, however the West Los Angeles Area Planning Commission (the "Commission") expressed concern that the project was being piecemealed. The Commission asked Four Sided to withdraw the submitted plans and return with plans covering both phases of the project. *AA* 556-557/*AR* 1003-1004. On October 29, 2008, Four Sided responded to the Commission's request by formally withdrawing its submitted application, stating that "We are now proceeding with the project as one submission, instead of in phases." AA 322/*AR* 0582.

Four Sided then submitted new plans for the entire Mini-Shopping Center project in December 2008. *AA 214, 224-229, 307, 316; AR 0943-0954.*

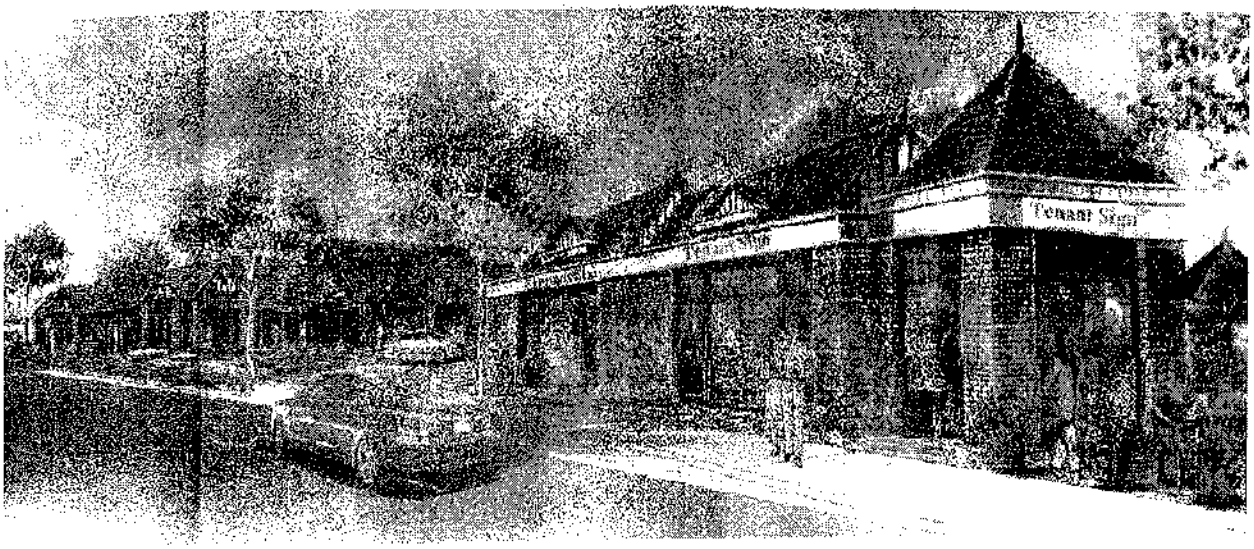


***AR* 0951 (showing both the remodeled and new structures).**

The Commission approved the plans on December 15, 2008. *AA* 558; AR 0448-0484. The approved plans depict the 8,024 square foot "remodeled" retail/restaurant structure and a new 1,870 square foot retail structure. AR 0943, 0947, 0949-0951, 0953. Four Sided also "tied" the two separate properties and executed a Mini-Shopping Center Covenant encom-

passing both structures on the tied lots, as required by the City. *AA* 210-212, 214, 224-229, 307, 542. The plan was to substantially remodel an existing building and to construct a new, second building, thereby creating a single "Mini-Shopping Center" on the lot-tied properties. *AA* 320. The new building at the 11906 address is described in the project plans as a "one story retail building of 1,870 sf with a 5,038 sf storage basement," and the "architecture style and finishes are to match the existing retail/restaurant building on site (11920)." *AR* 0943.

11906 & 11920 SAN VICENTE BLVD



AR 0943 (depicting both structures, separated by a common driveway/parking area).

The remodel phase entailed a gutting of the existing structure, retaining nothing but the roof and perimeter walls, excavating a 2,600 square foot basement below the structure, removing the entire floor area, along with the joists, walls, and supports, with the roof being held in place during the excavation by shoring supports. *AA* 280. This Daliesque construction methodology – with the roof being held in place above the foundation – was a transparent attempt to preserve grandfathered rights by claiming the work was merely a remodel, not a new structure.

On September 11, 2008, before Four Sided was instructed to submit plans for both phases of the Mini-Shopping Center project, Four Sided applied for Building Permit No. 08016-30000-15412 (the "Permit"). Four Sided requested a permit to change the use of the health club tenant space to a restaurant use, but with no change in parking requirements. *AR* 0245, 0253. The existing parking requirement for the entire structure was just 5 parking spaces, which had been "grandfathered" from a Certificate of Occupancy issued in 1971, when parking in the area was not the problem that it has become. *AR* 0245, 0251. On October 2, 2008, Building and Safety issued the Permit for a change of use without a change in parking requirements. *AA* 284-286; AR 0245-1046, 0253. Building and Safety did not require the parking to be brought up to current code – which would require **57** parking spaces for the existing structure – because code requirements for health club and restaurant uses are the same. *AR* 0244-0246. Thus, the grandfathered right to provide just **5** parking spaces was carried-over to the "remodeled" structure, even though the new use was an alcohol-serving, "destination" restaurant seating more than **150**. *AA* 3-6, 181-183, 423, 449; *AR* 0244-0246.

The tenant space allocated to health club/restaurant use has not been occupied since Pro Gym moved out in April 2007. The only tenant in the remodeled structure is "Lululemon," a retailer that opened for business in December 2008. *AR* 0800.

2. The BHA appeal to the West LA Area Planning Commission

Prospective Intervenor Brentwood Homeowners Association ("BHA") is a voluntary group formed in 1948, which is comprised of single-family residential property owners in Brentwood. *AA* 424. The BHA's mission is to protect the interests of homeowners in Brentwood, with particular focus on land use and zoning issues that may impact the quality

of life in Brentwood. *Id.* The BHA was concerned that a retail and restaurant structure at the busy intersection of San Vicente Blvd. and Montana Ave. with only 5 parking spaces for the entire building, including a 150-plus seat "destination" restaurant, would adversely impact the neighborhood with spillover parking and traffic. *See e.g., AR* 0546-0547, 0553-0554, 0561-0562, 0563-0564.

BHA took action by filing an administrative appeal in October 2008, contesting the Department of Building and Safety's issuance of the Permit without requiring that the parking be brought up to current code requirements. *AA* 280, 285. After the Zoning Administrator denied the appeal (*AR* 0715), BHA appealed that determination to the Commission. *AA* 308. The Brentwood Community Council ("BCC") filed a letter brief and evidence in support of the BHA's appeal. *AA* 341.

The BHA and other community groups and individuals argued to the Commission that Four Sided's grandfathered parking rights had expired due to the discontinuance of the health club use for more than one year. Specifically, Municipal Code Section 12.23.B.9 provides that nonconforming use rights terminate if the nonconforming use "is discontinued for a period of one year." *AA* 347-348, 520-522. In this case, the prior tenant, Pro Gym, vacated the premises in April 2007. *AA* 288. No new health club, restaurant or other business has occupied the tenant space since Pro Gym's departure, with the associated nonconforming parking falling into disuse for that time period. Thus, by the time the appeal was heard by the Commission on September 2, 2009, the premises had not been used as a health club, restaurant, or anything else for more than two years – far more than the one-year period required to divest Four Sided of any nonconforming rights. *AA* 347-348, 520-522, 535-536.

The BHA and others also argued that, even apart from the discontinuance of use, the Permit was improperly issued due to the failure to conduct environmental review of the "project," which encompassed not just the remodeled structure but the entire Mini-Shopping Center project. *AA 348, 516-517, 523, 550-552; AR, 210-212, 214, 224-229, 307.*

Under Section 12.22.A(23)(c)(1)(i) of the Municipal Code, a conditional use permit is required for an expansion of a Mini-Shopping Center if there is a 20% or greater increase in total square footage. Because the new 1,870 square foot retail structure would increase the square footage by 23% over the existing 8,024 square foot structure, Four Sided must seek and obtain a CUP, which is a discretionary permit. The need for a discretionary permit triggers the requirement to conduct environmental review under CEQA. Thus, the BHA and others argued that it was improper to issue the change-of-use Permit before conducting environmental review. *AA* 348-349, 517, 523-525, 538.

The BHA and community members presented evidence that the Mini-Shopping Center project, if permitted with no more than the 5 "grandfathered" parking spaces for the existing structure with, among other things, the 150-plus seat restaurant, would have significant environmental impacts on the surrounding neighborhood. Further, the second structure requires 7 parking spaces, for a total of just 12 parking spaces for approximately 10 retail businesses and the large restaurant in the two Mini-Shopping Center structures. Counsel for the BHA noted that, "[a]pproving a project with restaurants and new retail business which, under current standards, require a minimum of 65 parking spaces (42+23), and instead requiring only 12 spaces, shows there is a prima facie adverse environmental impact, a shortfall of

parking by a whopping 81% in an area where parking capacity is severely deficient." *AR 0788-0789; AA 549-551, 564-565.*

Substantial record evidence demonstrates that the Mini-Shopping Center project would have a significant adverse impact on the neighborhood. Residents and community leaders testified before the Commission that the area was already grossly under-parked and this development without onsite parking would make matters even worse. Wendy-Sue Rosen, Vice Chair of the BCC and later a founder and President of Potential Intervenor Brentwood Residents Coalition, stated: "It is clear to anyone with the slightest familiarity with the neighborhood, which already suffers adverse consequences from inadequate parking, that this new mini-shopping center . . . will make a very bad situation, much, much worse." *AR* 0563. Similarly, Raymond Klein, the then-current BCC Chair, stated that the impact of a large alcohol-serving restaurant with virtually no required parking was clear: "Both tenant employees and customers will be parking in residential streets. Short-term customers will be driving round and round the block looking for a non-existent metered space, adding to an already congested traffic condition on San Vicente Blvd. and adding to the noise and fumes from such traffic." *AR* 0561-0562. The likely impact was also addressed by Bette Harris, a resident and former officer of a neighboring homeowners association, who stated that "[t]he surge in development throughout our community has left us with a very tight parking situation for customers of retail establishments in Brentwood and particularly the neighboring residents. . . . It is not uncommon to drive continuously up and down blocks to locate parking when doing business on San Vicente Boulevard, . . . Folks are frequently late for appointments due to delay in finding parking. Residents without garage space

have the miserable task of circling to find parking when returning home. The situation is already a difficult one." *AR* 0546-0547. The predictable result, as explained by Bryan Gordon, a BCC member who is also a commercial developer, is that "[w]ithout sufficient parking spaces for the employees and customers of the shopping center to park, they will have no alternative but to park on these residential streets, crowding out the residents and making an already bad situation even worse." *AR* 0553-0554.

3. The Commission's decision

The Commission voted 5-0 to grant BHA's appeal and overturn the Zoning Administrator's determination that the Department of Building and Safety did not err in granting the Permit without requiring additional parking. *AA* 270. The Commission's September 2, 2009, ruling was based on its determination that, per Municipal Code Section 12.23.B.9, a discontinuance of use for more than one year divested Four Sided of the non-conforming parking rights. *AA* 271. In so ruling, the Commission reasoned that (1) "parking is a use and when it is non-conforming and the land use activity (in this instance Health Club) to which it is related is vacated for more than one year, then the right to that non-conforming parking for the subject land use activity is lost;" and (2) "the Zone Code indicates that parking is a use, and when it is non-conforming, even when associated with a conforming land use, that the closing of the conforming business with non-conforming parking will result in a loss of non-conforming parking rights to the involved business if it remains vacant for more than one year." *AA* 271.

The Commission also determined that environmental review for the project was inadequate. *AA* 270. The Commission found that "the large number of building permits is-

sued to the location" and "the common knowledge that there is an anticipated second building constitutes a piece-mealing of the project." *AA* 271. That finding was based on "the fact that two lots are tied as one, and that there is a mini-shopping center affidavit filed on the subject property, and that plans have been seen[1] showing a second structure." *AA* 271-272. Because the Commission denied the Permit, however, it had no occasion to definitively determine whether a Mini-Shopping Center CUP was required. But the Commission's findings indicate that a discretionary Mini-Shopping Center CUP is probably required. First, the Commission noted that "the whole project involves a new second building at this location, which, when considered with the existing older building may require an application for a Conditional Use Permit." *AA* 271. Second, the Commission stated that "this second structure will result in an increase in floor area on the overall site greater than 20% and may result in requirements for a CEQA evaluation, and the filing of a request for a Conditional Use Permit" per Municipal Code Section 12.22A(23)(c)(l)(i). *AA* 272.

B. The Petition for Writ of Mandate

1. The City Attorney failed to defend the Commission's ruling

Four Sided filed a Petition for Writ of Mandate challenging the Commission's determination. *AA* 1. In response to Four Sided's Motion for Writ of Mandate (*AA* 33), however, the City Attorney failed to defend (1) the Commission's substantive determination that the discontinuance of use terminated Four Sided's grandfathered parking rights; or (2) its conclusion that the project's environmental review was inadequate. Instead, the City Attorney argued only that the termination of grandfathered parking rights was rendered "moot"

[1] The Commission formally *approved* these plans on December 15, 2008. *AR* 0448-0484.

by the City's subsequent issuance of a permit that allowed Four Sided to provide the 57 code-required parking spaces at an offsite location leased by Four Sided. *AA* 52-61.

In its Reply Brief, Four Sided responded that (1) the grandfathered parking issue was not moot because Four Sided was entitled to grandfathered parking, irrespective of its subsequent attempt to "mitigate" its injury by securing offsite parking at its own cost; and (2) the City Attorney "waived" any substantive argument in support of the Commission's ruling by not making a single argument to support the Commission's interpretation and application of Municipal Code Section 12.23.B.9, the discontinuance of use provision. *AA* 88.

The City Attorney made no attempt to defend the Commission's ruling on the merits. As Four Sided stated in its Reply, the City Attorney (1) "never mentions or otherwise references a single LAMC section;" (2) "makes no attempt whatsoever to refute any of Petitioner's analysis concerning the LAMC sections at issue;" and (3) "offers absolutely no argument that Petitioner's . . . interpretation and application of the LAMC is somehow flawed." *AA* 89-90 (emphasis in original). The only apparent attempt made to support the Commission's ruling was a reference to letters submitted by community members complaining about traffic, which, as Four Sided accurately observed, the City Attorney "does not in any way connect" to "the law governing this case." *AA* 90.

The City Attorney also failed to address CEQA. This was a particularly significant omission because, even if the Commission's application of the discontinuance of use provision was improper, the Permit could not be issued absent compliance with CEQA. But the City Attorney, by failing to raise CEQA with the trial court, effectively waived the public's right to CEQA-mandated environmental review.

2. The trial court improperly granted the motion for writ of mandate due to the City Attorney's failure to (1) identify the record evidence of discontinuance of use or (2) mention the need for environmental review

On August 27, 2009, the parties appeared for oral argument in Department 85 before the Honorable Robert O'Brien, Superior Court Judge. *AA* 509. No argument was presented, the court had no substantive questions for counsel, and the matter was taken under submission. *AA* 510. Judge O'Brien entered a minute order granting the motion for writ of mandate later that day. *AA* 457.

The trial court's analysis was limited to the following: "The APC findings are not supported by the evidence. Moreover, the findings that the property was vacant for over 12 months is not supported by any evidence (see e.g. AR 1043)." *AA* 457. Although the trial court cited page 1043 of the administrative record (*AA* 567) in support of this finding, nothing on page 1043 has any apparent connection to the asserted absence of evidence that there was a more than a one-year discontinuance of use.

The trial court's determination that "the findings that the property was vacant for over 12 months is not supported by any evidence" is plainly erroneous. The record contains a letter from the manager of the prior tenant, Pro Gym, verifying that the gym closed its doors to the public in April 2007 and moved to a new location by May 2007. *AA* 530. There is also a declaration from a percipient witness stating that Pro Gym ceased operating at the location in April 2007. *AA* 280. The City Attorney, however, failed to cite this evidence in its Opposition Brief, nor did it seek reconsideration based on this evidence. *AA* 53-61.

The trial court granted the petition for writ of mandate without condition or qualification. The Commission was simply compelled to issue the change of use Permit without

requiring more than the 5 grandfathered parking spaces. *AA* 457. Significantly, no consideration whatsoever was given to CEQA, despite the Commission's findings that (1) the project had been improperly piecemealed; (2) the "project" included both of the planned structures; and (3) the project's square footage was more than 20% greater than the prior structure, which triggers the need for a discretionary Mini-Shopping Center CUP under Municipal Code Section 12.22.A(23)(c)(l)(i). *AA* 271-272, 583. The trial court, by compelling the Commission to issue the Permit, required the City to act in violation of CEQA.

In addition to granting the petition for writ of mandate, the trial court's August 27, 2010, minute order also provided that, "[s]ince the Petitioner also had a claim for damages, the case is hereby transferred to Department 1 for reassignment to a Trial Court." *AA* 111.

C. The Attempt To Intervene

1. The Potential Intervenors

Potential Intervenors are the BHA, the administrative appellant, and the Brentwood Residents Coalition ("BRC"), a local advocacy group formed in November 2009, after the Commission's ruling in September 2009. *AA* 277. The BRC is dedicated to the preservation and enhancement of the environment and quality of life in Brentwood. *AA* 277. The BRC was formed by, among others, a former three-term Chair of the BCC, which filed an extensive letter brief in support of the BHA appeal, and a current BHA executive officer, both of whom testified before the Commission at the September 2, 2009, hearing. *AA* 276-278, 341, 556, 559.

Both the BHA and BRC have been actively involved in subsequent land use proceedings concerning the Project Site at issue in this case. They have relied upon the Commis-

sion's September 2, 2009, ruling in opposing Four Sided's further efforts to intensify the Project Site in a manner detrimental to the community and in violation of local zoning and state environmental laws. The BRC and BHA jointly appealed the issuance of a conditional use permit for the sale of alcohol on the Project Site due to the lack of adequate parking for the proposed alcohol-serving use. In June 2010, the Commission granted the BHA/BRC appeals. Four Sided subsequently filed another Petition for Writ of Mandate challenging that determination (LASC Case No. BS128425), now pending in the Superior Court, in which both the BRC and BHA have intervened. The BRC and BHA also appealed the Department of Building and Safety's subsequent issuance of a permit for offsite parking, which, if granted, would allow the restaurant to satisfy its code-required parking by commandeering a public parking garage, thereby displacing public parking for the general public. *AA* 277-278, 279, 373-383.

2. The BRC learns that the City Attorney failed to present any substantive defense of the Commission's ruling or protect the public's CEQA rights

The BHA and BRC, having prevailed during the administrative proceedings, relied upon the City Attorney to defend the Commission's ruling. *AA* 278. On August 26, 2010, the BRC and BHA participated in a Zoning Administrator hearing on the offsite parking dispute. During that hearing, Four Sided's counsel made a statement that the BRC's counsel believed implied that the Commission's discontinuance-of-use ruling had been invalidated. *AA* 279. The next day, Friday, August 27, 2010, the BRC's counsel checked the Superior Court's online calendar and learned that the hearing on the motion for writ of mandate was scheduled for that morning. *Id.* Counsel then printed out the moving and opposition papers – thereby learning for the first time that the City Attorney had failed to present any substan-

tive defense of the Commission's ruling. *Id.* Early in the week of August 30, 2010, the BRC's counsel learned that the trial court had granted the motion to issue a writ of mandate on August 27, 2010. *Id.*

3. BRC's *ex parte* attempt to intervene

The BRC immediately attempted to intervene. *AA* 135. On Tuesday, August 31, 2010, at approximately 5:30 p.m., counsel for the BRC faxed the City Attorney and Four Sided its *ex parte* papers seeking an order staying or amending *nunc pro tunc* the August 27, 2010, minute order purporting to transfer the matter to Department 1. The BRC asked Judge O'Brien to stay his transfer in order the case to provide the BRC with an opportunity to (1) file a motion to intervene to be heard by Judge O'Brien, and not a newly-assigned trial court, because Judge O'Brien had just ruled on the writ of mandate motion and (2) suggest that Judge O'Brien reconsider his August 27, 2011 ruling on the writ of mandate. *AA* 115.

The BRC's *ex parte* application was heard by Judge O'Brien on September 2, 2010. *Reporter's Transcript ("RT")*, A-1. The BRC argued that (1) the motion to intervene was timely given the City Attorney's unforeseeable failure to defend the Commission's ruling; (2) the motion should be heard by Judge O'Brien, not the trial court to which the matter will be re-assigned for purposes of adjudicating the damages claim, because Judge O'Brien ruled on the petition for writ of mandate and is therefore best situated to address the merits of intervention in this case; and (3) if the motion is presented to another judge, the BRC will be accused of judge shopping. *RT* A-1 – A-4. BRC's counsel acknowledged that intervention at this stage of the case, after Judge O'Brien had already ruled on the motion, is extraordinary, but argued that the circumstances of this case are extraordinary. The City Attorney has chosen

not to defend the Commission's determination and, by doing so, has undermined the administrative process. *RT* A-3 – A-4. Judge O'Brien, however, denied the *ex parte* application on the ground that he had already transferred the case to Department 1: "If you're going to make a motion to intervene, you're going to have to do that down in Department 1 or in the Department where Department 1 will send the case." *RT* A-4; *AA* 245.

4. The BRC/BHA attempt to intervene by noticed motion

On September 7, 2010, the BRC filed a motion for leave to intervene and suggest that the court reconsider (*sua sponte*) the ruling on the petition for writ of mandate. *AA* 248. Prior to filing the motion, Department 1 informed the BRC's counsel that the case had *not* been transferred from Department 85, Judge O'Brien's court, so the motion was filed in Department 85. *AA* 249. After the motion was filed, the Clerk for Department 85 telephoned BRC's counsel to confirm that the case was still in Department 85 and instructed counsel to re-notice the motion from September 28, to November 1, 2010, in Department 85. *AA* 400. Later that day, however, the case was transferred to Department 1 and then reassigned to a trial court, Department 45. *AA* 409. The motion was then rescheduled for hearing in Department 45, before the Honorable Mel Red Recana, on November 22, 2010. *AA* 413.

On November 2, 2010, the BHA filed a joinder to the BRC's motion. *AA* 418. The BHA and BRC also lodged a proposed verified complaint in intervention. *AA* 422.

The motion to intervene was heard by Judge Recana on November 22, 2010. *RT*, B-1. During oral argument, Judge Recana inquired whether intervention was being sought simply because the BRC and BHA were unhappy with the City Attorney's strategy because it

proved unsuccessful. *RT* B-4. Counsel responded that, by failing to argue the merits of the Commission's ruling, the City Attorney did not simply pursue a reasonable but ultimately unsuccessful "strategy" – it effectively defaulted by making no argument whatsoever to support the determination:

> It's not a matter of mere strategy here. This is a situation in which the City, which is responsible for defending the last determination in the administrative process, did not make a single argument in support of the City's administrative determination. That's not a strategy call. That is a failure to defend the administrative process, and that makes a mockery of an administrative process where citizens have an obligation to participate, like my clients. They pay fees to lawyers. They participate in that process, and at the end of the day, when they are successful, the City Attorney's Office has an obligation to defend that decision. *RT* B-4.

Judge Recana asked, "Why did [the BHA/BRC] not intervene at the first instance?" *RT*, B-4. Counsel responded that they did not believe it would be necessary to intervene, and incur even greater costs, because "there's a legal duty on behalf of the City Attorney to . . . support the ruling of the administrative process, and that's how the system is supposed to work." *RT* B-5. "The point of having a City Attorney that we pay taxes for, is that they support the decisions that are made by the administrative agencies." *Id.* In this case, however, Judge O'Brien granted the writ because he found there was no evidence that the property was not used as a gym or restaurant for the requisite one-year period. That occurred because the City Attorney failed to defend the decision by citing the record evidence that Judge O'Brien incorrectly believed did not exist. *RT* B-5 – B-6. Thus, counsel argued, "This is an extraordinary circumstance, and it absolutely requires, as a matter of law, of fairness and principle, it requires that we be given the opportunity to intervene in this case." *RT* B-6.

Four Sided's counsel argued that the motion to intervene must be denied as untimely because the case was already transferred out of Judge O'Brien's court and, "if there's going to be an intervention motion, it needs to be made to Judge O'Brien, not here." *RT* B-7. During the hearing, Judge Recana learned not only that the case had not actually been transferred to Department 1 before Judge O'Brien denied the *ex parte* on the mistaken ground that it had been transferred, and that the case was not transferred until *after* the motion to intervene had been filed for hearing in Judge O'Brien's court, but that a hearing on the writ of mandate was scheduled for *the next day*, November 23, 2010, before Judge O'Brien, to consider whether the writ of mandate should be issued before entry of a final judgment in the case. *RT* B-8 – B-12. At that point, counsel requested that (1) Judge Recana grant the motion to intervene, which (2) would allow the BHA and BRC, as Intervenors, to appear in Judge O'Brien's court the next day and suggest that he reconsider his ruling on the motion for writ of mandate and, if he declines to do so, (3) the BRC and BHA, as Intervenors, could then file an appeal upon entry of final judgment, thereby attacking the writ of mandate ruling on the merits. *RT* B-10.

Judge Recana responded that, since Judge O'Brien still has the writ aspect of the case before him, the BHA and BRC should bring the motion to intervene before Judge O'Brien. *RT*, B-11. But counsel pointed out that by the time a motion to intervene could be scheduled for hearing before Judge O'Brien, he will likely have ruled on the pending matters, issued the writ, and would not longer have the case, causing him to again send the matter back to Judge Recana. *RT* B-12 – B-13. Thus, "we don't have an opportunity [to suggest that Judge O'Brien reconsider his ruling] if [we are] not intervened. All I'm asking is for you to grant

the motion to intervene, and then we will have to go to Judge O'Brien and ask him to reconsider. If he denies the request to reconsider then at least we, as an Intervenor – our case is over in the Superior Court and we can deal with [it] at the appellate court. But if we do not get an order – if we do not get permission to intervene, I cannot approach Judge O'Brien tomorrow because he is going to say: What are you doing here? I kicked you out. You are not an Intervenor. You have no reason to be here. [Four Sided's] going to say: What are you doing here? You're not a party. " *RT* B-13.

Judge Recana responded: "You want me to say that so you can intervene before him? It doesn't make sense to me. What makes sense to me is that if you would like to argue this motion before him, I'll deny your motion to intervene and you take me up to the court of appeal. . . . Then I have a way out – I mean, a way to make someone else to make this determination. But I think, under the circumstances, I have to deny the motion to intervene." *RT* B-13. On that basis, the motion to intervene was denied. *AA* 571.

In sum, Judge O'Brien denied the *ex parte* because he believed (incorrectly) that the case had already been transferred to Department 1 for reassignment to a trial court. Then Judge Recana denied the motion to intervene because he believed that only Judge O'Brien could consider the merits of the motion to intervene and Judge O'Brien had refused to do so, even though the case was still before him. Thus, no explicit ruling was ever made on the *merits* of the motion to intervene.

D. The BRC and BHA Appealed The Ruling Denying Intervention

On November 23, 2010, Potential Intervenors BRC and BHA filed a timely notice of appeal contesting the November 22, 2010, denial of the motion to intervene. *AA* 572.

E. The Commission Was Compelled To Void Its Permit Revocation and Building and Safety Reinstated The Permit – All Without Any CEQA Consideration

On January 20, 2011, Judge O'Brien issued the peremptory writ of mandate, requiring that the Commission set aside and void its prior revocation of the Permit. *AA* 583. On March 2, 2011, the Commission complied with the writ of mandate and on March 22, 2011, the City issued a new permit, which reinstated the Permit requiring just 5 parking spaces for the remodeled structure, which includes a 150-plus seat restaurant tenant space. *AA* 583.

III. STANDARD OF REVIEW

The standard of review governing a ruling on intervention was set forth by the court in *City and County of San Francisco v. State of California*, 128 Cal.App.4th 1030 (2005):

> "Because the decision whether to allow intervention is best determined based on the particular facts in each case, it is generally left to the sound discretion of the trial court. (Citations.) We therefore review an order denying leave to intervene under the abuse of discretion standard. (Citation.) Under this standard of review, a reviewing court should not disturb the trial court's exercise of discretion unless it has resulted in a miscarriage of justice. (Citation.) ' "[O]ne of the essential attributes of abuse of discretion is that it must clearly appear to effect injustice. [Citations.] Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power." [Citations.]' (Citation.)" *City and County of San Francisco,* 128 Cal.App.4th at 1036-1037.

But in this case, where the basis for denying the motion to intervene appears to be unrelated to any assessment of the motion's merits under the applicable law and delaying resolution of intervention for remand and reconsideration on the motion based on the proper standard would result in unjust delay, the appellate court should review the matter on a *de novo* basis.

IV. LEGAL ARGUMENT

A. The Standard For Granting Permissive Intervention

The purposes of intervention are both to "[protect] the interests of others affected by the judgment" and to "[obviate] delay and multiplicity." *People v. Superior Court (Good)*, 17 Cal. 3d 732, 736 (1976). The permissive intervention statute, Code of Civil Procedure Section 387(a), must therefore be liberally construed in favor of intervention. *Simpson Redwood Co. v. State of California*, 196 Cal.App.3d 1192, 1200 (1987); *Mary R. v. B.&R. Corp.*, 149 Cal.App.3d 308, 315 (1983); *Fireman's Fund Ins. Co. v. Gerlach*, 56 Cal.App.3d 299, 302 (1976). Intervention by parties adversely affected by a challenge to laws designed to protect them is proper, except in highly unusual cases where "circumstances compel exclusion." *People v. Superior Court*, 17 Cal. 3d at 737. A court should therefore grant leave to intervene where: (1) the proper procedures have been followed; (2) the nonparty has a direct and immediate interest in the action; (3) the intervention will not enlarge the issues in the litigation; and (4) the reasons for the intervention outweigh any opposition by the parties presently in the action. *Reliance Ins. Co. v. Superior Court*, 84 Cal.App.4th 383, 386 (2000).

B. The Motion To Intervene Was Timely

The BRC and BHA sought leave to intervene pursuant to Section 387(a), which provides that, upon "timely application, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding." While Section 387 *previously* required that an intervention motion be filed "At any time before trial," the "before trial" limitation was removed in 1977. The statute now provides that a motion can be brought "Upon timely application," not just "be-

fore trial." *Mallick v. Superior Court*, 89 Cal.App.3d 434, 437 (1979). The revised statute even permits intervention after trial, while an action is on appeal. *Id.*; 4 B.E. Witkin, *California Procedure*, Pleading, §223-224, pp. 297-299 (2008).

Intervention in this case was proper given (1) the miscarriage of justice due to the City Attorney's unpredictable failure to defend the Commission's ruling or enforce the public's CEQA rights; (2) the lack of prejudice that would result from intervention because intervention would not delay entry of judgment – due to the pending damages claims; and (3) the issues to be raised by the potential Intervenors are the same issues raised before the Commission, which should have been addressed on the motion for writ of mandate but were ignored by the City Attorney in its opposition papers. Moreover, absent intervention, the public rights (1) vindicated in the Commission's ruling and (2) protected by CEQA, will be forfeited through the City Attorney's failure to address those issues.

1. The duty to exercise reasonable diligence in seeking intervention is not triggered until the *need for intervention* is discovered

"The purpose of allowing intervention is to promote fairness by involving all parties potentially affected by a judgment." *Lindelli v. Town of San Anselmo*, 139 Cal. App. 4th 1499, 1504 (2006). Thus, the permissive intervention statute, Code of Civil Procedure section 387, "should be liberally construed in favor of intervention." *Simpson Redwood Co. v. State of California*, 196 Cal.App.3d 1192, 1200 (1987). But Four Sided has argued that, despite the statute's goal of promoting fairness, there is a strict rule precluding intervention if it is not promptly sought upon learning that a lawsuit has been filed. *AA* 441-443. That would be an arbitrary and distinctly unfair limitation in situations like this, where the potential intervenors had no reason to believe that intervention was necessary at the time the lawsuit was filed.

California courts have recognized that intervention is timely if sought promptly upon discovery of the necessity for intervention. Intervention is timely, for instance, if sought upon a potential intervenor's discovery that the party to the litigation charged with responsibility for prosecuting or defending an action has failed to "exercise good faith in defending the action" or has otherwise failed to "assert[ ] a position that should be presented in the litigation." *Kobernick v. Shaw*, 70 Cal.App.3d 914, 918 (1977). This is similar to the federal rule, which holds that, in determining the timeliness of a motion to intervene, "the focus is on the date the person attempting to intervene should have been aware his 'interest[s] would no longer be protected adequately by the parties,' rather than the date the person learned of the litigation." *Officers for Justice v. Civil Serv. Comm'n of City & County of San Francisco*, 934 F.2d 1092, 1095 (9th Cir. 1991) (quoting *Legal Aid Soc'y v. Dunlop,* 618 F.2d 48, 50 (9th Cir. 1980)). The federal "timeliness" rule is instructive because Section 387 "is consistent with rule 24(b) of the Federal Rules of Civil Procedure after which it was patterned." *Mar v. Sakti Int. Corp.*, 9 Cal.App.4th 1780, 1786 (1992).

Here, Four Sided's mere filing of the petition for writ of mandate did not itself trigger a duty to seek intervention because, at the time the petition was filed, neither the BRC nor BHA had reason to believe that the City Attorney would not diligently defend the Commission's determination. The City Attorney's Office was *required* to defend the final decision of the Commission and, consistent with that obligation, the City Attorney filed an answer defending that administrative determination. Moreover, appellate courts have held that municipal land-use restrictions cannot be subverted by the settlement of litigation challenging such municipal determinations. *League of Residential Neighborhood Advocates v. City of Los Angeles*, 498

F.3d 1052, 1056-1057 (9th Cir. 2007); *Trancas Property Owners Assoc. v. City of Malibu*, 138 Cal.App.4th 172, 181-182 (2006). The BRC and BHA therefore had every reason to believe that the City Attorney would diligently defend this action. AA 278 ("the BRC relied on the City Attorney to defend the Commission's ruling and assumed it would do so").

This case is analogous to decisions holding that shareholders of a corporation may intervene to defend the corporation upon discovering that the corporate officers and directors responsible for defending claims against the corporation failed to "exercise good faith in defending the action" or have otherwise failed to "assert[ ] a position that should be presented in the litigation." *Kobernick,* 70 Cal.App.3d at 918 (quoting *Continental Vinyl Products Corp. v. Mead Co.*, 27 Cal.App.3d 543, 551 (1972)). This line of cases dates back to the Supreme Court's decision in *Eggers v. National Radio Co.*, 208 Cal. 308 (1929), where the Court recognized that it would be "a reproach to the law" if stockholders could not intervene in a case where the corporation, acting through its officers and directors, fails to assert the defenses necessary to protect the corporation's interests. *Id.* at 314.

This equitable principle has been applied to analogous situations, such as where the legal owner of real property, a trustee, failed to defend title against adverse claims, thereby necessitating intervention by the equitable owner. *Kobernick*, 70 Cal.App.3d at 919 (describing *Elms v. Elms*, 4 Cal.2d 681, 684-685 (1935)). Similarly, the Court of Appeal in *Linder v. Vogue Investments, Inc.*, 239 Cal.App.2d 338 (1966), held that a general partner's failure to defend a lawsuit against the partnership, resulting in entry of a default judgment, could be challenged on intervention by a limited partner after entry of a default – "If it were the law that a limited partner who may have a substantial investment in the partnership, must sit idly by and watch

it disappear because the general partner refuses to defend an unmeritorious or collusive action against the partnership, something would have to be done about it." *Id.* at 341.

The same equitable principle applies in this case. The necessity for intervention was established by the City Attorney's failure to (1) make a single substantive argument in support of the Commission's ruling or (2) even mention the CEQA issues identified by the Commission. This necessity was not evident at the time the Petition or Answer were filed. It became evident only when the City failed to argue the merits of the Commission's decision in its August 10, 2010, Opposition Brief and during the August 27, 2010 hearing. Intervention was promptly sought on September 2, 2010, within days of discovering the City Attorney's effective default. Under the unique circumstances here, the delay was not unreasonable.

2. The City failed to defend the Commission's determination

Four Sided erroneously opposed the motion to intervene by arguing that there was no showing that the City Attorney failed to defend the Commission's determination. But a review of the City Attorney's Opposition Brief and the transcript of the August 27, 2010, oral argument makes clear that the City Attorney did not make a single argument in support of the Commission's ruling. This is not a matter of "second guessing" the City Attorney's strategic decisions, as Four Sided claimed. It is an objectively discernable fact that the City Attorney failed to make a single substantive argument supporting the Commission's ruling and it said nothing whatsoever about the necessity for environmental review if the Commission's denial of the Permit is overturned.

The City Attorney's Opposition Brief stated only one argument in opposition to the petition – that the Petition was moot. That is not a substantive defense of the Commission's

determination that the Permit could not be issued because of the discontinuance of use. Four Sided made precisely this point in arguing that the City Attorney "waived" any argument that the discontinuance-of-use use provision divested Four Sided's grandfathered parking rights. As Four Sided argued, the City Attorney's Opposition Brief (1) "never mentions or otherwise references a single LAMC section;" (2) "makes no attempt whatsoever to refute any of Petitioner's analysis concerning the LAMC sections at issue;" and (3) "offers absolutely no argument that Petitioner's . . . interpretation and application of the LAMC is somehow flawed." *AA* 89-90 (emphasis in original).

Perhaps nothing better illustrates the City Attorney's failure to defend the Commission's ruling than its response to the sole issue relied upon by Judge O'Brien in granting the petition. The Commission (1) interpreted Municipal Code Section 12.23.B.9 as terminating nonconforming rights upon a one-year or more discontinuance of use; and (2) found that there had been a discontinuance of use since the prior tenant, Pro Gym, closed its business doors to the public in April 2007. While the Commission had solid support for its interpretation of Section 12.23.B.9 of the Municipal Code,[2] Judge O'Brien did not consider whether the Commission's interpretation was correct because he ruled that, as argued in Four Sided's moving papers (*AA 45*), there was no record evidence to support the Commission's finding that there had been a more than one year discontinuance of use. *AA* 111. On the basis of that supposed fact, and that "fact" *alone*, Judge O'Brien granted the petition for writ of man-

[2] *Cf. Korean Am. Legal Advocacy Foundation v. City of Los Angeles*, 23 Cal.App.4th 376, 396-397 (1994) (holding that continuous-operations requirement for nonconforming right to operate liquor store precludes grandfathering after store's closure for 30-days after 1992 LA Riots).

date: "the findings that the property was vacant for over 12 months is not supported by any evidence (see e.g. AR 1043)." *AA* 111.

Contrary to Judge O'Brien's ruling, however, there was substantial record evidence supporting the Commission's finding of a 1+ year discontinuation of use. The record evidence, which the City Attorney failed to cite in its brief or mention at oral argument, includes (**1**) a written statement from the manager of "Pro Gym," the prior health club tenant, stating that Pro Gym ceased operating at the subject property in April 2007 and moved to a new address in May 2007; (**2**) the March 23, 2009 declaration of Donald G. Keller, testifying, based on personal knowledge, that the health club use ceased in April 2007; (**3**) the Department of Building and Safety Property Activity Report, attached to Mr. Keller's March 23, 2009 declaration, demonstrating that Four Sided did not even apply for a permit for a new use (as a restaurant instead of health club) until September 2008 – more than a year after Pro Gym's departure – much less was the structure actually *occupied* by a new use within one year of Pro Gym's departure, as required to end a period of continued vacancy; and (**4**) there is no evidence that a restaurant use has ever occupied the structure since Pro Gym vacated the premises in April 2007. *AA* 276, 280-307. The City Attorney, however, did not direct Judge O'Brien's attention to this record evidence.

And there is not a word about CEQA in the City Attorney's Opposition Brief. *AA* 52. This deficiency led to the trial court's entry of a writ of mandate compelling the City to issue the Permit without any consideration of the CEQA concerns raised by the BHA and others during the administrative proceedings and reflected in the Commission's ruling.

3. There is no "prejudice" in requiring Four Sided to prove its case

While Four Sided contended that it would be prejudiced by intervention, it ignored its culpability in procuring a ruling based on the absence of record evidence that actually exists, *i.e.*, evidence of the 1+ year discontinuance of use. Given Four Sided's derogation of its duty to notify the court of this evidence, the alleged delay in intervening causes it no prejudice "other than being required to prove its case," which is insufficient to prevent intervention *Truck Ins. Exchange v. Superior Court*, 60 Cal.App.4th 342, 351 (1997).

First, Four Sided violated its obligation as a petitioner on a writ of mandate proceeding by failing to cite record evidence of the discontinuance of use. By not referencing this record evidence in its moving papers, Four Sided violated its obligation under *Markley v. City of Los Angeles*, 131 Cal.App.3d 656, 673 (1982), to "make a fair statement of the evidence in their brief." *Citizens for a Megaplex-Free Alameda v. City of Alameda*, 149 Cal.App.4th 91, 112-113 (2007). Under the *Markley* standard in writ proceedings, Four Sided must be deemed to have conceded that the record evidence it failed to cite in its brief supports a finding of a 1+ year discontinuance of use:

> In this connection, we repeat what every lawyer should know, namely, that when an appellant urges the insufficiency of the evidence to support the findings it is his duty to set forth a fair and adequate statement of the evidence which is claimed to be insufficient. He cannot shift his burden onto respondent, nor is a reviewing court required to undertake an independent examination of the record when appellant has skirted his responsibility in this respect. . . . [Appellant's] failure to do so will be deemed tantamount to a concession that the evidence supports the findings. *Markley*, 131 Cal.App.3d at 673 (internal citations omitted; quoting *Brown v. World Church*, 272 Cal.App.2d 684, 690-691 (1969)).

Here, the trial court's ruling that there was no substantial evidence of a 1+ year discontinuance of use was due to Four Sided's complete failure to describe the above-referenced evi-

dence in its moving papers. Thus, under *Markley*, Four Sided must be deemed to concede that substantial evidence supports the Commission's finding of a 1+ year discontinuance.

Second, Four Sided could have avoided any "delay" by naming the BHA a "real party in interest." Indeed, the appellate court in *Highland Development Co. v. City of Los Angeles*, 170 Cal.App.3d 169 (1985), held that a successful administrative appellant must be named a "real party in interest" in a petition for writ of mandate challenging the administrative appeal. *Id.* at 180. Four Sided, having failed to name BHA as a real party, invited the "delay" to which is now objects.

Third, any delay would have been slight if Four Sided had not opposed the motion to intervene. The BRC and BHA merely sought to intervene for the limited purpose of seeking reconsideration of the writ determination and the right to appeal an adverse ruling. Doing so would not have caused serious delay, especially given that Four Sided included a claim for damages that prevented entry of a final judgment at the time.

Finally, the fact that the Commission's ruling has not been defended and CEQA requirements have not even been examined is a miscarriage of justice, the cure for which is intervention by those able to make the arguments that have so far gone unmade. Permitting intervention will simply require Four Sided to prove its case. This is not "prejudice. *Truck Ins. Exchange*, 60 Cal.App.4th at 351. That is particularly true where, as here, the intervening parties are seeking to vindicate important public rights. *Ryerson v. Riverside Cement Company*, 266 Cal.App.2d 789, 796 (1968).

C. Intervenors Have A "Direct And Immediate" Interest

Four Sided argued that the BRC and BHA lack a "direct and immediate" interest in the litigation because they have a merely "generalized interest" in the enforcement of land-use laws, making them virtually indistinguishable from anyone residing in the City. Not true.

The determination of whether a "direct interest" is present must be based on the facts of the particular case. *People ex rel. Rominger v. County of Trinity*, 147 Cal.App.3d 655, 660 (1983). The interest must be of "such a direct and immediate nature that the moving party will either gain or lose by the direct legal operation and effect of the judgment." *Id.* While an interest does not satisfy this standard when "the action in which intervention is sought does not directly affect it although the results of the action may indirectly benefit or harm its owner," a "direct and immediate" interest does not require a "pecuniary interest in the litigation" or that the intervenor have "a specific legal or equitable interest in the subject matter of the litigation." *Id.* at 661.

While the standard is necessarily dependant upon the facts of the particular case, precedent teaches that the "direct and immediate interest" standard is likely to be satisfied in *any* of the three following circumstances: (1) The intervenor actively participation in the public administrative process underlying the litigation (*Highland Dev. Co. v. City of Los Angeles*, 170 Cal. App. 3d 169, 179-180 (1985), disapproved on other grounds in *Morehart v. Co. of Santa Barbara*, 7 Cal. 4th 725 (1994); *Simac Design, Inc. v. Alciati*, 92 Cal.App.3d 146, 153 (1979); *Baroldi v. Denni*, 197 Cal.App.2d 472, 478 (1961)); (2) The law or legal determination challenged in the litigation was intended to protect the interests of the intervenor or those represented by the intervenor (*Rominger*, 147 Cal.App.3d at 662-663); *or* (3) The intervening or-

ganization's mandate includes protection of the interests at stake in the litigation. *US Ecology, Inc. v. State of California*, 92 Cal.App.4th 113, 139 (2001).

First, the direct and immediate nature of the BHA/BRC's interest in the litigation is similar to the intervening neighborhood association in *Highland Development Co. v. City of Los Angeles*, 170 Cal.App.3d 169 (1985). Justice Malcolm Lucas, writing for the Court of Appeal in *Highland*, explained that the Whitley Heights Civic Association, a homeowners group in the historic Whitley Heights neighborhood, had a "direct and immediate" interest in a developer's writ proceeding attacking the City's revocation of a development permit because the Civic Association had successfully appealed the initial issuance of the permit to the City Council. Indeed, the Court of Appeal ruled that the Civic Association, as a party to the underlying administrative proceeding, should have been named as a real party in interest based on its participation as the appellant in the administrative proceeding being challenged in court. *Id.* at 180. Here, the BHA was the successful appellant in the Commission proceeding being challenged by Four Sided, it should have been (but was not) named a real party in interest. At the least, it is entitled to intervene based on its direct and immediate interest. And while the BRC formed after the administrative proceeding, its interest in the litigation is demonstrated by its subsequent participation in administrative and judicial proceedings concerning the same tenant, developer and property and the relationship between the ruling under attack in this litigation and the other pending judicial and administrative proceedings, all of which concern the environmental impacts of the same project.

Second, the "direct and immediate" standard for intervention is eased where, as here, the party charged with responsibility for prosecuting or defending an action has failed to

make "the arguments that should have been presented in the litigation, or similar circumstances render strict definition of direct interest likely to result in injustice." *Continental Vinyl*, 27 Cal.App.3d at 551; *Kobernick*, 70 Cal.App.3d at 918-919. Here, the City Attorney failed to make a single argument in support of the Commission's determination or even mention the Commission's CEQA concerns. As a result, the Commission's ruling was not only overturned, but the trial court compelled issuance of the Permit without subjecting the project to environmental review. This injustice than can only be cured by allowing intervention.

Third, the mandate of both prospective intervenors includes protection of the interests at stake in this matter. In *U.S. Ecology, Inc. v. State of California*, 92 Cal.App.4th 113 (2001), an environmental action involving the Ward Valley radioactive waste disposal site, the court recognized that groups that "are broadly focus[ed] on environmental and safety concerns relating to the Ward Valley site," who have a "history of involvement as parties in numerous litigation actions involving the proposed Ward Valley [low-level radioactive waste] storage facility," have a sufficiently "direct and immediate" interest to intervene. *Id.* at 139.

As in *U.S. Ecology*, the BHA and BRC have focused on land-use concerns arising from this Project Site: (1) The BHA filed a formal appeal of the initial municipal determination that Four Sided was entitled to grandfathered parking, which is the subject of the underlying writ action; (2) The BHA retained legal counsel to represent its interests in the administrative proceedings – and its counsel not only appeared at two public hearings, he also presented substantial legal briefing to the administrative bodies; (3) Members of the soon-to-be formed BRC provided detailed public testimony in support of the BHA's administrative appeals; (4) The BRC formed shortly after the Commission's determination and has been ac-

tively involved in contested administrative and judicial proceedings involving the same project site; (5) The BRC and BHA retained legal counsel to represent the interests of Brentwood residents in these subsequent administrative and judicial proceedings; (6) Judge O'Brien's ruling in this writ of mandate action, if not reconsidered or reversed on appeal, will adversely impact the positions taken and results sought and achieved by the BRC and BHA in the subsequent administrative appeals involving the Project Site; and (7) The missions of the BHA and the BRC encompass protection of the residential character of the Brentwood community through proper enforcement and interpretation of the municipal land use and state environmental laws. *AA* 277-278, 341-397 (*Rosen Decl.* ¶¶ *2-5 & Exhs. 4-7); AA 276, 280-340 (Keller Decl. Exhs. 1-3); AA 279 (Freeman Decl.* ¶*2); AA 511-568 (Freeman Suppl. Decl. Exh.B); AR 209-210, 214-216, 432-441, 608-616, 690-697, 874-883, 979-1005, 1019-1023, 1025-1026-1043.*

D. Intervention Will Not Expand The Scope Of Litigation Beyond The Issues Properly Raised By The Petition And The Commission's Ruling

Intervention would not expand the scope of the writ of mandate litigation *beyond* the issues properly raised by the Petition. It would simply allow those issues to be resolved on the merits through an adversarial process. Due to the City Attorney's conduct, the Commission's ruling has not been adjudicated in a full and fair adversarial proceeding. As a result, the general public and the Brentwood community in particular have lost the zoning-law and environmental protections recognized by the Commission due to what Four Sided has characterized as the City Attorney's effective "waiver" by non-argument. *AA* 93-94. The City Attorney's waiver in this case raises the same types of concerns as a municipal settlement that negotiates-away public rights. Intervention would prevent that injustice.

Local land use regulations involve the exercise of municipal police powers. *Avco Comm. Dev., Inc. v. So. Cost Regional Com.*, 17 Cal.3d 785, 800 (1976); *Trancas Property Owners Assoc. v. City of Malibu*, 138 Cal.App.4th 172, 181 (2006). Municipalities may not waive or consent to a violation of such laws because those laws, like other forms of the police power, are enacted for the benefit of the public, not the government. *Hanson Bros. v. Bd. of Supervisors*, 12 Cal.4th 533, 564 (1996).

The general principle that a municipality cannot waive or consent to the violation of its own land use laws is reflected in two published appellate decisions condemning as improper municipal "consent" to the violation of zoning or land use laws through the settlement of litigation. In *Trancas*, 138 Cal.App.4th at 181-182, and *League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052, 1056-1057 (9th Cir. 2007), the appellate courts ruled that municipalities cannot settle litigation in a manner that would effectively circumvent mandated zoning processes, which require public hearings, mandated administrative findings, and, in cases like this, environmental review under CEQA. A settlement that effectuates a deviation from zoning laws, and without environmental review, is an abuse of the police power. This same principle applies to a municipal "waiver" (as opposed to settlement) of zoning law requirements. *Hanson*, 12 Cal.4th at 564 (holding that zoning laws cannot be waived or contractually abrogated).

Applying the logic of *Trancas* and *Neighborhood Advocates*, a municipality cannot *waive* compliance with zoning or environmental laws by choosing not to defend administrative rulings made by properly constituted municipal decision-makers. The failure to argue the merits of the Commission's determination amounts to a waiver, thereby circumventing the adminis-

trative zoning and environmental review processes enacted for the public benefit, which mandate public hearings, public participation, and transparent decision-making. Thus, just as a municipality may not enter into a settlement of litigation that would circumvent these processes, so to is it precluded from waiving the public's right to participate in a transparent administrative process. But the City Attorney, by its passive acquiescence, has effectively waived the public's rights.

The City Attorney's inaction is a breach of the public trust, which, if not corrected by allowing intervention, will effectuate the violation of municipal zoning laws and state environmental laws designed to protect the public welfare.

E. The Reasons For Intervention Outweigh Those Against It

The interests of justice compel intervention in this case because the City Attorney failed to defend a ruling of the properly-constituted municipal entity responsible for making a final determination in the underlying zoning proceeding, effectively arrogating to itself the unilateral authority to subvert the public decision-making process. The City Attorney's inaction was not based on the facial invalidity of the Commission's ruling, as Four Sided has implied. The Commission's interpretation of the discontinuance-of-use provision and its application of CEQA are clearly deserving of serious judicial consideration.

1. The Commission properly interpreted and applied the discontinuance-of-use ordinance

The established rules of statutory construction provide that, in interpreting legislative enactments, intent prevails over the letter, and the letter will, if possible, be construed as conforming to the spirit of the act. *Arias v. Superior Court*, 46 Cal.4th 969, 979 (2009). Moreover, local ordinances must be interpreted "in favor of the exercise of the power over mu-

nicipal affairs and against the existence of any limitation or restriction thereon, which is not expressly stated." *City of Los Angeles v. Superior Court*, 40 Cal.App.4th 593, 604 (1995).

Most significant to the interpretation of nonconforming use statutes, however, is the overriding objective of zoning law, which is to eliminate (not perpetuate) nonconforming uses. *Co. of San Diego v. McClurken*, 37 Cal.2d 683, 686-687 (1951). For that reason, "courts throughout the country generally follow a strict policy against their extension or enlargement." *Sabek, Inc. v. Co. of Sonoma*, 190 Cal.App.3d 163, 166 (1987). These principles require a *narrow* construction of statutes conferring nonconforming rights and a *broad* construction of statutes eliminating nonconforming rights. Municipal Code Section 12.23.B.9, which terminates nonconforming rights, must therefore be construed broadly.

The term "nonconforming use" is defined under Section 12.03 as "a use of building or land which does not conform to the regulations of this chapter and which lawfully existed at the time the regulations with which it does not conform became effective." Thus, the use of a building that lacks the code-required allotment of parking spaces is a nonconforming use of that building. Under Section 12.23.B.9, the right to maintain a nonconforming use is terminated upon a one-year discontinuance of that nonconforming use. Four Sided's structure was vacated by the health club in April 2007 and that tenant space has not been occupied by any other business for any use whatsoever since then. No restaurant, health club or retail establishment has used the nonconforming parking associated with that tenant space since April 2007. The Commission properly construed this to be a discontinuance of use terminating the nonconforming right to maintain just **5** parking spaces for a structure and use that, under current code, requires **57** parking spaces.

This interpretation of "nonconforming use" and "discontinuation of use" is consistent with the policy to broadly construe statutes eliminating nonconforming rights and narrowly construe statutes granting nonconforming rights. By contrast, Four Sided's interpretation would *perpetually* grandfather nonconforming parking rights – despite the discontinuance of use – in violation of the overriding policy of zoning laws to bring uses into compliance with code requirements. *McClurken*, 37 Cal.2d at 686-687. Any construction of the nonconforming use statutes that would add "permanency to a nonconforming use" violates the general intent "to eliminate nonconforming uses as rapidly" and "speedily as is consistent with proper safeguards for the interests of those affected." *Sabek*, 190 Cal.App.4th at 167-168.

2. CEQA mandates environmental review of the entire "project" – not a piecemeal analysis of a single permit for a single phase of the project

The City Attorney's failure to address CEQA is especially problematic because it led to a judicial order compelling the City to violate the public's CEQA-protected rights.

The Commission made findings that are consistent with requiring CEQA review before consideration of the Permit. But it did not and was not required to definitively rule on whether CEQA review was required because it found that the Permit was improperly issued. The *denial* of a permit is not subject to CEQA because CEQA has no application to projects that an agency "rejects or disapproves." *Sunset Sky Ranch Pilots Assoc. v. Co. of Sacramento*, 47 Cal.4th 902, 909 (2009) (citing *Public Res. Code* § 21080(b)(5) & *CEQA Guidelines* § 15270(a)). But the trial court, after rejecting the Commission's discontinuance-of-use analysis, issued a writ of mandate ordering the Commission to issue the Permit, thereby authorizing Four Sided to provide just 5 parking spaces. By doing so, the trial court compelled the City to violate CEQA by issuing the Permit without the requisite environmental review.

Four Sided has argued that CEQA does not apply because the decision to issue the Permit is "ministerial" and therefore not subject to CEQA. That contention, however, fails to account for (1) CEQA's broad definition of a "project," which encompasses not just a particular approval, but the entirety of the project; and (2) if the project is subject to discretionary approval, as in this case, the mandated environmental review encompasses any related ministerial determinations. Environmental review must therefore occur *before* the project approvals because piecemeal approvals would otherwise limit the range of mitigation options to eliminate or reduce environmental impacts. It was therefore improper to compel the City to issue the Permit before the entire project was subjected to environmental review.

a) The "project" includes *both* structures. Four Sided erroneously argued that this single permit application is exempt from CEQA simply because Four Sided chose to define the "project" narrowly as the renovation of a single structure of less than 15,000 square feet. Under CEQA, however, a "project" is defined to include all phases of a development project. *Los Angeles Unif. School District v. City of Los Angeles*, 58 Cal.App.4th 1019, 1027-1028 (1997). This broad definition of "project" is required in order to avoid piecemealing, *i.e.*, "chopping a large project into many little ones – each with a minimal potential impact on the environment – which cumulatively may have disastrous consequences." *Planning and Conservation League v. Castaic Lake Water Agency*, 180 Cal.App.4th 210, 234-235 (2009).

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. . . ." CEQA *Guidelines*, §15378(a). A "project" is (1) not limited to the particular permit or approval being sought (*Guidelines*, §15378(c)); (2)

includes *all phases* of a development project, including the foreseeable impacts of later phases of the development (*LA Unified School Dist.*, 58 Cal.App.4th at 1027-1028); and (3) all "reasonably foreseeable consequences" of the project, including foreseeable parking and traffic impacts. *Laurel Heights Imp. Assoc. v. Regents of Univ. of Calif.*, 47 Cal.3d 376, 395 (1998). Similarly, and to the same effect, CEQA requires that environmental review include not only the foreseeable impacts of the project under review but also the "cumulative impacts" of "closely related past, present and reasonably foreseeable future projects." *Bakersfield Citizens for Local Control v. City of Bakersfield*, 124 Cal.App.4th 1184, 1214 (2010) (quoting *CEQA Guidelines* § 15355(b)).

There is no question that, for CEQA purposes, the Four Sided "project" includes both phases of the planned development of two structures on the two lot-tied properties – not simply the issuance of a permit for a use of the renovated structure. It is undisputed that Four Sided's "remodel" of the existing structure is part of a larger development project spanning two tied lots and the development of two commercial buildings into a Mini-Shopping Center. This is confirmed by (1) the legal lot tie evidenced by the "Covenant And Agreement To Hold Property As One Parcel," which ties the two lots and identifies both the exiting, remodeled structure and the "proposed retail building" (*AA* 313-317); (2) the Mini-Shopping Center Covenant (*AA* 318-320); (3) the October 29, 2008 letter from Four Sided's architect, Carlos Rocha, confirming that, in accordance with the Commission's request, Four Sided withdrew a pending application for approval of a single structure and is "now proceeding with the project as one submission, instead of in phases" (AA 322); and (4) the project plans approved by the Planning Department in Case No. DIR-2008-4174-DRB-SPP (De-

cember 15, 2008) depicting both the existing, remodeled structure at 11920 San Vicente Blvd. and the proposed new building at "11906 S.V. (Proposed New Building)," which is further described as the "Proposed one story retail building" designed "to match the exiting retail/restaurant building on site (11920)." AR 0943, 0947; *AA* 316.

Further, the developer's architect, speaking at the hearing before the Commission, admitted that the plan was and has always been to develop the project in this manner -- never to simply renovate a single building. He clarified that Four Sided had previously separated the project into two "phases" in order to move a tenant, Lululemon, into one of the retail spaces: "There's no piecemealing of the project. The project started out as a dual project. It got a little bit complicated, so we separated, because we had a tenant, Lulu Lemon, which came in here, so I decided to pull the permit, separate the project just to get the Lulu Lemon tenant in here." The project itself, including the plan for a second structure to be built during the second phase of construction, did not change. *AA* 558-559; *AR* 1005-1006.

Substantial evidence therefore supports the Commission's determination that (1) "the whole project" includes both phases of the development project and the resulting intensification of the land use on the project site "should have been subjected to a more strict environmental review" and (2) the "large number of building permits [previously] issued to the location" and "the common knowledge that there is an anticipated second building constitutes a piece-mealing of the project," which likewise requires environmental review of the entire project, not separate consideration of its constituent parts.

b) Discretionary approval of the Mini-Shopping Center project is required. There is no dispute that Four Sided's two-structure project constitutes a Mini-

Shopping Center. Indeed, Four Sided executed a Mini-Shopping Center Covenant as a pre-requisite to seeking certain building permits. *AA* 320. Municipal Code Section 12.22.A(23)(c)(1)(i) provides for the conversion of an existing building to a Mini-Shopping Center. This change requires a Mini-Shopping Center CUP unless "all alterations result in *no more than a twenty percent increase* in the existing floor area of all of the buildings on a lot or lots." Four Sided's project, however, would increase the existing floor space from 8,024 square feet to 9,894 square feet, a 23% increase in floor space.[3] A CUP is therefore required for project approval.

c) The need for a discretionary approval triggers CEQA. 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). A CUP is discretionary because it 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).

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

[3] The floor area of the remodeled building remains 8,024 s/f and the project plan for the new building was approved at 1,870 s/f, a 23% increase in floor space. *AA* 330.

sible Agency shall consider a final EIR or Negative Declaration 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.

d) Environmental review is required *before* issuance of the Permit. Under CEQA, the City must subject the entire project to environmental review "at the earliest feasible stage in the planning process." *Sundstrom v. Co. of Mendocino*, 202 Cal.App.3d 296, 307 (1988). This environmental review must consider the specific project "in conjunction with other closely related past, present and reasonably foreseeable probable future projects" because "consideration of a project or projects as if no others existed would encourage the piecemeal approval of several projects that, taken together, could overwhelm the natural environment and disastrously overburden the man-made infrastructure and vital community services." *San Joaquin Raptor/Wildlife Rescue Center v. Co. of Stanislaus*, 27 Cal.App.4th 713, 739-740 (1994). If Four Sided could unilaterally choose to define the project as a single phase of the planned two-phase development project, it could effectively game the system by allowing "'bureaucratic and financial momentum' to build irresistibly behind the project, 'thus providing a strong incentive to ignore environmental concerns.'" *Save Tara v. City of West Hollywood*, 45 Cal.4th 116, 357-359 (2008) (quoting *Laurel Heights Improvement Assoc. v. Regents of Univ. of California*, 47 Cal.3d 376, 395 (1988)). In sum, prior agency approvals of multiple "mini-projects" would likely transform the deferred environmental review into a "*post hoc* rationali-

zation" of the prior approvals. *Riverwatch v. Olivenhain Mun. Water Dist.,* 170 Cal.App.4th 1186, 1207 (2009) (quoting *Laurel Heights,* 47 Cal.3d at 394).

e) CEQA expands agency authority to avoid environmental impacts. Where CEQA applies, an agency's limited authority to deny a discretionary project under non-CEQA law is *supplemented* by CEQA, which authorizes project denial or mitigation due to significant environmental impacts. Thus, "[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." *CEQA Guidelines*, §§15042, 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." *CEQA Guidelines* §15040(c).

f) The Permit improperly restricts mitigation options. The piecemeal approval of "ministerial" permits prior to environmental review, such as the Permit enabling Four Sided to lease tenant space to a 150-plus seat restaurant with just five parking spaces, is improper because the issuance of such permits eliminates mitigation options and renders approval of the entire project a *fait accomplis* before environmental review.

Absent piecemeal approvals, Four Sided would have to seek a Mini-Shopping Center CUP after or concurrent with environmental review. The municipal decision-maker, comparing the project's likely environmental impacts against a "baseline" defined as the conditions

existing at the time of environmental review[4] and in light of exiting traffic and parking congestion in the area that has already reached the "tipping point" with respect to spillover effects having significant environmental impacts,[5]has the authority under CEQA to mitigate the project's likely impacts by (1) requiring more onsite parking than is otherwise required under the zoning law or (2) precluding a tenant use like the 150-plus restaurant use sought by Four Sided because that use would create significant environmental impacts. These CEQA-based mitigation options, however, would no longer be available if permits, such as the Permit in this case, are issued before environmental review. There would be no space for additional onsite parking and the tenant spaces would already be leased. This is precisely what the rule against piecemealing is supposed to prevent.

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[4] *Community for a Better Environment v. So. Coast Air Quality Mngt. Dist.*, 48 Cal.4th 310, 320-321 (2010) (holding that a projects potential impacts must be "compared to the actual environmental conditions at the time of CEQA analysis, rather than to allowable conditions defined by a plan or regulatory framework").

[5] *Gray v. Co. of Madera*, 167 Cal.App.4th 1099, 1123 (2008) (holding that project's slight and otherwise insignificant increase in ambient noise may be "significant" under CEQA if the area is already at the tipping point where even a slight increase could have a potentially significant impact).

V. CONCLUSION

For these reasons, the trial court's denial of the motion to intervene must be reversed to allow the BHA and BRC to intervene and thereby request that the trial court reconsider its decision and, if necessary, file an appeal on the merits upon entry of a final judgment.

DATED: July 6, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed Opening Brief is produced using 13-point Roman type including footnotes and contains approximately 12,787 words, which is less than the 14,000 words permitted by the Rules of Court. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: July 5, 2011

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1875 Century Park East, 23rd Floor, Los Angeles, California 90067-2561.

On July 6, 2011, I served the following document(s) described as **APPELLANT'S OPENING BRIEF** on the interested parties in this action as follows:

BY MAIL: By placing a true copy thereof in sealed envelopes addressed to the parties listed on the attached Service List and causing them to be deposited in the mail at Los Angeles, California. The envelopes were mailed with postage thereon fully prepaid. I am readily familiar with our firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 6, 2011 at Los Angeles, California.

Sandy Palmieri

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