

# REUBEN, JUNIUS & ROSE, LLP

**Mark Loper**  
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June 8, 2018

## **Delivered Via Email and Messenger**

President London Breed and Supervisors  
San Francisco Board of Supervisors  
1 Dr. Carlton B. Goodlett Place  
City Hall, Room 244  
San Francisco, CA 94102  
Bos.legislation@sfgov.org

**Re: 2918 Mission Street  
Opposition to Appeal of the Community Plan Exemption (“CPE”)  
Planning Department Case No. 2014.0376ENV  
Our File No.: 10193.01**

Dear President Breed and Supervisors:

This office represents RRTI, Inc. (“Project Sponsor”) which proposes a zero-parking, 8-story mixed-income building with 75 affordable-by-design units in a transit-rich infill location currently occupied by a surface parking lot and coin operated laundromat owned by the Sponsor (the “Project”). The Project, located at 2918 Mission Street (the “Property”) is on one of the few soft sites remaining in the Mission. It is the first mixed-income project approved by the Planning Commission utilizing one of the Affordable Housing Bonus Programs unanimously enacted into law by the Board of Supervisors in June 2017, and will add much-needed housing across income levels on an ideal infill site.

The Project was originally scheduled for hearing in February 2018.<sup>1</sup> After the Planning Department notified Supervisor Ronen’s office that the Property might have historic merit, the Sponsor, the Appellant, and the Supervisor agreed to continue the hearing for preservation review to be undertaken. As detailed in the Planning Department’s response to the appeal of the Community Plan Exemption (“CPE”) for 2918 Mission Street (the “Planning Department Memo”) and discussed in detail below, the Planning Department has completed its preservation review and analysis and concluded the Property is not an historic resource.

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<sup>1</sup> We submitted a letter brief in February 2018. Rather than cross-reference back to points made in that letter, this brief includes much of the substance from that letter.

This analysis, and other technical studies done or commissioned by the Planning Department since February, provide further substantial evidence that the City's use of a CPE for the Project is proper, and the appeal is without merit under CEQA. The Project itself was approved by the Planning Commission via a Conditional Use, and the CEQA process is not meant to be used to revisit an entitlement approval<sup>2</sup>.

## 1. Project Benefits

The Project provides numerous benefits to the Mission and the City at large, including:

- **\$1.6 Million in Impact Fees.** The Project will pay into a number of impact fee programs supporting child care, public schools, transportation, and infrastructure improvements. Specifically, the Project will be subject to these fees: Child Care, Eastern Neighborhoods Infrastructure, Schools, and the Transportation Sustainability Fee, and is estimated to pay \$1,628,113.46 in fees.
- **On-Site Affordable Housing.** Although the Project was conceived and proposed when the on-site affordability level was 12%, the City's local affordability percentage for the Project increased to 14.5%. The Project is complying with the current inclusionary program by providing 14.5% on-site affordable units. 11% of the Project's base units will be set aside for households earning no more than 50% AMI. 50% AMI is the lowest income level that either state or local law impose on a mixed-income project. An additional 3.5% of the base units will be affordable to households earning either 55% AMI if rental or 90% if for-sale.<sup>3</sup>
- **Affordable by Design Rental Project.** In addition to providing on-site units to low income individuals and families, the Project's market rate units will be "affordable by design." The Project offers a range of unit types, with studios averaging 360 square feet, one bedrooms averaging 613 square feet, and two bedrooms averaging 833 square feet. In total, average unit size across types is 640 feet. These units will be more compact than typical new residential units—particularly the two-bedrooms—and will consequently rent or sell for less, passing on savings to occupants. It's a goal of the Sponsor for the Project's occupants to be people living and working in San Francisco.
- **Transit-Oriented Development.** The Project furthers San Francisco's transit goals in a number of different ways. First, it proposes zero parking spaces even though it is permitted to have up to 38 (a ratio of one space for every two units). The Sponsor eliminated off-

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<sup>2</sup> As noted in a recent law review article discussing CEQA lawsuits and California's housing crisis, "Housing can be built, and it is politically supported by majorities of existing residents, including those who are protective of the character, services, and property values in their community across the country. However, CEQA lawsuits provide California's anti-housing holdouts—the political minority of as few as one anonymous party—with a uniquely effective litigation tool to simply say 'no' to change." *California Environmental Quality Act Lawsuits and California's Housing Crisis*, Hastings Environmental Law Journal, Winter 2018, pg. 41.

<sup>3</sup> See San Francisco Mayor's Office of Housing 2017 Maximum Income by Household Size, available at: [http://sfmohcd.org/sites/default/files/Documents/MOH/Asset%20Management/2017%20AMI-IncomeLimits-HMFA\\_04-21-17.pdf](http://sfmohcd.org/sites/default/files/Documents/MOH/Asset%20Management/2017%20AMI-IncomeLimits-HMFA_04-21-17.pdf)

street parking from the Project at the request of a nearby preschool, which had safety concerns about cars traveling on Osage Alley—which the preschoolers cross to get to and from a play area. In addition, it eliminates 20 existing parking spaces, disincentivizing car trips within the neighborhood. Instead of car parking, the Project provides one protected and secure bike parking space for every unit. A 40-foot long passenger loading zone in front of the building will further reduce the effects of drop-offs and pickups in front of the building. Eliminating the current parking lot to make way for the Project should reduce traffic on Mission. The Property is one block away from the 24<sup>th</sup> Street Mission BART station, providing convenient and affordable transit for its residents throughout San Francisco and the larger Bay Area. It has a 99 Walk and Bike Score.

## **2. The Laundromat, Preservation, and Community Character**

### **a. Preservation Review Confirms the Project Is Not an Historic Resource**

Two weeks before the Project's originally-scheduled hearing in February 2018, and approximately two months after the Planning Commission approved the Project in late November 2017, the Planning Department notified the Project Sponsor that the Property might have preservation merit. Deferring to the Department's decision to undertake this study, and to ensure that all potential environmental issues associated with the Property and Project were studied, the Sponsor supported a continuance.

The resulting comprehensive historic resource evaluation confirms two significant points: (1) the Property has a rich cultural history tied to late 20<sup>th</sup> century community-based organizations in the Mission that occupied the building from approximately 1973-1985; and (2) the local community organizations left the Property long ago, and significant interior and exterior alterations to the Property since then deprive it of remaining physical characteristics relating it to its past cultural history other than its location on Mission Street between 25<sup>th</sup> and 26<sup>th</sup> Streets.

Under CEQA, in order to be an historic resource, a property needs to retain integrity that enables it to illustrate significant aspects of the past. Evidence of the survival of physical characteristics that existed when the site had historic merit must be present. All of the interior finishes and tenant improvements to the building carried out by the community organizations were removed in the early 1990s, as was a mural painted on the side of the building. What remains—a coin-operated laundromat—does not convey historic integrity as an administrative hub for these groups. Using CEQA parlance, the Property lacks integrity of association, design, workmanship, feeling, and materials. The building's presence on Mission Street surrounded by other retailers is not sufficient to convey historic integrity without any physical evidence of the groups themselves.

In addition, the Property is one of a series of buildings occupied over the years by the Mission community organizations identified in the historic study. It was not the first location (that was 3145 23<sup>rd</sup> Street) or the last location. These groups occupied the Property for approximately 10 out of the 45 years of their existence. In addition, the Mission Coalition Organization—the parent of many other Mission community organizations--never occupied the site. To the best of

our knowledge, none of the other buildings these organizations used is considered an historic resource.

b. Community Character is Not a Germaine CEQA Issue

The Appellant also identified a potential impact on the Calle 24 Latino Cultural District that was not discussed in the CPE. The Project Sponsor recognizes the Calle 24 Latino Cultural District serves an important purpose in the Mission and identifies a region and community linked together by a shared cultural heritage. Cultural heritage assets are a significant social aspect of San Francisco. But CEQA does not extend to the economic or social effects of a project. It is noteworthy that the Property is not located in either the Calle 24 Latino Cultural District or the Special Use District, although it is close to both.

Under CEQA, “economic or social effects of a project shall not be treated as significant effects on the environment.”<sup>4</sup> A cultural heritage asset such as the Calle 24 Latino Cultural District is not eligible for listing on local, state, or national registers or historic properties. Any potential impacts on the district are therefore social and/or economic effects, and not an issue for CEQA. To the extent community character is considered at all in CEQA, that evaluation is limited to aesthetic impacts and not the direct social or economic effects of a project.<sup>5</sup> However, in accordance with CEQA Section 21099(d)(1), aesthetics cannot be considered in determining if the Project has the potential to result in significant environmental effects because it is a residential infill project in a transit priority site.

In Preserve Poway v. City of Poway, 245 Cal.App.4th 560 (2016), community members protested vigorously against the conversion of a horse ranch into new housing, eventually appealing the CEQA clearance document after the housing project was approved on the grounds that it disrupted Poway’s “community character.” While recognizing that community character is an important political and policy issue, the Court of Appeal concluded that it is not an environmental issue under CEQA.<sup>6</sup> CEQA could not be used to study the psychological, social, and economic effects of a project:

“CEQA requires decisions be informed and balanced, but it ‘must not be subverted into an instrument for the ... delay of social [or] economic development or advancement.’ ”<sup>7</sup> Simply, the potential loss of community character is not a cognizable environmental effect under CEQA.

c. Studies Confirm the Project Does Not Contribute to Gentrification

Appellant also claims the Project contributes to gentrification occurring in the Calle 24 Latino Cultural District. The influx of new residents and business alone is not a cognizable CEQA effect, and there is no substantial evidence in the record showing that the Project will cause adverse physical environmental impacts due to gentrification or displacement of businesses or residents.

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<sup>4</sup> CEQA Guideline 15131(a)).

<sup>5</sup> Preserve Poway v. City of Poway, 245 Cal.App.4th 560, 576 (2016).

<sup>6</sup> Poway, 245 Cal.App.4th at 566.

<sup>7</sup> Id. at 581-582.

In addition, at the Planning Department's direction, an urban economist prepared a report studying a number of potential socioeconomic issues associated with the Project. The report concludes that it is unlikely commercial gentrification would result from pressure exerted on the existing retail base within ½ mile of the Property due to an excess of available retail supply compared to demand. Residential development in the Mission plays an insignificant role in influencing overall commercial makeup of districts like the Mission that are both neighborhood-serving and regional destinations. Regarding housing, new homes do not result in increased housing costs for current residents, but instead help to both suppress existing home prices and rents and open up existing housing when occupants of the new homes move from current residences.

As discussed in detail in the Planning Department Memo, substantial evidence shows that the fundamental causes of gentrification and displacement in the Mission and elsewhere in San Francisco are likely related to broader economic and social trends, such as the mismatch between the supply and demand for housing at all levels, the strength of the regional economy, low unemployment, high wages, favorable climate, and a preference for urban lifestyles and shorter commutes.

### **3. The Project and the Zaida T. Rodriguez Early Education Center**

The Project's potential impacts on the Zaida T. Rodriguez Early Education Center were adequately analyzed. Appellant claims the CPE did not adequately evaluate potential impacts to the Zaida T. Rodriguez school adjacent to the Project site, in particular with regards to shadow, transportation, construction, and noise impacts. All evidence in the record indicates otherwise, including transportation-related analysis conducted by Fehr & Peers at the Planning Department's direction since February.

#### **a. Shadow**

While Sponsor acknowledges that the Zaida T. Rodriguez Early Education Center and Child Development Center serve a very unique and sensitive population, net new shadow cast into the school grounds would not result in a significant impact under CEQA. The significance threshold for shadow impacts under the EN EIR is if a project creates new shadow that substantially affects either outdoor recreation facilities or other public areas. It does not cover shadow on privately owned land that is not accessible to the public; otherwise, nearly every single infill project in the Eastern Neighborhoods would require its own EIR due to shadow cast on neighboring yards and open space. In addition, the EN EIR specifically notes that implementing the Eastern Neighborhoods Plan's rezoning would cause a significant and unavoidable impact relating to shadow.<sup>8</sup>

Despite the Project not causing a CEQA impact relating to shadow, the Sponsor agreed to a shadow analysis for informational purposes. The analysis (attached as **Exhibit A**) indicates that the project would cast shadow on much of the school's outdoor space across Osage Alley during

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<sup>8</sup> Eastern Neighborhoods Rezoning And Area Plans EIR, pgs. 416-418 (Case No. 2004.0160E).

morning hours, and only minimal shadow on the playground to the south. New shadow is expected throughout the morning, but not in the afternoon or evening—shadows will end no later than 11:51. For the Child Development Center at 2950 Mission Street to the south of the Property, the Project is predicted to cast a small amount of new shadow onto the northernmost area of the playground during the morning and evening from April through August—but only before 9 am and after 4:45 pm.

b. Transportation

The CPE also specifically addresses transportation and construction-related issues with regards to the Property’s neighbors, including the school. The Project proposes no off-street car parking, consistent with the City’s transit first policies. The vast majority of car trips to and from the Property will take place along Mission Street and not Osage Alley. The building is accessible by pedestrian and bike from Osage, two far safer forms of transit for children crossing the alley from one school location to the other.

In addition, during the continuance period while the preservation report was being prepared, Fehr & Peers also prepared a transportation analysis of the Project. The transportation consultants collected new data in the Mission District, including vehicle volumes at key intersections, and evaluated transit reliability as a result of new development. The results of this analysis are attached as **Exhibit B**.

Two conclusions emerge, both of which support the CPE’s conclusion that the Project will not cause a new or increased significant transportation effect. First, car volumes at key locations in the Mission do not exceed forecasts from the Eastern Neighborhoods EIR, and in some cases are actually lower than the baseline used for the EIR. Next, public transit speeds have actually improved along Mission Street in the last ten years.

c. Construction

Finally, the Project is required to implement two construction-related noise mitigation measures from the EN EIR. The EN EIR contemplated that new developments could be constructed near noise-sensitive receptors such as residences and schools. As detailed in the Planning Department Memo and CPE, a host of additional measures on top of the two project-specific mitigations will reduce potential impacts to the school.

**4. The CPE’s Reliance on the Eastern Neighborhoods EIR Is Appropriate**

Projects consistent with development density established by an area plan EIR such as the Eastern Neighborhoods Plan EIR (the “EN EIR”) do not require additional environmental review except as necessary to determine if project specific effects not identified in the EIR exist. CEQA Guidelines Section 15183 requires that projects consistent with development density established through an area plan EIR shall not require additional environmental review, except as necessary

to examine if there are project specific effects that were not disclosed as significant effects in the area plan level EIR.

The Project's CPE included background documents or technical reports relating to transportation, archeology, geology and soils, site mitigation, air quality, greenhouse gas emissions, wind, and shadow. The careful environmental review conducted for this Project by City staff over the course of two years did not identify any impacts peculiar to the Project or Project Site that were not disclosed in the EN EIR, nor did any of the additional technical studies undertaken since February, including transportation, parking and loading, and preservation.

a. The Eastern Neighborhoods EIR Is Vital for All Types of Housing Projects

With two exceptions, Appellant's overarching issue is with the Eastern Neighborhoods plan itself, and specifically that its EIR is stale and cannot be used for any housing project going forward. As the Planning Department explains in detail, there is no merit to this claim.

Just as importantly, CEQA clearance for pending projects in the Eastern Neighborhoods will be threatened or significantly delayed if the appeal is upheld. A number of affordable housing projects have recently relied or are expected to rely on the EN EIR for their CEQA clearance, including:

1. 2205 Mission Street, 48 units, CPE pending;
2. 681 Florida Street, 130 units, CPE pending;
3. 1990 Folsom, 143 units, infill exemption based on EN EIR issued 5/16/2018;
4. 1950 Mission Street, 157 affordable units, CPE issued July 6, 2017;
5. 2060 Folsom Street, 136 affordable units, CPE issued June 10, 2016;
6. 1296 Shotwell Street, CEQA clearance issued November 11, 2016, CEQA appeal upheld by Board of Supervisors, February 2017.

b. The Board's Decision on 1296 Shotwell Should be Followed

This Board's decision in 2017 denying a CEQA appeal to a density bonus project at 1296 Shotwell is instructive and should be followed here. Like the Project, 1296 Shotwell is located in the Mission Street NCT, received a 20-foot height waiver to reach 85 feet along with relief from other code requirements as a density bonus project, and was found by the Planning Commission to be consistent with San Francisco's General Plan and the Mission Area Plan.

For background, the 1296 Shotwell project is a nine-story, 69,500 gross square foot residential building with 94 dwelling units. Like Appellant, 1296 Shotwell's opponent claimed the EN EIR was "woefully out of date" and could not be relied on anymore. It claimed the CPE inadequately addressed cumulative, transportation and circulation, socioeconomic impacts resulting in physical impacts, land use, aesthetics, and significance findings. That project's opponent also similarly claimed 1296 Shotwell's location in the Calle 24 Latino Cultural District was not properly addressed in the CPE.

In February 2017 the Board of Supervisors rejected the appeal. The Board's motion made three specific findings relevant to this Project:

1. The 1296 Shotwell project was eligible for streamlined environmental review under CEQA Guidelines Section 15183.3;
2. The effects of the project were analyzed in the EN EIR, no new information showed that the project would cause effects substantially greater than those identified in the EN EIR or not analyzed in the EN EIR; and
3. There are no substantial changes in project circumstances or new information of substantial importance that would change the conclusions of the CEQA exemption determination.

Appellant may try to distinguish 1296 Shotwell from the Project at least in part on affordability: 1296 Shotwell was a 100% affordable project while the Project is mixed-income. The implication is that a 100% affordable project does not cause or contribute to socioeconomic effects that would in turn result in significant impacts on the physical environment, but that a project that provides less affordability will. But as detailed in the Planning Department Memo, Appellant has not provided evidence that the Project—individually or cumulatively—causes gentrification or displacement that results in impacts to cultural or historic resources, health and safety, construction, or transportation.

Moreover, this Board rejected all other grounds for overturning the appeal of 1296 Shotwell that did not relate to the alleged indirect impacts caused by gentrification: (1) the EN EIR is “woefully outdated”; (2) the cumulative impact of growth projections in the EN EIR has been exceeded; (3) the transportation impacts for a density bonus project were not properly analyzed; (4) underperforming delivery of EN Plan community benefits; and (5) inconsistency with the General Plan and Mission Area Plan. Each ground is also raised by Appellant as a reason to overturn the Project’s CPE. It would be inconsistent to deny these grounds on a similarly-situated project due to the socioeconomic makeup of the future building’s residents.

c. The Superior Court’s Decision on 901 16<sup>th</sup> Street is Instructive

The San Francisco Superior Court recently upheld an Eastern Neighborhoods Community Plan Exemption in a lawsuit filed by opponents of a mixed use project at 901 16<sup>th</sup> Street. That project is significantly larger than the 2918 Mission Street Project: it proposes 395 dwelling units, 24,486 square feet of retail, and 388 off-street parking spaces. The opponents of that project—neighbors worried about the impact to their community caused by new residents and businesses—raised a number of objections to its CPE that mirror claims made by Appellant. A copy of this opinion is included as **Exhibit C**; the case is now on appeal, with the San Francisco City Attorney’s Office defending the CPE.<sup>9</sup>

Like Appellant, they claimed that the EN EIR is outdated. The court explained that EIRs do not have expiration dates or chronological limitations; rather, if impacts were addressed in the

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<sup>9</sup> Save the Hill and Grow Potrero Responsibility v. City and County of San Francisco, California Court of Appeal, Case No. A153549.



EIR certified in connection with the zoning, San Francisco cannot revisit those impacts except to determine if a project causes new or different impacts.<sup>10</sup>

The opponents also alleged that residential growth outpaced the EN EIR, like Appellant here. The Superior Court disagreed, pointing out that the opponents focused on projects in the “pipeline” that are just proposed or under review.<sup>11</sup> While Appellant’s brief has not yet been filed, Project Sponsor expects that it will attempt to include all pipeline projects when discussing residential growth in the Mission, instead of identifying constructed units, or even approved projects that have not been constructed.

Just as importantly, the Superior Court explained that exceeding growth forecasts in the EN EIR does not render the EN EIR moot or jeopardize a project that received a CPE. Even if growth forecasts have been exceeded, Appellant must point to evidence that due to this exceedance the Project will cause or contribute to significant environmental impacts that were not addressed as significant impacts in the Plan EIR, or will be more significant than described in the Plan EIR.<sup>12</sup> In addition, growth forecasts in CEQA are not necessarily limited to one use type to the exclusion of others when evaluating impacts. Appellant has not identified evidence showing new or more significant impacts due to growth projections, much less any that the Project would cause or contribute to.

## **5. The Project is Consistent with Applicable Development Standards**

Appellant claims that the Project is inconsistent with the General Plan and the Mission Area Plan. Available evidence demonstrates otherwise. The Project’s approval motion makes consistency findings with approximately 40 General Plan policies, including 13 Mission Area Plan policies.

Furthermore, the granting of a density bonus shall not require or be interpreted, in and of itself, to require amendments to the general plan or zoning ordinance;<sup>13</sup> a CEQA exemption is proper for density bonus projects that, outside of requested waivers or concessions, comply with other aspects of a general plan or zoning ordinance.<sup>14</sup> The Project here complied with the Planning Code except insofar as it required waivers from the height limit and other requirements to achieve its density bonus. These waivers do not amount to a significant environmental effect removing the project from eligibility for a CPE.

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<sup>10</sup>Save the Hill and Grow Potrero Responsibly v. City and County of San Francisco, Order Denying Petition for Writ of Mandamus (Case No. CPF-16-515238), pg. 20.

<sup>11</sup> Save the Hill and Grow Potrero Responsibly v. City and County of San Francisco, Order Denying Petition for Writ of Mandamus (Case No. CPF-16-515238), pg. 23.

<sup>12</sup> Save the Hill and Grow Potrero Responsibly v. City and County of San Francisco, Order Denying Petition for Writ of Mandamus (Case No. CPF-16-515238), pg. 24.

<sup>13</sup> Gov. Code Section 65915(f)(5).

<sup>14</sup> Wollmer v. City of Berkeley, 195 Cal.App.4th 1329, 1348-1349 (2011).

**6. Conclusion**

Requiring further environmental review to be conducted for the Project is unnecessary and unsupported by the law. It would discourage both this beneficial mixed-income housing project and similar projects in any part of the City that conduct CEQA review using a Community Plan Exemption, further exacerbating the shortage of housing of all income types in San Francisco. Appellant has not provided substantial evidence to meet its burden to overturn the City's decision to issue a CPE for the Project. Therefore, we respectfully request that you deny the appeal.

Thank you.

Sincerely,

**REUBEN, JUNIUS & ROSE, LLP**



Mark Loper

Exhibits

cc: Supervisor Sandra Lee Fewer  
Supervisor Mark Farrell  
Supervisor Aaron Peskin  
Supervisor Katy Tang  
Supervisor Jane Kim  
Supervisor Norman Yee  
Supervisor Jeff Sheehy  
Supervisor Hillary Ronen  
Supervisor Malia Cohen  
Supervisor Ahsha Safai  
Angelia Calvillo, Clerk of the Board  
Brent Jalipa, Legislative Clerk  
Lisa Lew, Legislative Clerk  
Julie Moore, Environmental Planner, Planning Department  
Chris Kern, Environmental Planner, Planning Department  
Lisa Gibson, Environmental Review Officer, Planning Department

# **Exhibit A**



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Guelph ON Canada  
N1G 4P6

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E-mail: solutions@rwdi.com

## MEMORANDUM

<b>DATE:</b>	2018-02-07	<b>RWDI Reference No.:</b> 1604031
<b>TO:</b>	Robert Tillman	<b>EMAIL:</b> rrti@pacbell.net
<b>FROM:</b>	Ryan Danks	<b>EMAIL:</b> ryan.danks@rwdi.com
<b>RE:</b>	<b>Shadow Analysis 2918 Mission Street San Francisco, CA</b>	

Dear Mr. Tillman,

As requested, we have conducted an analysis to understand the potential for shadowing from the proposed 2918 Mission Street development on two nearby schoolyards. The methodology we followed is the same as what is required for shadow studies on public spaces in San Francisco.

With respect to the Zaida T. Rodriguez Child Development Center (2950 Mission Street) we make the following observations:

- The proposed building is predicted to cast a small amount of new shadow onto the northern-most area of the playground during the morning and evening from April through August.
- No new shadows from the proposed building are predicted to fall anywhere on the playground between 8:59 am and 4:44 pm at any point in the year.
- The predicted morning shadows range in duration from 1 to 92 minutes and the evening shadows last between 1 and 102 minutes.
- If we ignore impacts outside of the school year (June 5 – Aug 19, per the SFUSD 2018/2019 calendar), the longest new morning shadow lasts 85 minutes and the longest new evening shadow lasts 99 minutes



Robert Tillman  
RRT Partners LLC  
RWDI#1603031  
2018-02-07

With respect to the Zaida T. Rodriguez Early Education School (421 Bartlett Street) we make the following observations:

- The proposed building is predicted to cast new shadows onto this space throughout the morning all year.
- No new shadows from the proposed building are predicted to occur after 11:51 am on any day of the year.
- The new shadows range in duration from 143 minutes to 270 minutes and if impacts outside the school year are ignored, the maximum duration reduces to 266 minutes.

Separate to this email we have included point-in-time shadow plots illustrating the location of the new shadow cast by the proposed building over the course of the summer and winter solstices and the vernal and autumnal equinoxes to provide additional context.

We would be happy to discuss our analysis and its findings further if desired.

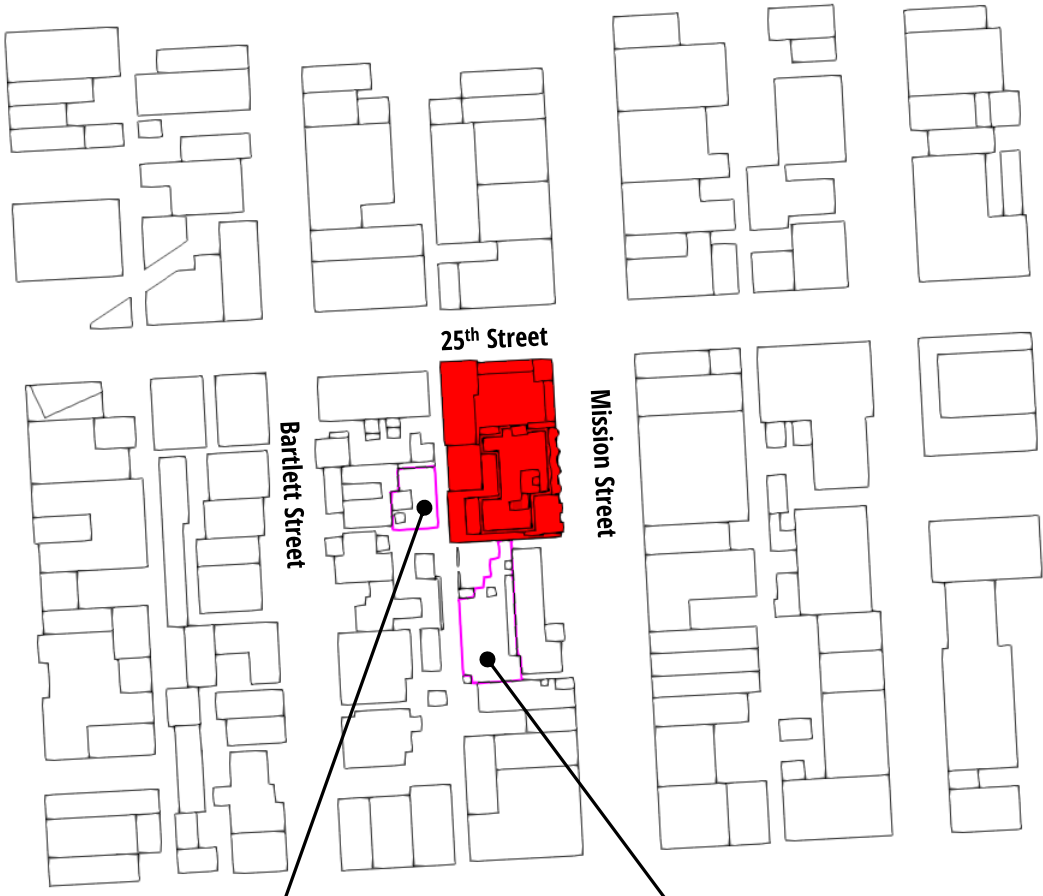
Yours truly,

**RWDI**

Ryan Danks, B.A.Sc., P.Eng.  
Senior Engineer

Frank Kriksic, BES, CET, LEED AP, C.Dir  
Senior Project Manager / Principal

# STUDY AREAS



Zaida T. Rodriguez Early  
Education School Playground





Zaida T. Rodriguez Child  
Development Center Playground



MARCH 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







8:11 am PDT - (Sunrise +1 hour)

MARCH 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project



9:00 am PDT





RWDI Project # 1604031  
February 7, 2018



MARCH 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







10:00 am PDT

RWDI Project # 1604031  
February 7, 2018

MARCH 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project




11:00 am PDT

MARCH 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







12:00 pm PDT

MARCH 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







1:00 pm PDT

MARCH 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







2:00 pm PDT

MARCH 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







3:00 pm PDT

MARCH 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







4:00 pm PDT

MARCH 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







5:00 pm PDT



MARCH 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







6:00 pm PDT

MARCH 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project




6:23 pm PDT - (Sunset -1 hour)

JUNE 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







6:48 am PDT - (Sunrise +1 hour)

JUNE 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project



7:00 am PDT

JUNE 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project





8:00 am PDT

JUNE 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project






9:00 am PDT

JUNE 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







10:00 am PDT

JUNE 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project





11:00 am PDT



JUNE 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







12:00 pm PDT

RWDI Project # 1604031  
February 7, 2018

JUNE 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







1:00 pm PDT

JUNE 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project




2:00 pm PDT

JUNE 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







3:00 pm PDT

JUNE 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project





4:00 pm PDT

JUNE 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







5:00 pm PDT

JUNE 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







6:00 pm PDT

JUNE 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project





7:00 pm PDT



JUNE 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







7:35 pm PDT - (Sunset -1 hour)

SEPTEMBER 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







7:57 am PDT - (Sunrise +1 hour)

SEPTEMBER 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project




8:00 am PDT

SEPTEMBER 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







9:00 am PDT

RWDI Project # 1604031  
February 7, 2018

SEPTEMBER 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







10:00 am PDT

SEPTEMBER 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project




11:00 am PDT

RWDI Project # 1604031  
February 7, 2018

SEPTEMBER 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







12:00 pm PDT

RWDI Project # 1604031  
February 7, 2018

SEPTEMBER 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project





1:00 pm PDT



SEPTEMBER 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







2:00 pm PDT

SEPTEMBER 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







3:00 pm PDT

SEPTEMBER 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project






4:00 pm PDT

SEPTEMBER 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







5:00 pm PDT

SEPTEMBER 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







6:08 pm PDT - (Sunset -1 hour)

SEPTEMBER 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







6:08 pm PDT - (Sunset -1 hour)

DECEMBER 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







8:22 am PST - (Sunrise +1 hour)

DECEMBER 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project





9:00 am PST



DECEMBER 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project





10:00 am PST

RWDI Project # 1604031  
February 7, 2018

DECEMBER 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project




11:00 am PST

DECEMBER 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project




12:00 pm PST

RWDI Project # 1604031  
February 7, 2018

DECEMBER 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project







1:00 pm PST

DECEMBER 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project




2:00 pm PST

DECEMBER 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project






3:00 pm PST

DECEMBER 21



**Legend**

-  Studied Spaces
-  Net New Shadow
-  Existing Shadow
-  Proposed Project



3:55 pm PST - (Sunset -1 hour)

## **Exhibit B**





## MEMORANDUM

Date: June 5, 2018  
To: Manoj Madhavan, San Francisco Planning Department  
From: Jesse Cohn & Eric Womeldorff, Fehr & Peers  
Subject: **2918 Mission Transportation Analysis**

SF18-0978

---

### Introduction

On November 30, 2017, the San Francisco Planning Commission approved the Community Plan Evaluation for the proposed development at 2918 Mission Street (Proposed Project). An appeal was filed by Calle 24 Latino Cultural District Council on January 1, 2018, based on concerns that the Eastern Neighborhoods Area Plan and subsequent 2008 EIR analysis are outdated, and that their determination of limited impacts to transit, traffic, and circulation is no longer accurate.

This memo summarizes new data collection in the Mission District, including vehicle volumes at key intersections in the neighborhood, and transit reliability as a result of new development. These observations reveal the following key findings:

- Intersection volumes at key locations in the Mission District do not exceed forecasts from the Eastern Neighborhoods Area Plan EIR, and in some cases are lower than the 2000 baseline.
- Transit speeds have improved along Mission Street in the past 10 years.

### Project Description

The Proposed Project Site, 2918 Mission Street, is located on the west side of Mission Street between 25<sup>th</sup> and 26<sup>th</sup> Streets in the Mission Street Neighborhood Commercial Transit (NCT) Zoning District. The property is currently developed with a single-story, 5,200 square foot commercial building (a laundromat) and an associated surface parking lot. In total, the site is approximately 11,653 square feet. With the exception of two spaces that are rented to the adjacent bank, all spaces in the surface parking lot are for customers of the laundromat (and there is a sign posting this parking restriction). Laundromat staff watch for people using the parking lot and not visiting the laundromat, and warn them if observed.



The Proposed Project would include the demolition of the existing building and new construction of an eight-story, 67,314 square foot mixed-use building with 75 dwelling units and 6,724 square feet of ground floor retail. The Proposed Project would not include any off-street vehicle parking, but would include 76 Class I bicycle parking spaces and 14 Class 2 bicycle parking spaces. The dwelling unit mix includes 18 studios, 27 one-bedroom units, and 30 two-bedroom units. The Proposed Project would include 9,046 square feet of usable open space.

Buildings immediately adjacent to the project site are the Zaida T. Rodriguez Early Education School to the south and to the west across Osage Alley, Chase Bank to the north at the corner of Mission and 25th Street, and a mix of two- and three-story buildings used for a variety of uses including automobile repair, retail stores, residences, restaurants, and the Instituto Familiar de la Raza across Mission Street to the east.

The project site is well served by public transportation. The Bay Area Rapid Transit (BART) 24th Street station is located one block north of the project site. Several MUNI bus lines including the 14-Mission, 14R-Mission Rapid (both 14 Muni lines run in their own exclusive travel lane), 48-Quintara/24th Street, 49-Van Ness/Mission and the 67-Bernal Heights are within one quarter mile.

## Intersection Volumes

The Eastern Neighborhoods EIR analyzed several intersections within the Mission District. Fehr & Peers worked with the Planning Department to select three of these intersections and conduct one-day PM peak hour turning movement counts in April 2018: Potrero Street/23<sup>rd</sup> Street, Mission Street/24<sup>th</sup> Street, and South Van Ness Avenue/26<sup>th</sup> Street. These counts were then compared to the Eastern Neighborhoods EIR expected level of traffic growth based on the total change in housing units constructed in the Mission from 2011 to 2018. In addition, traffic counts were compared to observed traffic volumes collected in 2015 included in the 1515 South Van Ness Avenue Transportation Impact Study (TIS).

The Eastern Neighborhoods PEIR included growth forecasts under Options A, B, C, and the B/C preferred alternative. The Preferred Alternative included fewer estimated households than the maximum analyzed under Option C. These forecasts represented projections of likely, anticipated development through the year 2025, using best available information at the time that the PEIR was certified, rather than “caps” on permissible development or estimates of maximum capacity at buildout under the rezoning. The Eastern Neighborhoods PEIR projected that implementation of the Mission Area Plan could result in an increase of up to 2,054 net dwelling units and 700,000 to 3,500,000 sf of non-residential space (excluding PDR loss).



Overall, the current level of reported development from the Eastern Neighborhoods Monitoring Report was estimated to represent around 65 percent of background, no project growth (based on progress from 2000 baseline year to 2018 relative to the 2025 projections), and around 10 percent complete<sup>1</sup> for the growth projected under EIR Option C. While the preferred alternative does not precisely match any of the three options set forth in the EIR, Fehr & Peers selected Option C for comparison purposes as it showed the highest level of residential growth in the Mission.

**Table 1** shows a summary of observed and estimated traffic volumes from the Eastern Neighborhoods EIR for the intersections analyzed. On average, observed traffic volumes in 2018 were around 25 percent lower than expected based on the Eastern Neighborhoods EIR and the percentage of estimated development complete<sup>2</sup>. At two of the three intersections counted, total traffic volume had in fact decreased from the 2000 baseline count data. The observed traffic counts include only one day of count data, which introduces a chance that the observations are not representative; however, traffic volumes at urban intersections tend to be fairly stable with respect to the amount of peak hour traffic. Overall, this reflects that the Eastern Neighborhoods TIS and EIR took a fairly conservative approach to modeling the levels of local traffic generated by the changes in land use allowed by the Plan.

Table 1. Comparison of Observed and Estimated Volumes (Eastern Neighborhoods EIR)

Intersection	2000 Baseline Volume	2025 Option C Projected Volume	2018 Projected Volume <sup>1</sup>	2018 Observed Volume	Difference (2018 Observed – 2018 Projected)	% Diff.
Potrero / 23 <sup>rd</sup>	2,663	2,837	2,680	2,546	-134	-5%
Mission / 24 <sup>th</sup>	1,615	1,935	1,647	1,142	-505	-44%

1. 2018 to date projected volume is derived from the 2000 baseline volume plus 10 percent of Option C added project trips. Actual completed development analyzed in Option C amounts to 25% of studied residential units, and 4% of non-residential new development.

Source: Fehr & Peers, 2018; Eastern Neighborhoods TIS, 2008

**Table 2** shows a summary of observed traffic volumes from the 1515 South Van Ness TIS compared with these 2018 traffic counts for the intersections analyzed. On average, observed traffic volumes in 2018 were around 8 percent lower than the observed volumes in the 1515 South Van Ness TIS. At Mission Street/24<sup>th</sup> Street, total traffic volume decreased from the 2015 observed volumes. At 26<sup>th</sup> Street and South Van Ness, there was an increase in traffic volume traveling northbound and

<sup>1</sup> Estimate of 10 percent complete includes 25 percent of estimated increase in housing units and 4 percent of estimated increase in non-residential square footage from the 2000 baseline. This does not include the reduction in total PDR square footage.

<sup>2</sup> Projected traffic volumes for EIR Option A (at 30% complete) and the No Project scenario were similar to those for Option C, and were on average higher than the observed 2016 traffic volumes.



southbound. This likely reflects shifts from other north/south streets such as Mission Street that have seen changes in their roadway configurations with the installation of bus-only lanes in 2015.

Table 2. Comparison of Observed Volumes (1515 South Van Ness TIS)

Intersection	2015 Observed Volume	2018 Observed Volume	Net Difference (2018 Observed – 2015 Observed)	% Difference
Mission / 24 <sup>th</sup>	1,476	1,142	-334	-29%
S. Van Ness / 26 <sup>th</sup>	1,534	1,759	225	13%

Source: Fehr & Peers, 2018; 1515 South Van Ness TIS, 2017

## Transit Effects

Three bus routes run along Mission Street past the Proposed Project Site: 14 Mission, 14R Mission Rapid, and 49 Van Ness/Mission. Increased development and density throughout the Mission District has resulted in an increase in demand for transit in the neighborhood, and the 2918 Mission Street appeal cites concerns about transit reliability. In addition, the increased prevalence of on-demand transportation, such as Uber and Lyft, has resulted in an increase in passenger loading. When curb space is unavailable, loading and unloading vehicles may stand in the transit-only lane or travel lane, potentially delaying transit vehicles.

**Table 3** shows transit speeds between 2007 and 2017, along Mission Street between 14<sup>th</sup> Street and Cesar Chavez. Transit travel speeds have generally increased. Speeds increased from 7.8 miles per hour (mph) to 9.3 mph (19 percent) in the southbound direction during the AM peak period, and from 5.2 mph to 7.3 mph (35 percent) in the southbound direction during the PM peak period. Transit travel speeds decreased from 8.5 mph to 8.1 (5 percent) in the northbound direction during the AM peak period between 2011 and 2017, and increased from 7.1 mph to 7.9 mph (11 percent) in the northbound direction during the PM peak period. It should be noted that transit-only lanes were implemented on Mission Street during this time (in 2015), which has contributed to the increase in speed noted between 2015 and 2017.

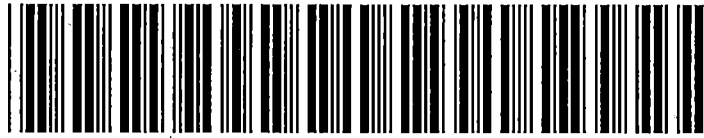


Table 3. Transit Travel Speeds Along Mission Street (14<sup>th</sup> Street to Cesar Chavez)

Time Period	AM Peak Period		PM Peak Period	
	Southbound	Northbound	Southbound	Northbound
2007	7.8	N/A	5.4	7.1
2009	8.4	N/A	6.6	7.1
2011	8.8	8.5	6.9	7
2013	8.6	8.3	6.6	6.8
2015	8.9	8.3	6.7	6.8
2017	9.3	8.1	7.3	7.9
% Change (2007-2017)	19%	-5%	35%	11%

Source: SFCTA Congestion Management Program, 2018

## **Exhibit C**



**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN FRANCISCO**

**Document Scanning Lead Sheet**

Oct-31-2017 2:11 pm

Case Number: CPF-16-515238

Filing Date: Oct-31-2017 2:11

Filed by: AUDREY HUIE

Image: 06086487

ORDER

SAVE THE HILL AND GROW POTRERO RESPONSIBLY VS. CITY AND COUNTY  
OF SAN FRANCISCO ET AL (CEQA Case)

001C06086487

**Instructions:**

Please place this sheet on top of the document to be scanned.

**FILED**

Superior Court of California  
County of San Francisco

OCT 31 2017

CLERK OF THE COURT

BY: Audrey [Signature]  
Deputy Clerk

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF SAN FRANCISCO**

SAVE THE HILL AND GROW POTRERO  
RESPONSIBLY, unincorporated associations;

Petitioners,

v.

CITY AND COUNTY OF SAN  
FRANCISCO, its PLANNING  
COMMISSION and BOARD OF  
SUPERVISORS, and DOES 1-5;

Respondents.

POTRERO PARTNERS LLC, PRADO  
GROUP INC., WALDEN DEVELOPMENT,  
LLC, DAN SAFIER, JOSH SMITH, and  
DOES 6-10;

Real Parties in Interest.

Case No. CPF-16-515238

**ORDER DENYING PETITION FOR WRIT  
OF MANDAMUS**

California Environmental Quality Act (CEQA)

Hearing date: May 12, 2017

Time: 9:30 a.m.

Dept. 503: Hon. Cynthia Ming-mei Lee

Petition filed: August 26, 2016



1 This matter was heard at 9:30 a.m. on May 12, 2017, in Department 503 of the San Francisco  
2 County Superior Court before the Honorable Cynthia Ming-mei Lee. Rachel Mansfield-Howlett  
3 appeared for Petitioners Save the Hill and Grow Potrero Responsibly (“Petitioners”). Whitman F.  
4 Manley, L. Elizabeth Sarine and Steven L. Vettel appeared on behalf of Real Parties in Interest Potrero  
5 Partners, et al. (“Real Parties”). Andrea Ruiz-Esquide and Christopher Tom appeared on behalf of  
6 Respondents City and County of San Francisco, et al. (“City” or “Respondents”).

7 In this writ of mandamus proceeding, Petitioners challenge Respondents’ environmental review  
8 and approval of the 901 16th Street and 1200 17th Street mixed-use residential project (“Project”)  
9 proposed by Real Parties on the grounds that Respondents failed to comply with the California  
10 Environmental Quality Act (“CEQA”) (Pub. Resources Code, § 21000 et seq.).

11 The Court has reviewed the record of proceedings certified by the City and lodged with the  
12 Court. The Court has also reviewed the briefs filed by the parties and considered the arguments of  
13 counsel on May 12, 2017. The Court finds and rules as follows.

14 **I. REQUESTS FOR JUDICIAL NOTICE**

15 Petitioners filed a Request for Judicial Notice in Support of Opening Brief with respect to  
16 Exhibit A (Objective 3 of the San Francisco General Plan Urban Design) and Exhibit B (Priority Policy  
17 2 and 8 of the San Francisco General Plan). The City and Real Parties did not oppose the request. The  
18 request is therefore granted.

19 Respondents and Real Parties filed a Request for Judicial Notice in Support of Opposition Brief  
20 with respect to Exhibit A (City Charter, § 4.106; City Admin. Code, §§ 10E.2, 31.16; City Planning  
21 Code, §§ 134, 135, 136, 145.1, 152.1, 260, 270.1, 329, 803.3) and Exhibit C (City’s zoning map  
22 HT08). Petitioners did not oppose the request with respect to Exhibits A and C. The request to take  
23 judicial notice of Exhibits A and C is therefore granted.

24 Respondents and Real Parties also filed a Request for Judicial Notice in Support of Opposition  
25 Brief with respect to Exhibit B. This exhibit consists of excerpts from the 2011-2015 Eastern  
26 Neighborhoods Monitoring Report prepared by the City. Petitioners oppose this request. The 2011-  
27 2015 Eastern Neighborhoods Monitoring Report is an official act of the City within the meaning of  
28 Evidence Code section 452, subdivision (c), which authorizes judicial notice of “[o]fficial acts of the

1 legislative, executive, and judicial departments of the United States and of any state of the United  
2 States.” The City and County of San Francisco is a “legal subdivision” or “legal department” of the  
3 State of California. (See Cal. Const., art. XI, § 1 [“The State is divided into counties which are legal  
4 subdivisions of the State”]; *Otis v. City of Los Angeles* (1942) 52 Cal.App.2d 605, 611-612; *Watson v.*  
5 *Los Altos School Dist., Santa Clara County* (1957) 149 Cal.App.2d 768, 772.) Therefore, official acts  
6 of the City are judicially noticeable acts under section 452, subdivision (c). (See, e.g., *Fontenot v. Wells*  
7 *Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 262-267; *Washington v. County of Contra Costa* (1995)  
8 38 Cal.App.4th 890, 895, 897, 901; *Pan Pacific Properties, Inc. v. County of Santa Cruz* (1978) 81  
9 Cal.App.3d 244, 255, fn. 2.)

10         Petitioners oppose the request for judicial notice because Exhibit B post-dates the date that the  
11 City approved the Project and therefore this exhibit is not part of the City’s record of proceedings and  
12 was not before City decision-makers, citing *Western States Petroleum Assn. v. Superior Court* (1995) 9  
13 Cal.4th 559 (“*WSPA*”). The City approved the Project in July 2016. The monitoring report was issued  
14 two months thereafter, in September 2016. Although some of the same data may appear within other  
15 parts of the administrative record, it was not considered by the City and is not properly part of the  
16 administrative record to be reviewed by this Court in this writ proceeding. For these reasons, the Court  
17 denies the request by the City to take judicial notice of Exhibit B.

## 18     **II. DISCUSSION**

19         Petitioners challenge the City’s decision to approve the Project, alleging that the City has not  
20 complied with CEQA. Petitioners challenge the following aspects of the City’s CEQA compliance  
21 efforts: (1) the City’s findings rejecting the Metal Shed Reuse Alternative as infeasible; (2) the City’s  
22 reliance on a Community Plan Exemption under Public Resources Code section 20183.3 to streamline  
23 the CEQA analysis of the Project; (3) the City’s analysis of cumulative impacts, particularly with  
24 respect to traffic; (4) the City’s analysis of the project’s consistency with land-use policies; (5) the  
25 City’s conclusion that the Project would not result in significant open space, recreation, or shadow  
26 impacts; (6) the City’s approach towards the Project’s aesthetic impacts; and (7) the responses to  
27 comments set forth in the City’s Final Environmental Impact Report (“EIR”). The City and Real Parties  
28 dispute these claims. The City and Real Parties also argue that Petitioners failed to exhaust their

1 administrative remedies with respect to their claim concerning the City's findings on project  
2 alternatives. Each of these claims is addressed below.

3 **A. Statement of Facts**

4 In 2007, the City proposed the Eastern Neighborhoods Rezoning and Area Plans Project  
5 ("Eastern Neighborhoods Plan"). (AR 8327.) The goal was to permit housing development in areas that  
6 were zoned for industrial use, while protecting an adequate supply of land and buildings for production  
7 distribution and repair (PDR) employment and businesses. (AR 8404.) This resulted in plans covering  
8 four neighborhoods: Central Waterfront, Showplace Square/Potrero Hill ("Potrero"), the Mission, and  
9 East South of Market. (AR 8413-8430.) The Eastern Neighborhoods Plan was an amendment to the  
10 existing San Francisco General Plan. (AR1036.)

11 The 2007 Eastern Neighborhoods Plan EIR ("Plan EIR") analyzed three rezoning options:  
12 Options A, B, and C for each neighborhood. (AR 8413-8414, 2886.) The options varied by the degree  
13 to which they would permit land then zoned for industrial uses to be converted to residential and  
14 mixed-use districts, with Option A permitting the least conversion and Option C permitting the greatest.  
15 (AR 8413-8414.) Under all three options, most of the existing Heavy Industrial (M-2) and Light  
16 Industrial (M-1) use districts would be replaced with either mixed-use residential districts (MUR), new  
17 Urban Mixed-Use (UMU) districts that would permit residential and PDR uses, or new districts  
18 permitting only PDR uses. (AR 8414.)

19 The 2008 Plan Final EIR included a "Preferred Project" based on public input. (AR 9111.) The  
20 Preferred Project resembled the zoning in Option B with elements of Option C. (AR 9111, 1036.) In the  
21 Showplace Square/Potrero area, the Preferred Project changed the proposed use district on seven large  
22 parcels from PDR to UMU. (AR 9118.) It allocated 84.1 acres for mixed use and 71.5 acres for PDR in  
23 that area. (AR 9121.)

24 In August 2008, the City's Planning Commission ("Commission") certified the Plan EIR and  
25 recommended approval of the Preferred Project and four sub-area plans. (AR 2886-2889.) The  
26 Commission also adopted CEQA Findings and a Statement of Overriding Considerations for the Plan's  
27 significant and unavoidable impacts, including transportation/circulation impacts and cumulative loss  
28 of PDR. (AR 2890-2922.) In December 2008, the City's Board of Supervisors incorporated the

1 Commission's CEQA Findings and approved the area plans, rezoning and Planning Code amendments.  
2 (AR 816-817, 9377-9470.)

3 The project at issue here ("Project") is a mixed use project at 901 16th Street and 1200 17th  
4 Street, within the Showplace Square/Potrero Area of the Eastern Neighborhoods Area Plan. As part of  
5 the 2008 Area Plans approval, the City rezoned the Project site to an UMU district and amended the  
6 site's height and bulk districts to 68 feet along 16th Street and 48 feet on 17th Street. (AR 1036.) The  
7 UMU zoning district "encourage[s] transitional development patterns between business and  
8 employment districts and predominantly residential neighborhoods" with a mix of housing, retail, and  
9 commercial uses permitted. (AR 8415-8416, 35, 37.)

10 The Project site currently contains two metal shed industrial warehouse buildings, a brick office  
11 building, modular office structure and parking lots. (AR 822-827, 825, 957-961.) Surrounding uses  
12 include educational facilities, light industry, office space, residential uses, retail, warehouses, and a  
13 park. (AR 1044.)

14 In May 2012, Real Parties proposed the Project (AR 12397-12409) and revised the application  
15 in 2014. (AR 13422-13501.) The Project proposes to demolish all existing buildings except the brick  
16 office building (AR 828) and replace them with two mixed-use buildings. The north building at 901  
17 16th Street is six stories and 68 feet in height and will have 260 dwelling units; the south building at  
18 1200 17th Street is four stories and 48 feet in height and will have 135 dwelling units. (AR 35-36.)  
19 There will be a total of 395 residential units, 24,486 square feet ("sf") of retail space, and 388 off-street  
20 parking spaces. (AR 35, 823, 2772.) The buildings include rooftop elements like mechanical and stair  
21 penthouses that extend above the maximum building height, occupying roughly 12% of the 16th Street  
22 building's roof and 3.8% of the 17th Street building's roof, as allowed by Planning Code section  
23 260(b). (AR 829, 832-834, 839, 843; see Respondents' RJN, Exh. A, pp. 58-65.) The Project also  
24 includes 14,669 sf of public open space (including a 30- to 40-ft wide publicly accessible pedestrian  
25 alley), 33,149 sf of common open space for residents, and 3,114 sf of private open space. (AR 2772,  
26 829-830, 1060.) Total open space will be 50,932 sf. (AR 867-868, 2819-2820; see Planning Code, §  
27 135 [Respondents' RJN, Exh. A, pp. 28-37].)

1 The Project is generally consistent with applicable density, uses, height, open space, and other  
2 Planning and Zoning Code standards. (AR 864.) The Planning Commission approved the applicant's  
3 request for six minor design exceptions and waivers in its Large Project Authorization ("LPA")  
4 application as allowed under the City's Code. (AR 864, 35 [citing Planning Code §§ 134, 136, 145.1,  
5 152.1, 270.1, 329(D)(10), & 803.3(B)(1)(C)]; see Respondents' RJN, Exh. A, pp. 18-57, 65-78.)

6 The City prepared an EIR to analyze the Project's impacts. In performing this review, the City  
7 determined that since the Project is a mixed-use, residential project on an infill site, visual and parking  
8 impacts are not subject to CEQA review. (Pub. Resources Code, § 21099; AR 819.)

9 CEQA mandates that projects consistent with the development densities established by existing  
10 zoning, general plan, or community plan policies for which an EIR was certified require a limited or  
11 "streamlined" review by the lead agency. (Pub. Resources Code, § 21083.3; Cal. Code Regs., title 14,  
12 § 15000 et seq. ("CEQA Guidelines"), § 15183.) The environmental review is limited to effects upon  
13 the environment which are peculiar to the parcel or to the project and which were not addressed as  
14 significant effects in the prior EIR, or which substantial new information shows will be more  
15 significant than described in the prior EIR. (*Id.*) Relying on the 2008 Plan EIR, the City found that the  
16 Project qualifies for streamlined review under these provisions. (AR 819, 1034-1038, 13774-13775,  
17 15204-15206.)

18 In February 2015, the City completed and circulated for public review a Notice of Preparation  
19 and Community Plan Exemption ("CPE") Checklist. (AR 1034-1038, 1040-1109.) The City concluded  
20 that transportation and circulation and historic architectural resources impacts required further analysis  
21 in a focused, project-specific EIR. (AR 14-15, 1035, 1037.) The CPE Checklist determined that the  
22 Project would not result in new or more severe environmental impacts than those analyzed in the Plan  
23 EIR for all other categories: land use and land use planning; population and housing; paleontological  
24 and archeological resources; noise; air quality; greenhouse gas emissions; wind and shadow; recreation;  
25 utilities and service systems; public services; biological resources; geology and soils; hydrology and  
26 water quality; hazards and hazardous materials; mineral and energy resources; and agriculture and  
27 forest resources. (AR 1064-1101, 2772.) The CPE Checklist addressed loss of PDR uses in the land use  
28 section, noting that the Project would contribute to the significant and unavoidable impact related to

1 cumulative loss of PDR uses previously identified in the Plan EIR. (AR 1064-1065, 784-785.) The CPE  
2 Checklist incorporated seven mitigation measures from the Plan EIR to reduce impacts related to  
3 archeological resources, air quality, noise, and hazardous materials. (AR 1101-1109, 2772.)

4 In August 2015, the City circulated the Project's Draft EIR ("DEIR") for public review and  
5 comment. (AR 15907-15917.) The DEIR focused on Transportation and Circulation and Historic  
6 Architectural Resources. (AR 782, 770-1031.) The DEIR described the Project (AR 822-858),  
7 discussed applicable City plans and policies (AR 860-871), analyzed three alternatives (AR 990-1026  
8 [No Project, Reduced Density, and Metal Shed Reuse Alternatives]) and included the CPE Checklist as  
9 an Appendix (AR 1032-1109). The DEIR concluded that Impact TR-2 (significant traffic impacts at 3  
10 of the 14 study intersections) and Impact C-TR-2 (significant cumulative traffic impacts at 4 of the 14  
11 study intersections) would be significant and unavoidable even after mitigation. (AR 920-924, 945-  
12 947.) The other thirteen Transportation and Circulation impacts would be less than significant, either  
13 with no mitigation required or after implementing mitigation. (AR 786-795.) The DEIR incorporated  
14 the Eastern Neighborhoods EIR mitigation measures identified in the CPE and proposed additional  
15 mitigation and improvement measures to reduce transportation impacts. (AR 786-802 [DEIR], 249-271  
16 [Mitigation Monitoring and Reporting Program].) The DEIR determined that only the brick office  
17 building qualified as a historic resource (AR 791-895) and that the Project's impact would not be  
18 significant because the brick office building will be preserved and rehabilitated. (AR 977-978.)

19 The DEIR included project elevations and visual modeling, as well as an assessment of parking  
20 demand. (AR 823-857 [aesthetics], 902-904 [parking conditions], 1063.) The DEIR stated that  
21 information provided about aesthetics and parking "does not relate to the impact significance  
22 determinations in the EIR." (AR 819.)

23 On October 1, 2015, the Planning Commission held a public hearing to receive comments on  
24 the DEIR. (Supplemental Administrative Record ("SAR") 18079-18090, 18085-18086.) The Planning  
25 Department received written comments through October 4, 2015. (AR 284.)

26 In April 2016, the City released the Project's Final EIR ("FEIR"), including responses to  
27 comments ("RTCs") and revisions to the DEIR in light of Senate Bill 743 and Commission Resolution  
28 19579 regarding the use of vehicle miles traveled ("VMT") – instead of Level of Service ("LOS") – as

1 the appropriate metric to assess transportation impacts. (AR 272-495, 287-288, 489-495 [revisions to  
2 DEIR].) The RTC document was organized by topic area (e.g., Transportation, Alternatives, and Land  
3 Use), with excerpts of comments preceding the responses. (AR 278, 313-488.)

4 On May 12, 2016, the Commission held a public hearing, certified the EIR and approved the  
5 Project in separate motions. (AR 2924-2933 [agenda], 3569-3589 [minutes].) The Commission certified  
6 the Project EIR in a motion with its certification findings (AR 6-8 [Motion No. 19643]). Immediately  
7 thereafter, the Commission adopted CEQA Findings, including findings related to the feasibility of  
8 alternatives (AR 9-34 [Motion No. 19644]) and approved the Project by granting the Large Project  
9 Authorization in a motion with its LPA findings (AR 35-79 [Motion No. 19645]). No party, including  
10 Petitioners, filed an appeal of the LPA approval and its CEQA Findings to the City's Board of Appeals  
11 within the 15-day appeal period as set forth in Planning Code Section 329(e)(5). (AR 2771).

12 On June 10, 2016, Petitioners filed an appeal to the Board of Supervisors within the 30-day  
13 appeal period for EIR certification set forth in San Francisco Administrative Code section 31.16(c)(2).  
14 (AR 1110-1111, 2770; see Respondents' RJN, Exh. A, pp. 12-17.) On July 18, 2016, the Planning  
15 Department issued a letter to the Board of Supervisors regarding Petitioners' appeal, in which it  
16 recommended that the Board: (1) uphold the Planning Commission's certification of the EIR, and (2)  
17 reject the purported appeal of the Commission's CEQA Findings because such findings are appealable  
18 to the Board of Appeals as part of the LPA approval and not to the Board of Supervisors. Appeals of an  
19 LPA are required to be made to the Board of Appeals within fifteen (15) days. (AR 2770-2873, 2771.)  
20 In the event the Board of Supervisors entertained the merits of the purported CEQA Findings appeal,  
21 Planning staff's memorandum also addressed the substance of those claims. (AR 2814-15.) On July 26,  
22 2016, the Board of Supervisors denied the appeal and affirmed the Planning Commission's certification  
23 of the Project's FEIR at a public hearing. (AR 217-222 [Motion M16-097], 3810 & 3812 [minutes].)  
24 On July 29, 2016, the City filed a Notice of Determination. (AR 1-5.) Petitioners filed their petition for  
25 writ of mandamus on August 26, 2016.

#### 26 **B. Standard of Review**

27 The standard of review in CEQA actions is prejudicial abuse of discretion if it "is established  
28 that the agency has not proceeded in a manner required by law or if the determination or decision is not

1 supported by substantial evidence.” (Pub. Resources Code, § 21168; *Laurel Heights Improvement Assn.*  
2 *v. Regents of Univ. of California* (1988) 47 Cal.3d 376, 392 (*Laurel Heights I*.) The Court “adjust[s] its  
3 scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of  
4 improper procedure or a dispute over the facts.” (*Vineyard Area Citizens for Responsible Growth v.*  
5 *City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.) In CEQA actions, claims of improper procedure  
6 are reviewed de novo and disputes over facts and conclusions are reviewed under the substantial  
7 evidence standard with “greater deference to the agency’s substantive factual conclusions. In reviewing  
8 for substantial evidence, the reviewing court ‘may not set aside an agency’s approval of an EIR on the  
9 ground that an opposite conclusion would have been equally or more reasonable,’ for, on factual  
10 questions, [the Court’s] task ‘is not to weigh conflicting evidence and determine who has the better  
11 argument.’ [Citation.]” (*Ibid.*)

12 The parties dispute which standard of review applies. The proper standard of review must be  
13 determined in the context of each of Petitioners’ claims, and whether that claim focuses on improper  
14 procedures or factual determinations. This issue is therefore addressed in the discussion of each of  
15 Petitioners’ claims.

16 Petitioners have the burden of proof. (*Gilroy Citizens for Responsible Planning v. City of Gilroy*  
17 (2006) 140 Cal.App.4th 911, 918-919.) To meet this burden, Petitioners must show either that the City  
18 failed to proceed in the manner required by law or that its conclusions are not supported by substantial  
19 evidence. (*Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227  
20 Cal.App.4th 1036, 1064 (*Treasure Island*.) Petitioners must also show prejudice. (Pub. Resources  
21 Code, § 21005, subd. (b); *Neighbors for Smart Rail v. Exposition Metro Line Const. Auth.* (2013) 57  
22 Cal.4th 439, 463; *Rialto Citizens for Reasonable Growth v. City of Rialto* (2012) 208 Cal.App.4th 899,  
23 925, 926-927 (*Rialto Citizens*.)

### 24 **C. City’s CEQA Findings on Metal Shed Reuse Alternative**

25 In approving the Project, the Planning Commission adopted CEQA findings rejecting the Metal  
26 Shed Reuse Alternative as infeasible. Petitioners challenge this finding and argue the Board of  
27 Supervisors failed to fully consider their CEQA appeal. The City defends its actions on two grounds:  
28



1 (a) Petitioners did not exhaust their administrative remedies with respect to this claim; and (b)  
2 substantial evidence supports the City's findings.

3 **1. Exhaustion of Administrative Remedies**

4 A petitioner must exhaust its administrative remedies prior to seeking judicial review of an  
5 agency's decision. The exhaustion requirement is a jurisdictional prerequisite. Whether a petitioner has  
6 exhausted its remedies is a question of law. Petitioners have the burden of proof to show they exhausted  
7 their remedies. (*Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 291; *North Coast Rivers*  
8 *Alliance v. Marin Municipal Water Dist. Board of Directors* (2013) 216 Cal.App.4th 614, 624 (*North*  
9 *Coast*); *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 536.)

10 In this case, the Planning Commission certified the completeness and accuracy of the  
11 information contained in the Project EIR. (AR 6-8.) Having certified the EIR, the Commission then  
12 adopted CEQA Findings and approved the Project by granting the Large Project Authorization in May  
13 2016. (AR 9-33 [CEQA Findings], 35-67 [approving LPA]), 36 [LPA reference to CEQA Findings],  
14 3495-3496 [transcript].) This approach is consistent with CEQA. (Pub. Resources Code, § 21082.1,  
15 subd. (c); CEQA Guidelines § 15090, subd. (a) [EIR certification]; Pub. Resources Code, § 21081;  
16 CEQA Guidelines, § 15091 [requirement to adopt CEQA findings]; CEQA Guidelines, § 15092 ["in  
17 conjunction with making findings under Section 15091," agency may consider whether to approve  
18 project].) The City filed its Notice of Determination on July 29, 2016. (AR 1-2.)

19 Petitioners appealed the Planning Commission's decision to certify the EIR to the Board of  
20 Supervisors. (AR 1110-1111.) The right to appeal the certification resolution is consistent with the  
21 City's Administrative Code and with CEQA. (S.F. Administrative Code, § 31.16, subd. (c); Pub.  
22 Resources Code, § 21151, subd. (c).) Section 31.16(c)(3) of the City's Administrative Code specifies  
23 that "[t]he grounds for appeal of an EIR shall be limited to whether the EIR complies with CEQA,  
24 including whether it is adequate, accurate and objective, sufficient as an informational document,  
25 correct in its conclusions, and reflects the independent judgment and analysis of the City and whether  
26 the Planning Commission certification findings are correct." The Board of Supervisors considered the  
27 appeal and ultimately upheld the Planning Commission's decision to certify the EIR. (AR 217-222  
28 [Motion M16-097], 3810, 3812 [minutes].)

1 Petitioners did not separately appeal the Planning Commission’s approval of the LPA and  
2 adoption of the CEQA Findings, including the finding that the Metal Shed Reuse Alternative was  
3 infeasible. The Planning Commission’s decision to approve an LPA is properly appealable to the Board  
4 of Appeals, not to the Board of Supervisors. (AR 66, 2770-2873, 2771; S.F. Planning Code, § 329(e)(5)  
5 [Respondents’ RJN, Exh. A, pp. 71-75]; see also S.F. Charter Section 4.106(b) [Board of Appeals has  
6 jurisdiction to hear permit appeals – see Respondents’ RJN, Exh. A, pp. 3-4].) No party appealed the  
7 LPA and its incorporated CEQA Findings to the Board of Appeals.

8 Section 31.16 of the Administrative Code, relied upon by Petitioners, demonstrates that it  
9 applies only to the appeal of EIR certification. (S.F. Administrative Code, § 31.16, subd. (a) [EIR  
10 certification is appealable to Board of Supervisors].) EIR certification (Motion 19643) is separate from  
11 the City’s CEQA Findings (Motion 19644) and LPA Approval (Motion 19645). The City’s CEQA  
12 Findings were part of the Project’s approval, appealable to the Board of Appeals. (See, e.g., *California*  
13 *Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 981, 999 (CNPS) [an EIR  
14 assesses whether an alternative is *potentially* feasible, while during the final project approval phase the  
15 decision-making body determines whether it is *actually* feasible]; see also *San Franciscans Upholding*  
16 *the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 689-690 [an EIR  
17 is an informational document that does not include ultimate determinations of economic feasibility,  
18 while the agency bears the responsibility for making feasibility findings].)

19 Petitioners argue that, because the LPA approval would be voided should the Board of  
20 Supervisors uphold their appeal of the EIR certification, the appeal of the EIR certification was also an  
21 appeal of the LPA and its CEQA Findings. Petitioners cite no authority for this argument. To the  
22 contrary, an administrative appeal of one element of a project (the EIR certification appealed to the  
23 Board of Supervisors) does not fulfill the requirement to exhaust a separate administrative remedy (the  
24 CEQA Findings appealable to the Board of Appeals). (*Tahoe Vista Concerned Citizens v. County of*  
25 *Placer* (2008) 81 Cal.App.4th 577, 589 (*Tahoe Vista*) [CEQA petitioner must appeal to “the  
26 administrative body with the ultimate responsibility to approve or disapprove the project”].) The  
27 doctrine of exhaustion of administrative remedies precludes judicial review of those issues, legal and  
28 factual, which were not first presented at the administrative agency level. (*Sierra Club v. City of*

1 *Orange* (2008) 163 Cal. App. 4th 523, 548; *Coalition for Student Action v. City of Fullerton* (1984) 153  
2 Cal. App. 3d 1194, 1197.) To satisfy the doctrine, “the ‘exact issue’ must have been presented to the  
3 administrative agency”. (*Sierra Club, supra*, 163 Cal. App. 4th at p. 535.) Petitioners failed to properly  
4 appeal the CEQA findings to the appropriate administrative agency. Petitioners’ erroneous appeal to the  
5 Board of Supervisors does not satisfy the burden of exhaustion of administrative remedies. This Court  
6 accordingly lacks jurisdiction to entertain Petitioners’ challenge to City’s CEQA Findings.

7 Petitioners cite statements of one member of the Board of Supervisors to support their argument  
8 that the CEQA Findings should have been before the Board. (AR 3690-3691.) Whether exhaustion has  
9 occurred, however, is a question of law. (*North Coast, supra*, 216 Cal.App.4th at p. 624.) For this  
10 reason, the views of a member of the Board are not relevant to the resolution of this issue. More  
11 significantly, a majority of the Board voted to uphold the Planning Commission’s decision to certify the  
12 EIR. (AR 217-222 [Motion M16-097].)

13 Petitioners did not raise this issue to the administrative body with ultimate or final responsibility  
14 to approve or disapprove the Project – the Board of Appeals. (See *Tahoe Vista, supra*, 81 Cal.App.4th  
15 at p. 594.) Because there has not been a final decision by the Board of Appeals regarding the  
16 sufficiency of the CEQA Findings as they relate to the feasibility of alternatives, this Court lacks  
17 jurisdiction to consider Petitioners’ challenge.

## 18 **2. Adequacy of Findings**

19 However, even if Petitioners had exhausted their administrative remedies, the Court finds that  
20 their challenge fails because substantial evidence supports the Planning Commission’s findings on the  
21 infeasibility of the Metal Shed Reuse Alternative.

22 The DEIR discussed three alternatives: the No Project Alternative, the Reduced Density  
23 Alternative, and the Metal Shed Reuse Alternative. (AR 992-993.) The Metal Shed Reuse Alternative  
24 would retain and reuse all the warehouse buildings on site and then build one new building with  
25 underground parking in the northeast corner of the site. That project would be a mix of 177 residential  
26 units, commercial space, artist workspace and exhibition space. (AR 992, 1008-1021, 410-428, 494-  
27 495.) The Project as proposed would provide 395 residential units, additional neighborhood-serving  
28

1 retail space and incorporate many positive urban design features and add light and air exposure in small  
2 courtyards. (AR30).

3 If an EIR identifies one or more significant effects on the environment that would occur if the  
4 project is approved, which has happened here, the lead agency shall not approve the project unless it  
5 makes written findings that the impacts have been mitigated or that specific economic, legal, social,  
6 technological, or other considerations make the alternatives infeasible. (Pub. Resources Code, § 21081,  
7 subd. (a); CEQA Guidelines, § 15091.) “‘Feasible’ means capable of being accomplished in a  
8 successful manner within a reasonable period of time, taking into account economic, environmental,  
9 social, and technological factors.” (Pub. Resources Code, § 21061.1; see also CEQA Guidelines, §  
10 15364.)

11 Here, the Metal Shed Reuse Alternative was rejected as infeasible. (AR 29-31.) Petitioners  
12 challenge this infeasibility finding.

13 The substantial evidence standard of review applies to this challenge. Infeasibility findings must  
14 be supported by substantial evidence. (*CNPS, supra*, 177 Cal.App.4th at pp. 982, 996-997.)

15 “Substantial evidence” means “enough relevant information and reasonable inferences from this  
16 information that a fair argument can be made to support a conclusion, even though other conclusions  
17 might also be reached.” (CEQA Guidelines, § 15384, subd. (a).) “Substantial evidence shall include  
18 facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.” (CEQA  
19 Guidelines, § 15384, subd. (b).) It does not include “[a]rgument, speculation, unsubstantiated opinion  
20 or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic  
21 impacts which do not contribute to or are not caused by physical impacts on the environment.” (CEQA  
22 Guidelines, § 15384, subd. (a).) The findings are entitled to great deference and “‘are presumed correct.  
23 The parties seeking mandamus bear the burden of proving otherwise, and the reviewing court must  
24 resolve reasonable doubts in favor of the administrative findings and determination.’ (Citation.)”  
25 (*CNPS, supra*, 177 Cal.App.4th at p. 997.) Evidence for the findings may be contained anywhere in the  
26 record. (*Id.* at p. 1003.)  
27  
28

1 In approving the Project, the Commission rejected the Metal Shed Reuse Alternative as  
2 infeasible for six reasons listed in the CEQA Findings:

- 3 (1) It would not fulfill the City's "important policy objective . . . to increase the housing stock .  
4 . . . to address a shortage of housing in the City" as well as the proposed Project;
- 5 (2) It would not reduce the significant and unavoidable traffic-related impacts to less than  
6 significant levels;
- 7 (3) It is unnecessary to reuse the metal sheds for PDR uses because the "City adopted  
8 overriding findings that the loss of PDR space and uses within the UMU district was an  
9 unavoidable but acceptable cumulative land use impact" when it adopted the Eastern  
10 Neighborhoods Plan and [Potrero] Area Plan;
- 11 (4) It would not meet to the same degree or be as consistent as the Project with the City's  
12 Strategies to Address Greenhouse Gas Emissions or CEQA and the air district's  
13 requirements for reducing GHG emissions;
- 14 (5) It does not incorporate as many of the positive urban design features as the Project, and it  
15 would provide inferior light and air exposure to residential units; and
- 16 (6) It is economically infeasible because the "reduced unit count would not generate a sufficient  
17 economic return to obtain financing and allow development."

18 (AR 29-31.) Petitioners' challenge focuses on Findings 6 (economic infeasibility) and 2 (traffic).  
19 Findings 1, 3, 4 and 5 address other environmental and policy considerations which are equally  
20 permissible to support findings. (*CNPS, supra*, 177 Cal.App.4th at pp. 1001-1003; *Habitat and*  
21 *Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1307-1308 [three of six  
22 findings sufficient to support statement of overriding considerations] (*Habitat Caretakers*.) Petitioners  
23 did not address these four other findings in their opening brief. The Court concludes that Petitioners'  
24 challenge to these findings is waived. (*City of Lomita v. City of Torrance* (1983) 148 Cal.App.3d 1062,  
25 1069 [in a CEQA case, appellant must cite all relevant record evidence]; *Jacobson v. County of Los*  
26 *Angeles* (1977) 69 Cal.App.3d 374, 388 [failure to address evidence is "tantamount to a concession that  
27 the evidence supports the findings"]; *Inyo Citizens for Better Planning v. Board of Supervisors* (2009)  
28

1 180 Cal.App.4th 1, 14 fn. 2 (*Inyo Citizens*) [new arguments raised in reply brief are waived]; *Habitat*  
2 *Caretakers, supra*, 213 Cal.App.4th at p. 1292 fn. 6 [same].)

3         Petitioners' concession that four of the six findings are supported also supports the  
4 determination that the Metal Shed Reuse Alternative was rejected as infeasible. However, even if the  
5 Court were to consider the two specifically challenged findings, substantial evidence in the record  
6 supports the infeasibility determination.

7         Here, the City found the Metal Shed Reuse Alternative was economically infeasible because the  
8 smaller project of 177 units would result in reduced potential to generate revenue, while the  
9 construction costs per square foot would be higher. The development costs would exceed potential  
10 revenues, resulting in a negative developer return. Financing would not occur, which would mean the  
11 Project would not be built. (AR 30.) The finding discussed a financial feasibility analysis prepared by  
12 Seifel Consulting. This analysis concluded that the Metal Shed Reuse Alternative is not financially  
13 feasible because the development costs exceed potential revenues, resulting in a negative developer  
14 return. It does not meet either of the return thresholds measures by Yield on Cost or Return on Cost.  
15 Given the significant fixed development costs, the lower number of units and the high cost to  
16 rehabilitate the metal sheds negatively impact its financial viability, as there are fewer units over which  
17 to spread the fixed development costs in comparison to the Project and estimated PDR rent levels are  
18 relatively low compared to the rehab costs. (AR 31.)

19         The infeasibility finding is supported by the April 12, 2016, memorandum prepared by Seifel  
20 Consulting presenting a "Financial Feasibility Analysis" for the Project and the EIR alternatives (Seifel  
21 Memo). (AR 2728-2743; see AR 2726, 2731 [Seifel qualifications].) The City independently reviewed  
22 the Seifel Memo in a May 6, 2016, memorandum from staff member Jacob Bintliff. Mr. Bintliff  
23 concurred with Seifel's methodology, analysis, and conclusions. (AR 2726-2727; see AR 3660-3662  
24 [testimony to Board of Supervisors]; AR 2813 [staff report].) The Seifel Memo estimated development  
25 costs and projected revenues for the Project and alternatives, including the Metal Shed Reuse  
26 Alternative. (AR 2737-2738 [tables with comparative analysis of the Project and Alternatives under  
27 both rental-apartments and condominium scenarios], 2740, 2743.) The Seifel Memo's analysis  
28 demonstrated that the Metal Shed Reuse Alternative's projected return fell below both the developer

1 margin and yield on cost thresholds. (AR 2735-2738.) Mr. Bintliff found the methodology and  
2 approach of Seifel was appropriate and consistent with professional standards and concurred that the  
3 low density alternatives considered with the Metal Shed Reuse Alternative were not financially  
4 feasible. (AR 2726)

5         Petitioners argue that the City improperly closed the public comment period before the Planning  
6 Commission discussed the feasibility analysis, the City should have provided the Bintliff memorandum  
7 to Petitioners before the hearing, and the Board of Supervisors should have addressed Petitioners'  
8 feasibility arguments. The record shows, however, that Petitioners reviewed the Seifel Memo. (AR  
9 426-427, 3366-3368, 3370-3373.) Thus, Petitioners have not met their burden of proof to show  
10 prejudice. (Pub. Resources Code, § 21005, subd. (b); *Schenck v. County of Sonoma* (2011) 198  
11 Cal.App.4th 949, 958-960.) In addition, CEQA does not require an agency to provide the public an  
12 opportunity to review and comment on such an analysis; to hold otherwise "would be inconsistent with  
13 the court's recognition that it is the administrative agency, and not the public, that weighs the benefits  
14 of a project against its effects and bears responsibility for the decision to approve or reject the project."  
15 (*Sierra Club v. County of Napa, supra*, 121 Cal.App.4th at p. 1505.) Nor does CEQA require that the  
16 public be afforded an opportunity to debate economic feasibility. Rather, the statute requires only that  
17 "the public to be informed if its officials choose economic feasibility over environmental concerns in  
18 approving a project." (*Id.* at p. 1506.)

19         The cases cited by Petitioners are distinguishable. In *Citizens of Goleta Valley v. Board of*  
20 *Supervisors* (1988) 197 Cal.App.3d 1167, 1180-1181, the Court concluded that the record did not  
21 contain any evidence supporting the county's finding that a smaller hotel would be economically  
22 infeasible because there was no evidence in the record of financial analysis of that alternative in terms  
23 of comparative costs, profit or losses. The record in this case demonstrates a complete financial  
24 analysis of the alternatives. Similarly, in *Burger v. County of Mendocino* (1975) 45 Cal.App.3d 322,  
25 326-327, the record did not contain any "estimate of income or expenditures" for a smaller motel that  
26 the county found to be economically infeasible. In *County of San Diego v. Grossmont-Cuyamaca*  
27 *Community College Dist.* (2006) 141 Cal.App.4th 86, 107-108, the record contained no evidence of the  
28 agency's share of required traffic improvements; as a result, there was "no substantial evidence"

1 supporting the agency's finding rejecting that measure. Distinguishable here, the record contains  
2 substantial evidence of financial and other analysis in reaching a determination of infeasibility. (AR  
3 2726-2743; see AR 2737-2738 [tables].) That Petitioners disagree with this evidence is immaterial.  
4 (*Laurel Heights I, supra*, 47 Cal.3d at pp. 392-393 [deferential substantial evidence standard of  
5 review]; *Sierra Club v. County of Napa, supra*, 121 Cal.App.4th at pp. 1502-1506.) Finally, in  
6 *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, the city "failed to make  
7 a specific finding regarding the infeasibility of the reduced-size alternative" and the record did not  
8 contain any evidence to support such a finding, suggesting that an agency should not uncritically accept  
9 a developer's claim that it would not build a reconfigured project. (*Id.* at pp. 1355-1356.) Here, by  
10 contrast, the City adopted specific findings about the infeasibility of the Metal Shed Reuse Alternative,  
11 cited the Seifel Memo as supporting evidence, independently scrutinized the Seifel Memo (as reflected  
12 in the memorandum prepared by Mr. Bintliff in advance of the Planning Commission hearing), and  
13 relied on additional findings unrelated to economic feasibility. (AR 29-31, 2726-2743.)

14       Petitioners argue that the Seifel Memo should have used the applicant's actual land acquisition  
15 costs from 2006 instead of current land value. In support of this argument, Petitioners cite a non-expert  
16 calculation and analysis of public commenters that purportedly show how the Metal Shed Reuse  
17 Alternative would meet the targeted profit margin identified in the Seifel Memo. (AR 1455-1456; see  
18 also AR 3599-3600.) There is a paucity of evidence to explain how those figures were reached. In  
19 determining feasibility the proper focus is on a "reasonably prudent property owner"; an agency is not  
20 to "discriminat[e] between project applicants for an identical project based upon the financial status of  
21 the applicant." (*Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 599-600  
22 [wealth of project applicant is irrelevant to feasibility analysis]; see AR 3665-3666 [discussion at Board  
23 hearing], 2813 [Seifel Memo appropriately used "a constant land value for all three alternatives" and  
24 focused on whether "a prudent person" would proceed with each alternative]; *Maintain Our Desert*  
25 *Environment v. Town of Apple Valley* (2004) 124 Cal.App.4th 430, 443-445 [identity or financial status  
26 of end user not relevant to CEQA analysis].) The unsupported conclusions cited by Petitioners also do  
27 not take into account carrying and opportunity costs incurred by the applicant after purchasing the site  
28 in 2006. The use of current land value is reasonable in the calculation of current development costs.



1 Seifel's financial analysis was based upon extensive interviews with "members of the real estate  
2 community (including developers, contractors, residential and commercial market specialists and  
3 architects) to obtain current development revenue, cost and financial performance data and  
4 assumptions". (AR 2731) The City had discretion to rely on the analysis by its own experts (Mr.  
5 Bintliff, concurring with Seifel) and to reject the views preferred by Petitioners.

6 Petitioners also argue that the Seifel Memo should have used a \$4/sf monthly rental value for  
7 PDR uses instead of \$2.50/sf. (AR 1456, 1625-1629.) Petitioners cite a publication by SFMade and  
8 CitiCommunity Development (AR1625-1629) in support of a \$4/sf figure, but a review of that  
9 document fails to support any rental rate of PDR. Petitioners failed to demonstrate that the \$2.50/sf  
10 figure cited by Seifel and confirmed by City staff was unsupported by substantial evidence and  
11 unreasonable. (See Pub. Resources Code, § 21080, subd. (e).)

12 Substantial evidence in the record supports the economic infeasibility finding (Finding 6). Even  
13 if Petitioners had submitted evidence to the contrary, this Court's job is not to weigh the evidence.  
14 (*Ebbetts Pass Forest Watch v. California Dept. of Forestry and Fire Protection* (2008) 43 Cal.4th 936,  
15 944 [in reviewing for substantial evidence, the court may not set aside an agency's approval of an EIR  
16 on the ground that an opposite conclusion would have been equally or more reasonable, as the court's  
17 task is not to weigh conflicting evidence and determine who has the better argument].)

18 Petitioners also challenge Finding 2 in which the Planning Commission found that the Metal  
19 Shed Reuse Alternative would not avoid the Project's significant and unavoidable traffic impacts. (AR  
20 29.) The traffic analysis shows that although the Metal Shed Reuse Alternative would generate  
21 somewhat less traffic than the Project, the "significant and unavoidable" traffic impacts caused by the  
22 Project would still occur under the Metal Shed Reuse Alternative. In other words, the Metal Shed  
23 Reuse Alternative would not "solve" any of the Project's significant traffic impacts. (AR 410-413,  
24 1017-1018, 1021.) Although Petitioners submitted their own trip-generation calculations, the trip-  
25 generation characteristics of a project, or of an alternative, are methodological issues for the lead  
26 agency to resolve, subject to review under the deferential "substantial evidence" standard of review.  
27 (*Saltonstall v. City of Sacramento* (2015) 234 Cal.App.4th 549,582-583 [City entitled to rely on the  
28 methodology and conclusions in the EIR because it had the prerogative to resolve conflicting factual

1 conclusions about the extent of traffic congestion that would result]; *Latinos Unidos de Napa v. City of*  
2 *Napa* (2013) 221 Cal.App.4th 192, 206-207 (*Latinos Unidos*) [court’s task is not to weigh conflicting  
3 testimony from competing traffic experts, but to determine whether substantial evidence supports  
4 agency’s conclusions]; CEQA Guidelines, § 15151.) Petitioners argue the City should have used lower  
5 trip generation rates for PDR uses, as the City did in preparing a “nexus” study to calculate traffic  
6 impact fees. The record shows, however, that the City re-calculated the number of trips that this  
7 alternative would generate using a revised trip-generation rate (7 trips/1000 sf) for PDR uses taken  
8 from the TSF Nexus Study study, as Petitioners proposed, and found that the impacts would remain the  
9 same: the Metal Shed Reuse Alternative still contributed to the same traffic impacts. (AR 2807, 412.)  
10 The City developed the Metal Shed Reuse Alternative to retain some PDR uses on the site and to  
11 preserve the metal sheds in the event they were found to be historic; avoiding traffic impacts was not  
12 the focus of this alternative. (AR 1008-1022.) Thus, the analysis shows that the alternative would  
13 generate less traffic, but not enough to avoid any of the project’s significant traffic impacts. Petitioners  
14 complain that the selection of a restaurant and retail space and office composite rates skewed the  
15 analysis. This is, in essence, a challenge to the methodology used for the analysis. Challenges to  
16 methodology are governed by the substantial evidence standard of review. (*Saltonstall, supra*, 234 Cal.  
17 App. 4th at p. 583.)

18 In their reply brief, Petitioners improperly challenge Feasibility Findings 1, 3, 4 and 5 for the  
19 first time. These claims are waived as not having been addressed in their opening brief. (*Habitat*  
20 *Caretakers, supra*, 213 Cal.App.4th at p. 1292 fn. 6.) Petitioners’ arguments are not supported by  
21 citations to the record or to authority and are deemed waived on that ground as well. (Petitioners’ Reply  
22 Brief, pp. 8-10; see *Inyo Citizens, supra*, 180 Cal.App.4th at p. 14.) Failure to discuss the evidence  
23 supporting the other four findings is tantamount to a concession that the evidence supports those four  
24 findings. (*Jacobson, supra*, 69 Cal App. 3d at p. 388 [when a party urges the insufficiency of evidence  
25 to support findings, it is their duty to set forth the evidence which is claimed to be insufficient and  
26 failure to do so will be deemed tantamount to a concession that the evidence supports the findings].)  
27 Under CEQA, an agency may cite policy considerations or design characteristics, such as those cited in  
28 Feasibility Findings 3, 4, and 5, in rejecting an alternative as infeasible. (*CNPS, supra*, 177 Cal.App.4th

1 at pp. 1001-1003 [upholding infeasibility findings based on policy considerations]; *Sierra Club v.*  
2 *Gilroy City Council, supra*, 222 Cal.App.3d at p. 44 [same]; *City of Del Mar, supra*, 133 Cal.App.3d at  
3 p. 417 [same].)

4 Assuming arguendo that Petitioners have not waived their challenges to Findings 1, 3, 4 and 5,  
5 substantial evidence supports these findings. Of significance, Finding 1 focuses on the extent to which  
6 the Project and alternatives will address the City's policy objective of increasing its supply of housing.  
7 The Planning Commission rejected the Metal Shed Reuse Alternative because it would provide only  
8 177 housing units, whereas the Project includes 395 units. The Commission's finding cited the  
9 "important" policy of increasing the supply of housing wherever it is possible to do so. (AR 29.) This  
10 policy objective is derived from the General Plan Housing Element and the Showplace/Potrero Area  
11 Plan. (AR 8407, 9391-9392.) The Metal Shed Reuse Alternative provides significantly fewer units and  
12 therefore does not meet this objective as fully as would the Project. *CNPS, supra*, 177 Cal.App.4th 957  
13 is on point. Thus, even if no other findings were upheld, this would be reason enough to uphold the  
14 Planning Commission's findings concerning the Metal Shed Reuse Alternative. (*Habitat Caretakers,*  
15 *supra*, 213 Cal.App.4th at pp. 1307-1308 [three of six findings sufficient to support statement of  
16 overriding considerations].)

17 Substantial evidence supports Findings 6 (economic infeasibility) and 2 (traffic). Findings 1, 3,  
18 4 and 5 were conceded and/or waived by Petitioners.

19 **D. Use of Community Plan Exemption**

20 Petitioners assert that the Project does not qualify for a Community Plan Exemption ("CPE")  
21 and streamlined EIR because the 2008 Plan EIR is outdated, residential development exceeded the  
22 projected growth analyzed in the Plan EIR, cumulative impacts were not fully analyzed, and the Plan  
23 EIR failed to analyze height and density contemplated by the Project. (Petitioners' Opening Brief, p.  
24 14:17-25.) Petitioners support many of these arguments by citing to passages in the record in which  
25 Petitioners' members, or others in the community, raised objections about traffic congestion, the lack of  
26 adequate transit, and the absence of promised parks or other amenities.

27 CEQA provides for streamlined environmental review for projects consistent with the  
28 development densities established by existing zoning, general plan, or community plan policies for

1 which an EIR was previously certified. (Pub. Resources Code, § 21083.3; CEQA Guidelines, § 15183;  
2 see *Wal-Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal.App.4th 273, 279 (*Wal-Mart*) [upholding  
3 approval of an ordinance based on CEQA Guidelines section 15183], disapproved of on another ground  
4 in *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 295.) In those instances, CEQA review “shall  
5 be limited to effects upon the environment which are peculiar to the parcel or to the project and which  
6 were not addressed as significant effects in the prior environmental impact report, or which substantial  
7 new information shows will be more significant than described in the prior environmental impact  
8 report.” (Pub. Resources Code, § 21083.3, subd. (a).) Where an agency determines that a project *is*  
9 consistent with a plan for which the agency previously certified a program EIR, the CEQA Guidelines  
10 direct the agency to determine whether the program EIR “adequately addressed” each impact. (CEQA  
11 Guidelines, §§ 15063, subd. (b)(1)(C), 15152, subd. (f) [tiering], 15168, subd. (d) [program EIR],  
12 15183 [development densities from plan].)

13 The agency’s conclusions whether the CPE applies to impacts analyses must be upheld if  
14 supported by substantial evidence. (*Latinos Unidos, supra*, 221 Cal.App.4th at pp. 201-202; *Citizens*  
15 *for Responsible Equitable Environmental Devel. v. City of San Diego Redevelopment Agency* (2005)  
16 134 Cal.App.4th 598, 610-611.) The decision of the agency is reviewed under the deferential  
17 substantial evidence standard and the agency’s decision that a project or its circumstances were not  
18 substantial enough to require a supplemental EIR should be given deference, such that reasonable  
19 doubts should be resolved in favor of the agency’s decision. (*Santa Teresa Citizen Action Group v. City*  
20 *of San Jose* (2003) 114 Cal. App. 4th 689, 702.) The fair argument standard does not apply to judicial  
21 review of an agency’s determination that a project is within the scope of a previously completed EIR.  
22 (*Mission Bay Alliance v. Office of Community Investment and Infrastructure* (2016) 6 Cal. App. 5th  
23 160, 174 [“Substantial evidence is the proper standard where, as here, an agency determines that a  
24 project consistent with a prior program EIR presents no significant, unstudied adverse effect.  
25 (Citations.)”].) Neither *Wal-Mart, supra*, 138 Cal.App.4th 279 nor *Gentry v. City of Murrieta* (1995) 36  
26 Cal.App.4th 1359 held that the fair argument standard applies to judicial review in this situation.

### 27 **1. The EIR is Outdated**

28 EIRs do not have expiration dates or chronological limitations. (See *Committee for*

1 *Re-Evaluation of the T-Line Loop, supra*, 6 Cal.App.5th 1237, 1252-1256 [upholding reliance on 1998  
2 EIR]; *Mission Bay Alliance, supra*, 6 Cal.App.5th at pp. 172-176 [upholding reliance on 1998 EIR for  
3 certain topics]; *Citizens Against Airport Pollution v. City of San Jose* (2014) 227 Cal.App.4th 788, 802  
4 [upholding reliance on 1997 EIR for amendments to airport plan]; see AR 332 [noting that planning  
5 horizon for Plan EIR extended to 2025, and that Plan EIR had not expired].)

6 Public Resources Code section 21083.3, the streamlining device used by the City in preparing  
7 the CPE Checklist (AR 1034-1035, 1062), does not state that EIRs certified for zoning actions have  
8 expiration dates. Rather, CEQA provides that if impacts were addressed in the EIR certified in  
9 connection with the zoning action, the agency is directed not to revisit them. (CEQA Guidelines, §  
10 15183.)

11 The purpose of the EIR is as an informational document, designed to “ensure that agencies and  
12 the public are adequately informed of the environmental effects of proposed agency action”. (*Friends of*  
13 *the College of San Mateo v. San Mateo Community College District* (2016) 1 Cal. 5th 937, 951.) The  
14 question of whether the Plan EIR remains relevant despite any changes in circumstances or lapse of  
15 time is a factual question for the agency; the question for the Court is whether the agency’s decision is  
16 supported by substantial evidence.

17 The City complied with CEQA Guidelines section 15168(c)(4) in preparing a written checklist  
18 to document the evaluation of the project and determine whether the environmental effects were  
19 covered in the Plan EIR. It found the Project would be generally consistent with and encompassed  
20 within the analysis in the Plan EIR, determined the Plan EIR adequately anticipated and described the  
21 majority of the Project’s impacts, and found the Project is consistent with the height, use, and density  
22 for the site described in the Plan EIR. (AR 819 [DEIR], 13774-13775 [2014 CPE Eligibility  
23 Determination], 15204-15206 [2015 CPE Eligibility Determination].) The CPE Checklist found most  
24 environmental impacts of the Project were adequately covered in the Plan EIR but that the Project  
25 could result in potentially significant impacts on transportation and circulation and historic architectural  
26 resources. A project EIR was required to address only those impacts. (AR 819, 1062-1101 [CPE  
27 Checklist].) Other impacts were not addressed in the Project EIR because the CPE Checklist found the  
28 impacts had been adequately covered. Petitioners argue that many of the impacts the City concluded

1 had been adequately reviewed in the Plan EIR had not actually received an adequate review. To the  
2 extent these claims attack the Plan EIR, the Court rejects them as untimely. (Pub. Resources Code, §§  
3 21167, 21167.2; *Laurel Heights II, supra*, 6 Cal.4th at p. 1130.)

4         Petitioners argue residential development has outpaced the Plan EIR, buttressing its argument  
5 that the Plan EIR is outdated. The City determined that the Project is consistent with the densities  
6 established in the Eastern Neighborhoods Plan, the Potrero Area Plan, the UMU zoning, and the 68-  
7 foot and 48-foot height limits implementing those plans. (AR 819, 13774-13775, 15204-15206 [CPE  
8 Eligibility Determinations].) The UMU District does not set a minimum or maximum density  
9 requirement for residential uses, but it does require that at least 40% of the units contain two or more  
10 bedrooms. (AR 865.) Substantial evidence supports the City’s conclusion that the Project complies with  
11 this requirement: its 395 residential units include 146 two-bedroom units and 14 three-bedroom units.  
12 (AR 865.) The Project’s 24,968-sf of commercial uses is below the maximum of 25,000-sf/lot of retail  
13 uses permitted in UMU districts. (*Ibid.*) The 68-foot and 48-foot height limits are not exceeded except  
14 by minor rooftop elements, which are exempt from the height limits under the Planning Code. (AR  
15 865-866.) In fact, Petitioners concede that the Project is consistent with the applicable development  
16 densities and existing zoning. (AR 3729 [petitioner Allison Heath concedes Project is “code  
17 compliant”].)

18         **2. Residential Growth Has Outpaced the Plan EIR**

19         The Plan EIR included a growth forecast under Options A, B, C and the B/C Preferred Project.  
20 (AR 8436-8437, 9130.) According to the Plan’s EIR, by the year 2025, net housing units in Potrero  
21 were forecast to be as follows:

22             Option A	2,294 units
23             Option B	2,635 units
24             Option C	3,891 units
25             Option B/C (Preferred Project)	3,180 units

26 (AR 8437, AR 9130.) These forecasts represented projections of likely, anticipated development  
27 through the year 2025, using the best available information at the time of the Plan EIR certification.  
28

1 These forecasts did not represent “caps” on permissible development or estimates of maximum zoning  
2 capacity at build-out. (AR 333.)

3 The Plan called for preparing monitoring reports every five years to “track all development  
4 activity occurring within Plan Area boundaries . . . as well as the pipeline projecting future  
5 development.” (AR 2804; see S.F. Admin. Code, § 10E.2 [Respondents’ and Real Parties’ RJN, Exh.  
6 A, pp. 5-11].)

7 Petitioners have not sustained their burden of showing the obsolescence of the Plan EIR.  
8 Substantial evidence in the record demonstrates that the number of residential units that have been  
9 constructed or approved in the area pursuant to the Plan EIR do not exceed the development projections  
10 of 3,180 units under the Preferred Project and 3,891 units under Option C in the Plan EIR by the year  
11 2025. (AR 330-335, SAR 18724 [2,379 dwelling units have been built or completed CEQA review as  
12 of Feb. 23, 2016], SAR 18730 [2,384 dwelling units have been built or completed CEQA review as of  
13 July 25, 2016].) If the Project’s 395 residential units are added to the 2,384 units that had already been  
14 built or entitled under the Plan as of July 25, 2016 (the date of Project approval), the total comes to  
15 2,779 units which is below the Plan EIR’s projections for both the Preferred Project and Option C.

16 Petitioners instead focus on projects in the “pipeline” that are merely proposed and still  
17 undergoing review. Some of these projects, however, may not be approved. (SAR 18731 [“some  
18 projects were withdrawn or superseded”].) Others will be smaller than originally proposed. (AR 3731  
19 [staff explaining how some projects had reduced number of proposed units].) Still others may not rely  
20 on the projections in the Plan EIR, but will instead conduct separate, independent environmental review  
21 altogether, which will include consideration of cumulative impacts as required by CEQA. (AR 334  
22 [Potrero Hope SF Project proceeding under stand-alone EIR], 2803-2805; SAR 18731 [“Some projects  
23 were removed from our list or not included as some projects . . . will not rely on Eastern  
24 Neighborhoods” EIR].) Thus, Petitioners’ argument that residential development in the Potrero area  
25 may someday exceed the growth projected in the Plan EIR fails since adding the Project’s residential  
26 units to the number of existing or entitled units does not result in exceeding the Plan EIR’s projections.  
27 (AR 377 [“the proposed project is consistent with and fits within the growth projections identified in  
28 the *Eastern Neighborhoods PEIR* for cumulative conditions. . .”], 333-335 [concluding that growth that

1 has occurred since adoption of the Eastern Neighborhoods Plan is within the Plan EIR’s growth  
2 projections].)

3 Petitioners cite a table from the draft 2011-2015 Eastern Neighborhoods Monitoring Report  
4 (AR 1636 [Table 4]) to support their claim that the Potrero area had 4,526 residential units under  
5 construction, entitled, or under review, as of December 31, 2015. This total includes 2,634 units that  
6 were still “under review,” 84 entitled units and 1,808 units under construction. (AR 1636.) This total  
7 also includes proposals that may not proceed under or rely upon the Plan EIR. The record does not  
8 support Petitioners’ claim that the number of residential units constructed or entitled under the Plan  
9 exceed the projections for residential development set forth in the Plan EIR.

10 Assuming *arguendo* that the record supports Petitioners’ claim that the Plan EIR’s growth  
11 projections had been exceeded, to prevail Petitioners have the further burden of proof to show that,  
12 because these projections have been exceeded, the Project will cause or contribute to significant  
13 environmental impacts that were not addressed as significant effects in the Plan EIR or will be more  
14 significant than described in the Plan EIR. (Pub. Resources Code, § 21083.3, subd. (b); CEQA  
15 Guidelines, § 15183.) Petitioners must demonstrate the absence of substantial evidence supporting the  
16 City’s analysis. Petitioners have not met this burden. For instance, the City explained in the Project EIR  
17 that although residential growth may be approaching the Plan EIR’s projections, non-residential growth  
18 has been substantially less than estimated in that document. (AR 333.) The analysis in the Plan EIR  
19 “took into account the overall growth in the Eastern Neighborhoods and did not necessarily analyze in  
20 isolation the impacts of growth in one land use category....” (*Id.*) Petitioners have provided no  
21 evidence to show how these statements are incorrect. Nor have Petitioners shown that the Project,  
22 together with other development in the Potrero neighborhood, would result in greater impacts than  
23 those identified by the City in the Plan and Project EIRs. As an example, one of the impacts cited by  
24 Petitioners is the loss of land zoned for PDR uses. That impact, however, was identified in the Plan  
25 EIR. (AR 2890-2922.) Petitioners also cite cumulative traffic impacts, however the City prepared a  
26 project-specific analysis of the Project’s direct and cumulative traffic impacts and did not rely  
27 exclusively on the traffic analysis in the Plan EIR. The Project analysis included updated traffic counts  
28 and projections of regional growth in traffic. (AR 880-951.) At most, Petitioners show that the pace of



1 residential growth has been more rapid than projected in the Plan EIR, such that someday in the future  
2 that development may exceed the Plan EIR's projections for residential development. That is not  
3 sufficient to sustain Petitioners burden to show that the Project will cause specific significant impacts  
4 that neither the Plan nor Project EIRs disclosed.

5 In challenging the residential growth analysis, Petitioners allege confusion over the baseline  
6 used in the Plan EIR at the Planning Commission. The discussion concerned what "development" was  
7 considered part of the environmental setting at the time the City approved the Plan, and, going forward,  
8 what "development" the City expected to occur under the rezoning authorized by the Plan. (AR 3417-  
9 3419, 332-333.) Petitioners have not met their burden of proof to show how this purported confusion  
10 resulted in prejudice. (Pub. Resources Code, § 21005, subd. (b); *Neighbors, supra*, 57 Cal.4th at p. 463  
11 [EIR did not commit prejudicial error in using the wrong baseline for analysis].) The discussion  
12 focused on the extent of residential development expected to occur under the Plan, i.e., a projection of  
13 future development. The baseline for purposes of analysis is the environmental setting against which  
14 the impacts of a project are measured and generally consists of physical conditions at the time the  
15 analysis is performed. (CEQA Guidelines, § 15125, subd. (a); *North Coast, supra*, 216 Cal.App.4th at  
16 pp. 644-645; *Wal-Mart, supra*, 138 Cal.App.4th at pp. 289-291 [baseline in the context of Guidelines §  
17 15183].) The time to challenge the Plan EIR's description of the setting expired years ago and is  
18 presumptively valid. (*Laurel Heights II, supra*, 6 Cal.4th at p. 1130 [unchallenged EIR presumed  
19 valid]; Pub. Resources Code, § 21167.2 [same].)

### 20 **3. Height or Density Analysis**

21 Petitioners argue that the Plan EIR did not analyze a project of this height or density at this  
22 location. Specifically, Petitioners assert that the analysis for the Plan EIR anticipated a height on the  
23 site of 68 feet, while the height of the Project will be 72-83 feet. Petitioners also argue that the 68-foot  
24 allowance is only for the north side of 16th Street, while the south side is where the Project is proposed.  
25 This is a challenge to plan consistency and will be discussed below in that separately delineated  
26 section.

### 27 **E. Cumulative Impacts**

1           Petitioners challenge the City’s cumulative impacts analysis on traffic and transportation  
2 impacts, loss of PDR uses, and open space/recreation impacts. Petitioners also challenge the analysis of  
3 the pace of residential development, which has been addressed above.

4           Public Resources Code section 21083 requires a public agency to determine whether a proposed  
5 project may have “a significant effect on the environment”, which may occur if “[t]he possible effects  
6 of a project are individually limited but cumulatively considerable. As used in this paragraph,  
7 ‘cumulatively considerable’ means that the incremental effects of an individual project are considerable  
8 when viewed in connection with the effects of past projects, the effects of other current projects, and  
9 the effects of probable future projects.” (Pub. Resources Code, § 21083, subd. (b)(2).)

10           The CEQA Guidelines define “cumulative impacts” as “two or more individual effects which,  
11 when considered together, are considerable or which compound or increase other environmental  
12 impacts.... The cumulative impact from several projects is the change in the environment which results  
13 from the incremental impact of the project when added to other closely related past, present, and  
14 reasonably foreseeable probable future projects.” (CEQA Guidelines, § 15355, subd. (b).) An EIR’s  
15 cumulative impacts analysis “need not provide as great detail as is provided for the effects attributable  
16 to the project alone.” (CEQA Guidelines, § 15130, subd. (b).) The discussion of cumulative impacts  
17 ““should be guided by the standards of practicality and reasonableness.”” (*City of Maywood v. Los*  
18 *Angeles Unified School Dist.* (2012) 208 Cal.App.4th 362, 397 (*City of Maywood*).) Courts generally  
19 uphold a cumulative impacts analysis that demonstrates a ““good faith effort at full disclosure.”” (*Id.* at  
20 pp. 397-401; see *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209,  
21 1228-1229 [upholding brief cumulative traffic impacts analysis]; *Rialto Citizens, supra*, 208  
22 Cal.App.4th at pp. 928-931 [upholding cumulative traffic impacts analysis that relied upon a prior  
23 “environmental document”]; *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176  
24 Cal.App.4th 889, 905-912 [upholding cumulative air quality and traffic impacts analyses] (*City of Long*  
25 *Beach*).)

26           When a project’s incremental effect is cumulatively considerable, the EIR must discuss  
27 cumulative impacts. (CEQA Guidelines, §15130, subd. (a).) When an incremental effect is not  
28 cumulatively considerable, the lead agency does not need to consider the effect significant, but “shall

1 briefly describe its basis for concluding that the incremental effect is not cumulatively considerable.”  
2 (*Id.*) A lead agency shall identify facts and analysis supporting the agency’s conclusion that the  
3 cumulative impact is less than significant. (CEQA Guidelines, § 15130, subd. (a)(2).)

4 **1. Cumulative Transportation and Circulation Impacts**

5 The substantial evidence standard of review applies. (*North Coast, supra*, 216 Cal.App.4th at  
6 pp. 638-639; see *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147  
7 Cal.App.4th 357, 375-376 (*Eureka Citizens*).)

8 Petitioners’ argument that the Project EIR did not fully analyze cumulative transportation  
9 impacts is that (1) the EIR used cumulative traffic levels from the Plan EIR’s 2025 projection, but that  
10 growth level is outdated based upon residential growth; (2) the analysis failed to include certain  
11 projects; (3) the analysis failed to adequately consider transit impacts; and (4) the City failed to  
12 consider adoption of feasible traffic mitigation measures.

13 Plan EIR’s 2025 Projections

14 The Project’s EIR includes an analysis of Transportation and Circulation impacts. (AR 880-  
15 951.) This analysis is supported by the Transportation Impact Study (“TIS”) prepared by DKS  
16 Associates. (AR 15223-15341 [March 2015 TIS], 4691-4718 [August 2015 Errata], 4969-4992  
17 [November 2015 updated traffic counts], 880 [DEIR’s discussion based upon TIS and Errata], 369-370  
18 [FEIR discussion of updated counts], 376-377 [FEIR discussion of cumulative traffic].) DKS gathered  
19 traffic counts in order to characterize traffic conditions. (AR 721, 887.) The methodology used in the  
20 TIS is consistent with the City’s Transportation Impact Analysis Guidelines. (AR 7287-7402; see, e.g.,  
21 AR 15229 & 15235 [TIS conducted intersection analysis using criteria in the City’s Guidelines], 15252  
22 [same for Muni’s service capacity analysis], 15266 [same for trip generation calculations].) The  
23 Project’s FEIR includes additional analysis pertaining to vehicle miles traveled (“VMT”) and induced  
24 demand pursuant to Senate Bill 743 and Planning Commission Resolution 19579. (AR 287-307.) The  
25 VMT analysis was in addition to, and did not supplant, the LOS analysis in the DEIR. (AR 288 [“EIR  
26 considers traffic impacts of the proposed project under both metrics”].) The FEIR also included  
27 updated traffic counts from November 2015. (AR 369-370, 4969-4992.)  
28

1 The Project EIR's cumulative traffic analysis encompassed growth projections in the Plan EIR;  
2 the "impact assessment for year 2025 conditions . . . took into account both the future development  
3 expected in the Eastern Neighborhoods . . . and the expected growth in housing and employment for the  
4 remainder of San Francisco and the nine-county Bay Area at that time, including growth within  
5 Mission Bay." (AR 376-377.) As the FEIR explained, the City completed a full TIS in 2015 based on  
6 traffic counts gathered in 2012 and 2014; to establish existing traffic levels, the TIS did not rely on  
7 traffic counts obtained for the Plan EIR. (AR 369.) The analysis thus took into account any changes in  
8 traffic that occurred as a result of development in the area after the City adopted the Eastern  
9 Neighborhoods Plan. (*City of Long Beach, supra*, 176 Cal.App.4th at p. 910 [effect of previously  
10 approved projects were reflected in traffic counts showing existing conditions].) The cumulative impact  
11 analysis then added anticipated increases in traffic through the year 2025. These projections were based  
12 on continued development in the area under the Eastern Neighborhoods Plan, as well as a general  
13 increase in traffic throughout the region based on the City's transportation model; these projected  
14 increases in traffic were added to the counts gathered for the TIS, as well as the estimate of traffic that  
15 the Project would generate. (AR 906-907, 914 [DEIR], 376-377 [FEIR].) The City also compared its  
16 results with those of traffic studies performed by other agencies in the area, in particular the "University  
17 of California San Francisco 2014 Long Range Development Plan EIR." (AR 369.)

18 The City received a comment that the 2012 and 2014 traffic counts might be too old to capture  
19 traffic from the recently opened UCSF Medical Center. The City responded by gathering additional  
20 traffic counts to determine "whether any significant changes [] occurred in travel patterns or traffic  
21 volumes" in the area after the medical center opened. (AR 721, 370.) These counts, gathered on  
22 November 3, 2015, showed that traffic volumes at most intersections had declined or stayed the same.  
23 At the sole exception – the 7th/16th/Mississippi intersection – traffic volumes between 2012 and  
24 November 2015 had increased by 6% – not enough to affect the intersection's LOS. (AR 4969-4992  
25 [DKS memorandum], 724-745; see AR 369-370.) Thus, although Petitioners argue that traffic  
26 conditions deteriorated after 2012, the data show otherwise. Moreover, these traffic counts represented  
27 "baseline" conditions against which the Project EIR measured Project-related and cumulative traffic  
28 impacts.

1 Petitioners failed to demonstrate that the cumulative impacts analysis used outdated growth  
2 projections. Cumulative conditions were developed from Plan EIR growth projections as well as more  
3 recent data. As discussed above, Petitioners failed to demonstrate that residential growth has exceeded  
4 the Plan EIR's projections. In addition, even if such growth has exceeded the projections, Petitioners  
5 did not demonstrate that such growth makes the transportation cumulative impact analysis deficient.

#### 6 Other Specific Projects

7 Petitioners argue the cumulative impact analysis did not account for traffic from other proposed  
8 projects in the area. Under CEQA, however, the lead agency has discretion to base its analysis of  
9 cumulative impacts either on "(A) [a] list of past, present, and probable future projects producing  
10 related or cumulative impacts . . . , or [¶] (B) [a] summary of projections contained in an adopted local,  
11 regional or statewide plan, or related planning document, that describes or evaluates conditions  
12 contributing to the cumulative effect. . . . A summary of projections may also be contained in an  
13 adopted or certified prior environmental document for such a plan." (CEQA Guidelines, § 15130, subd.  
14 (b)(1).) In this case, the City used a summary of projections approach to analyze the annual growth in  
15 traffic expected to occur as the Eastern Neighborhoods Plan builds out, together with anticipated  
16 regional growth in traffic. (AR 376-377, 914.) As noted above, observed growth in the area has not  
17 exceeded those projections. (AR 333-335.) Thus, the City's approach is consistent with CEQA. (*Rialto*  
18 *Citizens, supra*, 208 Cal.App.4th at pp. 928-929 [trial court erred by assuming the agency had to use a  
19 "list of projects" approach; agency also had discretion to rely on "summary of projections"].)

20 Petitioners cite the Warriors arena project proposed on Third Street in Mission Bay as a project  
21 that the City should have considered. First, the EIR did not need to discuss specific projects, as stated  
22 above. Second, the DEIR did not include the Warriors project because when the City commenced the  
23 Project's review process, the Warriors arena project had not been proposed and thus was not reasonably  
24 foreseeable. (AR 377; see CEQA Guidelines, § 15355, subd. (b); *Gray v. County of Madera* (2008) 167  
25 Cal.App.4th 1099, 1127-1128 [agency has discretion to set the date of project's application as cut-off  
26 date for determining what other projects are reasonably foreseeable for purposes of assessing  
27 cumulative impacts]; *City of Maywood, supra*, 208 Cal.App.4th at pp. 398-401 [agency's general  
28 awareness of proposal to construct freeway off-ramp was not enough to make it "reasonably

1 foreseeable”].) The DEIR did assign “trips” to the site, however, because at the time the Project  
2 analysis was performed Salesforce had proposed to build its headquarters on the site. Only later did  
3 Salesforce sell the land to the Warriors for the arena. By the time the City prepared the Project’s FEIR,  
4 the Warriors arena project had emerged. The FEIR included additional analysis showing that the arena  
5 proposal “would not cause significant change” to the analysis of relevant intersections because the  
6 EIR’s traffic projections already assumed that the site would be developed (the previously proposed  
7 Salesforce office project) and would contribute similar traffic volumes to the one intersection  
8 potentially affected by both projects. (AR 377, 378-379, 944, 983.) In 2015, the City certified a  
9 focused EIR analyzing the impacts of the proposed Warriors event center in Mission Bay. The Court of  
10 Appeal ruled that the City’s EIR complied with CEQA, upholding, among other things, the  
11 transportation analysis. (*Mission Bay Alliance, supra*, 6 Cal.App.4th at pp. 179-191.)

12 “ “We review an agency's decision regarding the inclusion of information in the cumulative  
13 impacts analysis under an abuse of discretion standard. ‘The primary determination is whether it was  
14 reasonable and practical to include the projects and whether, without their inclusion, the severity and  
15 significance of the cumulative impacts were reflected adequately.’ ” (Citation.)” (*Banning Ranch  
16 Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1228.)

17 Petitioners did not demonstrate that without the inclusion of the Warriors arena project, or any  
18 other specific projects which Petitioners assert were improperly left out, the severity and significance of  
19 cumulative impacts were not adequately reflected.

#### 20 Transit

21 There was a full consideration of the impact on public transit in the EIR, with the analysis  
22 conducted “in a manner consistent with the Planning Department’s Transportation Impact Analysis  
23 Guidelines.” (AR 341-342, 924-927 [less-than-significant Impact TR-3].) Based on this analysis, the  
24 EIR concluded that the Project would not result in project-specific or cumulative impacts related to  
25 transit capacity or delays. (AR 341, 924 [“The proposed project would not result in a substantial  
26 increase in transit demand that could not be accommodated by Muni transit capacity; nor would it  
27 affect transit operating conditions within the project vicinity such that adverse impacts to Muni transit  
28 service could occur”], 947-950 [“The proposed project, combined with past, present, and reasonably

1 foreseeable future projects, would not contribute considerably to any significant cumulative transit  
2 impacts”].) The City also explained that the Project applicant would be required to pay the  
3 Transportation Sustainability Fee and the Eastern Neighborhoods Infrastructure Fee to help fund city-  
4 wide infrastructure and planned transit improvements. (AR 342.) Petitioners’ arguments on this topic  
5 focus on commenters’ views that the area is poorly served by public transit. (See, e.g., AR 1411-1412,  
6 1663.) Petitioners do not, however, demonstrate how the EIR’s transit impacts analyses violated  
7 CEQA.

### 8 Mitigation Measures

9 Petitioners assert the City violated CEQA by failing to consider “traffic reducing and/or  
10 calming measures”, such as signal timing, bulb-outs or pedestrian islands. (AR 345.) This is incorrect.  
11 The EIR details several traffic calming measures already incorporated into the Project description (AR  
12 845) and found signalization of one intersection (Mariposa and Mississippi Streets) inadvisable because  
13 traffic patterns are more effectively served by the existing stop pattern than by signalization. (AR 922).  
14 As the FEIR noted, the City did not incorporate the additional traffic and signal calming measures  
15 suggested by Petitioners because the analysis showed that the Project would not result in “significant  
16 traffic hazards or hazards to pedestrians or bicyclists.” (AR 345-347, 928-936 [less than significant  
17 Impacts TR-4, TR-5, TR-6, and TR-7], 949-950 [less than significant cumulative impacts C-TR-4 and  
18 C-TR-5].) Mitigation measures are required only for *significant* adverse impacts. (CEQA Guidelines, §  
19 15126.4, subd. (a); see *South County Citizens for Smart Growth v. County of Nevada* (2013) 221  
20 Cal.App.4th 316, 336 [CEQA did not require county to consider proposal to expand road because EIR  
21 found traffic impact on road would not be significant].) The EIR identified, and the City adopted, a  
22 measure requiring the applicant to implement a Transportation Demand Management (TDM) Plan, with  
23 a goal of reducing one-way vehicle trips by 10%. (AR 923-924 [DEIR], 194-196 [adopted TDM Plan  
24 requirement]; see *Mission Bay Alliance, supra*, 6 Cal.App.5th at pp. 179-188 [Transit Service Plan  
25 upheld as project component to reduce transportation impacts]; *City of Hayward v. Trustees of Cal.*  
26 *State Univ.* (2015) 242 Cal.App.4th 833, 851-852 [TDM Plan included in proposed master plan upheld  
27 as CEQA mitigation].) The City and applicant went beyond the requirements of CEQA in agreeing to  
28 adopt improvement measures that would reduce the already less-than-significant project impacts. (AR

1 933-934 [Improvement Measures I-TR-5a & I-TR-5b: On-site Bicycle Safety Strategies], 936  
2 [Improvement Measure I-TR-6: Off-street Loading Management].) Petitioners' claims are therefore  
3 misplaced, as they fail to address how their assertions render the EIR's cumulative impacts analyses  
4 deficient. Additionally, the administrative record demonstrates that the City did consider possible  
5 mitigation measures to reduce significant adverse traffic impacts.

6 Petitioners did not demonstrate that the City failed to conduct an adequate analysis of traffic  
7 and/or transit impacts. The conclusions that there would not be significant, cumulative impacts on  
8 transit, pedestrians or bicycles, or construction-related transportation impacts are supported by  
9 substantial evidence.

## 10 **2. Cumulative Loss of PDR Uses**

11 Petitioners raise the issue of loss of PDR uses in their briefs, but they fail to address how this  
12 argument relates to the adequacy of the EIR's cumulative impacts analysis. The CPE Checklist  
13 analyzed the loss of PDR space and determined that it would not result in significant impacts that were  
14 not previously identified in the Plan EIR, nor be of a more severe impact than analyzed in the Plan EIR.  
15 (AR 1065.) The gravamen of the argument seems to be the Project will permanently displace PDR in  
16 favor of primarily residential use and allow for too much residential development. Petitioners  
17 acknowledge that the UMU zoning changes allow for a mixed-use district in which residential  
18 development is mixed with PDR use. UMU zoning does not require a specific allocation of residential  
19 and PDR use.

20 Petitioners further argue that the City improperly relied on the analysis of land use impacts  
21 related to the loss of PDR uses in the Plan EIR. Land use inconsistency is not an environmental impact  
22 under CEQA unless it can be traced to an effect on the physical environment. (*Joshua Tree*  
23 *Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal.App.5th 677, 694-696 [perfect  
24 conformity with applicable plans is not required]; *Preserve Poway v. City of Poway* (2016) 245  
25 Cal.App.4th 560, 581 [impacts on "community character" are not environmental impacts]; see  
26 *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1207  
27 ["inconsistency between a project and other land use controls does not in itself mandate a finding of  
28 significance".])



1 The City addressed the loss of PDR uses in the CPE Checklist by reference to the Plan EIR.  
2 (AR 1064-1065.) The Plan EIR concluded that implementation of the Plan, including the rezoning of  
3 some formerly industrially zoned land to mixed use UMU zoning, would result in a significant and  
4 unavoidable cumulative land-use impact related to the loss of PDR uses that was not able to be feasibly  
5 mitigated and adopted a Statement of Overriding Considerations for this impact. (AR 2890, 2907-2908,  
6 2920-2922.) Consistent with the Plan, the Project site was rezoned UMU in 2008 to allow mixed use  
7 residential development to replace the existing industrial buildings. (AR 443, 1065, 8458-8459.) This is  
8 distinguishable from other locations which were rezoned PDR, a zoning designation that prohibits some  
9 uses in order to retain and encourage additional PDR space. (AR 443.) Therefore, although the Project  
10 would contribute to the cumulative loss of PDR uses envisioned in the Plan EIR, it “would not result in  
11 new significant impacts that were not previously identified or more severe impacts than were analyzed  
12 in the [Plan] EIR.” (AR 443, 1064-1065, 8465-8471.) Because the cumulative loss of PDR was  
13 previously disclosed in the Plan EIR, and is not peculiar to the parcel or Project, no further analysis was  
14 required. (Pub. Resources Code, § 21083.3; *Wal-Mart, supra*, 138 Cal.App.4th at p. 296 [record did not  
15 support claim that ordinance would result in project-specific impacts beyond those already disclosed in  
16 plan EIR].) Petitioners have not demonstrated that the City failed to comply with Public Resources  
17 Code section 21083.3, nor have they demonstrated how their argument related to loss of PDR use is  
18 tied to the adequacy of the EIR’s cumulative impacts analysis.

### 19 3. Cumulative Open Space, Recreation and Shadow Impacts

20 Petitioners argue that the City improperly relied on the analysis of open space, recreation, and  
21 shadow impacts in the Plan EIR and that unanticipated growth in the Showplace/Potrero area resulted  
22 in increased demands on the area’s limited open space and recreational facilities.

23 The City addressed these impacts in the CPE Checklist. (AR 1088 [Recreation], 1081-1087  
24 [Wind and Shadow].) The City relied on the Plan EIR, which concluded that: (a) “none of the proposed  
25 rezoning options . . . would result in substantial or accelerated deterioration of existing recreational  
26 resources or require the construction or expansion of recreation facilities that might have an adverse  
27 physical effect on the environment” (AR 8782, 8766-8782 [“Parks, Recreation, and Open Space”]); and  
28 (b) “the [Eastern Neighborhoods Plan] project impact with respect to shadow is judged to be significant

1 and unavoidable for all three rezoning options” (AR 8821, 8785-8821 [Shadow]). Because the Project  
2 is within the development projected under the Eastern Neighborhoods Plan, its implementation would  
3 not result in either project-level or cumulative significant impacts not previously identified in the Plan  
4 EIR related to physical degradation or deterioration of recreation resources or physical effects on the  
5 environment. (AR 1088.)

6 Petitioners have not met their burden of proof to show that the City’s determination that the  
7 Project would not have peculiar impacts different from those analyzed in the Plan EIR was not  
8 supported by substantial evidence. Instead, Petitioners repeat the claim, as elsewhere, that parks have  
9 not kept pace with development.

10 First, Petitioners assert four acres of new park space was required but only one acre of new park  
11 space has been provided in Daggett Park. Petitioners quote from the Showplace/Potrero Area Plan:

12 “Analysis reveals that a total of about 4.0 acres of new space should be provided in this  
13 area to accommodate expected growth. Thus, this Plan proposes providing at least one  
14 new open space in the area, in addition to widened sidewalks with pocket parks and green  
streets, and an increased private open space requirement.”

15 (AR 9437.) Petitioners portray this passage as mandating four acres of new parks. This portrayal is not  
16 borne out by the full record. This passage is an aspirational observation in the introductory paragraph  
17 preceding the Plan’s Streets and Open Space Policies. The Plan actually proposed providing at least one  
18 new open space in the area, in addition to widened sidewalks with pocket park and green streets and an  
19 increased private open space requirement. (AR 9437.) The Plan and City’s Planning Code allow for  
20 both public and private open space to fulfill residents’ recreation needs. The Project includes 14,669 sf  
21 of public open space, 33,149 sf of common open space for residents, and 3,114 sf of private open space  
22 (combined ~1.2 acres) (AR 2772, 829-830, 1060), which exceeds Planning Code section 135’s  
23 requirements of 80 sf of usable open space per dwelling unit if all open space is private or common, or  
24 54 sf/unit if publicly accessible open space is provided. (AR 867-868; Respondents’ RJN, Exh. A, pp.  
25 28-37.) Thus, although the record does not support Petitioners’ claim that the Potrero area has  
26 insufficient open space, even if there were such a shortfall, the record contains no evidence the Project  
27 will exacerbate it. (*San Joaquin Raptor /Wildlife Rescue Center v. County of Stanislaus* (1996) 42  
28 Cal.App.4th 608, 624-625.) Moreover, the Project exceeds Planning Code open space requirements and

1 must pay the City's adopted fee to support park development. (AR 48-49, 457, 2819-2820.) Also, as  
2 noted above, the number of units approved and built has not exceeded the Plan EIR's projections. (AR  
3 330-335.)

4         Second, Petitioners cite the Project's shadow impacts on Daggett Park. (Petitioners' Opening  
5 Brief, p. 24.) The CPE Checklist included a shadow analysis comparing baseline shadows with the  
6 Project's net new shadow. (AR 1081-1087; see AR 14333-14384 [shadow study].) Although the  
7 Project would cast net new shadow on nearby sidewalks and a portion of the park, the CPE Checklist  
8 stated that this impact would be less than significant because: (a) many sidewalks in the area "are  
9 already shadowed by existing buildings and additional project-related shadow would be temporary in  
10 nature and would not substantially affect the use of the sidewalks," (b) Daggett Park would "experience  
11 shadowing in the mornings in the mid-fall to mid-winter with or without the proposed project," and (c)  
12 the Project's additional shadow on the park "would be limited in both time of day and time of year" and  
13 would not occur in the afternoon when the park is expected to experience the greatest use. (AR 1082-  
14 1083.) The Project's net new shadow would not substantially affect the use of Daggett Park. Although  
15 the Project would contribute to shadows at Daggett Park, the contribution was physically and  
16 temporally limited, and therefore less than significant. (AR 458.) The only contrary evidence consists  
17 of Petitioners' opinion that the shadow impact is significant. (AR 1407, 1451.) Such a difference of  
18 opinion is insufficient to overturn the City's conclusion (*Eureka Citizens, supra*, 147 Cal.App.4th at pp.  
19 375-376 [EIR's "qualitative judgment" that playground would not have significant visual impact]),  
20 particularly where, as here, the comments are unsubstantiated. (Pub. Resources Code, § 21080, subd.  
21 (e)(2); *Pala Band, supra*, 68 Cal.App.4th at p. 580.) Finally, the Plan EIR had already disclosed the  
22 potential for projects within the Eastern Neighborhoods to cause significant shadow impacts. (AR  
23 8783-8821.) Petitioners failed to demonstrate that the Project's shadow impacts constitute an effect  
24 peculiar to the project which were not addressed as significant effects in the Plan EIR, nor have  
25 Petitioners shown any substantial information which results in a more significant impact than in the  
26 Plan EIR. (Pub. Resources Code, § 21083.3, subd. (b).)

1 Substantial evidence supports the City's cumulative impacts analysis on all grounds objected to  
2 by Petitioners. Petitioners have not met their burden of demonstrating the City failed to adequately  
3 analyze cumulative impacts.

4 **F. Aesthetic and View Impacts**

5 Petitioners assert the City erred in relying on Public Resources Code section 21099, which  
6 provides that the Project's visual impacts are not considered significant impacts under CEQA. The  
7 statute states: "Aesthetic and parking impacts of a residential, mixed-use residential, or employment  
8 center project on an infill site within a transit priority area shall not be considered significant impacts  
9 on the environment." (Pub. Resources Code, § 21099, subd. (d)(1).) Subdivision (a)(4) and (a)(7) of  
10 section 21099 define "infill site" and "transit priority area".

11 The substantial evidence standard of review applies to the City's factual determinations that the  
12 Project falls within the category of projects embraced by section 21099, subdivision (d). (*Concerned*  
13 *Dublin Citizens v. City of Dublin* (2013) 214 Cal.App.4th 1301, 1311-1312.)

14 Addressing the correct statutory authority, under section 21099, the criteria are that the project  
15 be: (1) in a residential, mixed-use residential or employment center, (2) on an infill site, and (3) within  
16 a transit priority area. (Pub. Resources Code, § 21099, subd. (d)(1).) Petitioners (1) argue that the  
17 Project is not the sort of "mixed-use" contemplated by the statute, and (2) dispute the application of  
18 "within a transit priority area."

19 Petitioners' argument that the Project is not the sort of "mixed-use" contemplated by section  
20 21099 is specious. Section 21099 applies to "a residential, mixed-use residential, *or* employment center  
21 project." (Pub. Resources Code, § 21099, subd. (d)(1), italics added.) Petitioners suggest the Project is  
22 not the right sort of mixed-use project because the proportion of residential uses is too high. But the  
23 statute expressly applies to either residential *or* mixed use projects. (*Ibid.*) The Project is both  
24 residential *and* mixed use (395 residential units and ground-floor retail spaces). (AR 38.)

25 Section 21099 also requires the Project to be within a transit priority area, defined as "an area  
26 within one-half mile of a major transit stop that is existing or planned, . . . ." (Pub. Resources Code, §  
27 21099, subd. (a)(7).) Petitioners argue the Project fails to meet the requirements of subdivision (a)(7)  
28 because the area is "severely underserved by transit and proposed upgrades to transit are tenuous."

1 (Petitioners' Opening Brief, p. 28:6-7) It is noteworthy that in their Reply Brief, Petitioners propose a  
2 different argument, that the Project fails to come within the requirements of subdivision (a)(7) because  
3 "the Project must be located within one-half mile of a major transit stop or high-quality transit corridor  
4 included in a regional transportation plan... a high-quality transit corridor means a corridor with fixed  
5 route bus service with service intervals no longer than 15 minutes during peak commute hours." (Reply  
6 Brief, p. 13:10-18.) A review of section 21099 demonstrates it does not contain the quoted language or  
7 a 15 minute interval requirement.

8 The Planning Department's Transit-Oriented Infill Project Eligibility Checklist ("21099  
9 Memo") identified a Muni metro stop (T line) at Third Street and Gene Friend Way, which is one-half  
10 mile from the Project (operating with headways of less than 10 minutes), and two Muni bus stops: 19  
11 Polk at 17<sup>th</sup> Street and Rhode Island and 22 Fillmore at 17th Street and DeHaro, one block away  
12 (operating with headways of 15 minutes or less). (AR 14416, 14418, 38.) Substantial evidence supports  
13 the City's conclusion that the Project site is within half a mile of two existing, major transit stops. (AR  
14 14416, 14418.) Petitioners' argument relating to the area being underserved by transit is without merit  
15 and does not defeat the application of section 21099 to the Project.

16 Petitioners raise the application of Public Resources Code section 21151(a) and CEQA  
17 Guidelines section 15064 in support of their argument that visual impacts must be addressed as  
18 significant CEQA impacts. Neither authority applies to this issue. The statutory language cited by  
19 Petitioners is not contained within the Code or Guideline as quoted.

20 Petitioners cite CEQA cases stating that personal observations may be evidence of impacts.  
21 Section 21099 became effective in 2014. (Stats. 2013, ch. 386, § 5 (Senate Bill 743).) All the cases  
22 cited by Petitioners predate 2014. None of the cases address or bear on the applicability of section  
23 21099 or any other statutory exemption.

24 Petitioners cite critical comments regarding visual impacts. Under Public Resources Code  
25 section 21099, subd. (d), for a qualified project, "visual impacts shall not be considered significant  
26 impacts." The issue is not whether the Project's critics were displeased. "A project opponent or  
27 reviewing court can always imagine some additional study or analysis that might provide helpful  
28 information. It is not for them to design the EIR. That further study [] might be helpful does not make it

1 necessary.” (*Laurel Heights I, supra*, 47 Cal.3d at p. 392.) “Where, as here, the agency prepares an  
2 EIR, the issue is whether substantial evidence supports the agency’s conclusions, not whether others  
3 might disagree with those conclusions. [Citations.]” (*North Coast, supra*, 216 Cal.App.4th at p. 627  
4 [upholding EIR’s visual impact analysis]; see *Eureka Citizens, supra*, 147 Cal.App.4th at pp. 375-376  
5 [upholding EIR’s “qualitative judgment” that playground would not have significant visual impact].)  
6 Here, the record shows that critics thought the buildings were too tall. (AR 314-316, 466-469, 1231-  
7 1232, 1247-1250, 1254-1258, 1426-1431, 4954-4957.) Petitioners cite these criticisms but do not  
8 address the EIR’s Responses to Comments, in which City staff explained that the Project is consistent  
9 with applicable height limits and policies regarding building heights and neighborhood compatibility  
10 and that the minor rooftop elements are exempt from height limits. (E.g., AR 316-317, 322-323, 2777-  
11 2779, 3001-3005.) Simulations show that the site is located at the foot of Potrero Hill and that given the  
12 topography and the existence of another 68-foot tall building directly across 16th Street (AR 847), the  
13 Project will not, in fact, block public views. (AR 832-834 [building elevations], 847-857 [photographs  
14 from multiple viewpoints, including visual simulations showing Project will not obstruct views of  
15 downtown San Francisco from Potrero Hill].) Petitioners may disagree, or want more simulations, or  
16 prefer other visual characterizations of the Project, but under the applicable standard of review, that is  
17 insufficient. (*North Coast, supra*, 216 Cal.App.4th at p. 627.)

18 In any event, the parties’ arguments and cited record evidence regarding whether the Project  
19 will, or will not, impact views are irrelevant because substantial record evidence supports the  
20 application of the section 21099 exemption.

### 21 **G. Inconsistencies with Plans and Policies**

22 Petitioners argue the CPE Checklist and Project EIR did not adequately address the Project’s  
23 consistency with the San Francisco General Plan, the Eastern Neighborhoods Plan, and the Potrero  
24 Plan. Petitioners’ claims focus on the Project’s height and bulk and public view.

25 Petitioners argue that the City violated CEQA because the FEIR declined to consider the extent  
26 to which the Project is consistent with applicable plans and policies. The Project EIR includes a chapter  
27 on Plans and Policies discussing the ones applicable to the Project and potential inconsistencies. (AR  
28 860-871.) The Final EIR states: “project-related conflicts and inconsistencies do not constitute, in and

1 of themselves, significant environmental impacts.” (AR 322; see also AR 860, 2798.) This statement is  
2 correct. (Pub. Resources Code, § 21151, subd. (b) [“For purposes of [CEQA] any significant effect on  
3 the environment shall be limited to ... adverse changes in physical conditions”]; *Id.* at § 21060.5  
4 [defining “environment” as “physical conditions which exist within the area which will be affected by a  
5 proposed project”; CEQA Guidelines, §§ 15358, subd. (b) [“Effects analyzed under CEQA must be  
6 related to a physical change”], 15131, subd. (a) [“Economic or social effects of a project shall not be  
7 treated as significant effects on the environment”], 15064, subd. (e) [same].) The requirement is that an  
8 EIR must “discuss any inconsistencies” with applicable planning documents; the EIR need not resolve  
9 them. (CEQA Guidelines, § 15125, subd. (d); *Karlson v. City of Camarillo* (1980) 100 Cal.App.3d 789,  
10 805-806.)

11         Where a project could conflict with a plan or policy adopted “for the purpose of avoiding or  
12 mitigating an environmental effect,” the lead agency must analyze such potential conflicts as  
13 environmental impacts. (See CEQA Guidelines, Appendix G, § X, subd. (b); AR 1064 [CPE  
14 Checklist].) The record shows that the City performed such an analysis. For instance, the CPE  
15 Checklist considered whether the Project would exceed noise levels established in the General Plan and  
16 Noise Ordinance and be consistent with the 2010 Clean Air Plan. (AR 1070-1080.) The CPE Checklist  
17 also considered whether the Project’s height and bulk – which are consistent with the 48-X and 68-X  
18 height and bulk districts – may result in wind and shadow impacts. (AR 1081-1087.)

19         Petitioners list 14 bullet points of which 12 are for policies and objectives with which  
20 Petitioners believe the Project is inconsistent. Petitioners argue that the City had an obligation under  
21 CEQA to analyze environmental impacts associated with these purported inconsistencies. Petitioners  
22 fail to support most of the statements of policy or objectives with evidence from the record and they are  
23 therefore deemed waived. (*Jacobson, supra*, 69 Cal App. 3d at p. 388; see also *Defend the Bay v. City*  
24 *of Irvine* (2004) 119 Cal.App.4th 1261, 1265–1266 [“As with all substantial evidence challenges, an  
25 appellant challenging an EIR for insufficient evidence must lay out the evidence favorable to the other  
26 side and show why it is lacking. Failure to do so is fatal. A reviewing court will not independently  
27 review the record to make up for appellant's failure to carry his burden. (Citation.)”].)

1 As to Petitioners' arguments related to scale and height of the Project's buildings, the CPE  
2 Checklist and Project EIR adequately addressed this issue. They demonstrate that the Project is  
3 consistent with the height and bulk limits established by the Eastern Neighborhoods Plan and Potrero  
4 Plan. (AR 316-317 [FEIR, RTC PO-1], 865-866 [DEIR], 1064 [CPE Checklist], 2798-2800.) The  
5 DEIR specifically noted the Eastern Neighborhood Plan approvals rezoned the site to the 48-X (17th  
6 Street) and 68-X (16th Street) height and bulk districts (AR 864-865, 1064; see AR 2799), which allow  
7 buildings up to 68 feet and 48 feet high, respectively. (AR 1064.) The CPE Checklist and EIR indicated  
8 the Project is consistent with these limits and would not cause greater impacts than identified in the  
9 Plan EIR. (AR 865, 1064-1065, 9113, 9115, 2799.)

10 Petitioners argue that the Project cannot rely on the Plan EIR because, Petitioners claim, the  
11 Plan EIR assumed height limits on the south side of 16th Street would be lower than 68 feet. The record  
12 does not support this claim. Although the Plan's Draft EIR looked at lower heights, the Plan's Final  
13 EIR analyzed height limits of 68 feet on both sides of 16th Street at the Project site. (AR 9113, 9115;  
14 see AR 9100 [August 7, 2008, approved height limit map].) Although Petitioners note that the Plan  
15 FEIR stated "the established residential areas of Potrero Hill would remain unchanged at 40 feet,"  
16 Figure C&R-2 of the Plan FEIR makes clear that this statement applied to other residential areas of  
17 Potrero Hill, not the Project site. (AR 9113, 4466-4467.) These same height limits are shown on the  
18 final height-limit map approved by the Commission and Board of Supervisors in 2008. (AR 9100;  
19 Respondents' RJN, Exh. C [Zoning Map HT08].)

20 Petitioners did not demonstrate either an inconsistency with height and bulk limits or an  
21 inadequacy of the environmental review documents in discussing consistencies with those limits.

22 As to Petitioners' arguments that the Project is inconsistent with restrictions against obscuring  
23 public views and altering the natural topography of Potrero Hill, such aesthetic and view impacts are  
24 not significant impacts under CEQA, as discussed above. (Pub. Resources Code, § 21099, subd. (d)(1).)

25 Petitioners failed to meet their burden of demonstrating that either the Project is inconsistent  
26 with the General Plan, the Eastern Neighborhoods Plan, or the Showplace Square/Potrero Area Plan, or  
27 that any inconsistencies were not adequately identified and discussed in the EIR as required by  
28 Guidelines section 15125.



1       **H.       Responses to Comments**

2               Petitioners argue the FEIR does not provide adequate Responses to Comments. The FEIR  
3 contains 176 pages of responses. (AR 313-488.) These responses address cumulative impacts, policies,  
4 and recreation/open space. (E.g., AR 280-282, 330-336, 341-342, 376-377 [cumulative impacts], 314-  
5 323 [plans/policies], 456-458 [recreation/open space].) These responses contrast with the perfunctory  
6 responses regarding major environmental issues at issue in *People v. County of Kern* (1976) 62  
7 Cal.App.3d 761, 769-774 and *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3d 348, 355-360. In  
8 *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 878-879, the  
9 Court generally upheld the FEIR’s responses, except for those pertaining to portions of the EIR that  
10 were themselves deficient. In this case, the FEIR’s responses constitute the good-faith effort that the  
11 courts uphold. (E.g., *City of Irvine v. County of Orange* (2015) 238 Cal.App.4th 526, 546-558; *Eureka*  
12 *Citizens, supra*, 147 Cal.App.4th at p. 378.)

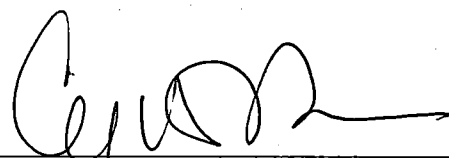
13               Petitioners fail to identify to which comments the FEIR failed to adequately respond, explain why a  
14 response was inadequate or cite to the administrative record. It is Petitioners’ burden to demonstrate  
15 there is no sufficient evidence in the record to justify an agency’s action and petitioner “must set forth  
16 in its brief all the material evidence on the point.” (*Citizens for a Megaplex-Free Alameda v. City of*  
17 *Alameda* (2007) 149 Cal. App. 4th 91, 112-113.) It is not the Court’s obligation to scour the record and  
18 find the evidence on behalf of Petitioners. (*Id.* at p. 113.) The Court deems the claim waived by  
19 Petitioners. Additionally, the FEIR’s Responses to Comments were cited and addressed at various  
20 points in the above discussion.

21       **III.       CONCLUSION**

22               For the reasons set forth above, the Petition for Writ of Mandamus is denied in its entirety.

23  
24       IT IS SO ORDERED.

25  
26       Dated: October 31, 2017



27               Hon. Cynthia Ming-mei Lee  
28               JUDGE OF THE SUPERIOR COURT

Superior Court of California  
County of San Francisco

SAVE THE HILL AND GROW POTRERO  
RESPONSIBLY,

Plaintiff(s)

vs.

CITY & COUNTY OF SAN FRANCISCO,  
ET AL.,

Defendant(s)

Case Number: CGC-16-515238

**CERTIFICATE OF ELECTRONIC SERVICE**  
(CCP 1010.6 & CRC 2.251)

I, Audrey Huie, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On **October 31, 2017**, I electronically served **ORDER DENYING PETITION FOR WRIT OF MANDAMUS** via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: **October 31, 2017**

CLERK OF THE COURT,

By:

  
Audrey Huie, Deputy Clerk