SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF YOLO
1000 MAIN STREET
WOODLAND, CA 95695

FILED
YOLO SUPERIOR COURT
AUG 09 2017
By _____ Deputy

CASE TITLE: DAVIS CITIZENS VS. CITY OF DAVIS

CASE NO: CVPT-16-444

I, the undersigned, certify under penalty of perjury that I am a Deputy Clerk of the above-entitled Court and not a party to the within-entitled action; that on August 09, 2017 I served true and correct copies of the foregoing/attached ORDER by depositing the same, enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Post Office at Woodland, California addressed as follows:

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At the time of said mailing there was regular communication by United States Mail between the said place of mailing and the places addressed.

Dated: August 09, 2017

SUPERIOR COURT OF CALIFORNIA COUNTY OF YOLO

DAWN C. LANDRY
COURT EXECUTIVE OFFICER

By _____ K. Joslin, Deputy Clerk

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YOLO SUPERIOR COURT FOR THE STATE OF CALIFORNIA

DAVIS CITIZENS ALLIANCE, Plaintiff, vs. CITY OF DAVIS, et al. Defendant.	Case No.: CV-16-444 ORDER

Before the Court is Davis Citizens Alliance for Responsible Planning's ("petitioner") petition for writ of mandate against the City of Davis and the City Council of the City of Davis ("City Council") (jointly referred to as "respondents" or "City") for violation of the California Environmental Quality Act ("**CEQA**").

Factual and Procedural Background

Project Location: The project site is located in Yolo County in and near the City of Davis.

Project: The proposed project involves the annexation and development of approximately 47 acres of agricultural land with up to 650 multi-family residential uses, 325,000 sf of office/research & development space, and

20,000 sf of accessory retail commercial space within Yolo County. The 47 acres would be annexed by the City of Davis as part of the project. The project also involves the rezoning of approximately 11 acres within the City of Davis that could result in a net increase of approximately 55,000 sf of commercial space upon redevelopment. (Administrative Record ("AR") 1.)

Real Parties: Real Party in Interest is Nishi Gateway, LLC. (Complaint, ¶ 7.) Nishi Gateway, LLC is identified as the Project applicant and recipient of Project approvals on the City's Notice of Determination filed on February 17, 2016.

Petitioner: Petitioner is an unincorporated association comprised of residents of the City of Davis located in Yolo County. Petitioner and its members have a direct and substantial beneficial interest in ensuring that respondents comply with CEQA. Petitioner was formed after respondents' approval of the Project. Petitioner's members submitted written comments on the EIR and the Project and participated in the City Council's hearings regarding the Project. (Complaint, ¶ 3.)

Respondents: City of Davis and City Council of the City of Davis (jointly referred to as "respondents" or "City").

Timeline Summary

January 28, 2015 City released a Notice of Preparation of Draft Environmental Impact Report ("DEIR") (AR 2610.)

February 23, 2015	City conducted a public scoping meeting. No oral comments were provided at this meeting, however several written comments were received at this meeting (AR 83.)
September 10, 2015	City released the DEIR for a 46-day public review period from September 10 to October 26, 2015. (AR 83, 35101.)
October 14, 2015	A public hearing was held to receive input from agencies and the public on the DEIR. (AR 83-84.)
December 16, 2015	The Final EIR ("FEIR" or "EIR") with responses to public comments was released for review. (AR 86, 162.) The City of Davis Planning Commission conducted a public workshop on the FEIR and the Project. (AR 24677-24678.)
January 6, 2016	Planning Commission conducted a public hearing on the FEIR and the Project. (AR 24656-24657.) At the hearing, the City Planning Commission recommended to the City Council that the FEIR be certified as adequate. (AR 86.)
January 11, 2016	City of Davis Finance and Budget Committee held a public meeting on the FEIR and the Project. (AR 24799.)
January 12, 2016	City Council conducted a public workshop on the EIR and the Project. (AR 24036-24038)

January 19, 2016	City Council conducted a public hearing on the FEIR and on the Project. (AR 23894-23897.)
February 16, 2016	City Council and City conducted a public hearing on the FEIR and on the project. (AR 23402-23408.) Respondents approved Resolution No. 16-013, Series 2016 and Resolution No. 16-014, Series 2016. They also enacted Ordinances 2470, 2471, and 2472 and approved the Resolution calling for a special election to be held on June 7, 2016.
February 17, 2016	The Notice of Determination ("**NOD**") is filed. (AR 1.)
May 18, 2016	Petitioner's verified petition for writ of mandate is filed.
January 17, 2017	Administrative record (AR 1-39229) is filed with the Court (electronic copy only).

Relief Requested: In its complaint, petitioner requests that the Court issue a peremptory writ that orders the respondents to:

a) Vacate and set aside the certification of the Final Environmental Impact Report on the grounds that it violates the California Environmental Quality Act, Public Resources Code section 21000 et seq.;

b) Vacate and set aside approval of Resolution No. 16-013, Series 2016

c) Vacate and set aside approval of Resolution No. 16-014, Series 2016;

d) Vacate and set aside the City's enactment of Ordinance No. 2470;

e) Vacate and set aside the City's enactment of Ordinance No. 2471;

f) Vacate and set aside the City's enactment of the Ordinance Approving an Agreement by and Between the City of Davis and Nishi Gateway, LLC Relating to the Development of the Property Commonly Known as the Nishi Property;

g) Vacate and set aside the City's approval of the Resolution of the City Council of the City of Davis Calling a Special Election to be held in the City on Tuesday, June 7, 2016, for Submission to the Voters of a Measure Amending the General Plan to Change the Land Use Designations for the Nishi Property and Establishing the Nishi Baseline Project Features and Directing the City Clerk to Specify the Deadline for Submission of Arguments for and Against the Measure;

h) Suspend all activity that could result in any change or alteration to the physical environment until Respondents have taken such actions as may be necessary to bring their determination, findings or decision regarding the Project into compliance with CEQA.

e)[sic] Withdraw the Notice of Determination for the Project (identified as a);

f)[sic] Prepare, circulate and consider a legally adequate environmental impact report for the Project;

g)[sic] Suspend approval of any and all construction of the Project until the Respondents are in compliance with CEQA; and

h)[sic] Suspend all activity that could result in any change or alteration to the physical environment until Respondents have taken such actions as may be

necessary to bring their determination, findings or decision regarding the Project into compliance with CEQA.

Legal Analysis

A. Petition for Writ of Mandate

Petitioner's verified writ of mandate states a cause of action for violation of CEQA and violation of the City's Affordable Housing Requirements. The issues, as framed by petitioner's opening brief, are as follows:

Issue 1: The EIR failed to adequately analyze, discuss, and mitigate the project's traffic impacts as follows: (*Id.* at p. 16.)

i. The EIR's traffic analysis relies upon unreasonable trip generation assumptions. (*Id.* at p. 17.)
ii. The City fails to document the validation of the VISSIM model in respect to replication of the existing queue conditions. (*Id.* at p. 18.)
iii. The EIR fails to adequately analyze and mitigate vehicle miles travelled. (*Id.* at p. 19.)
iv. The EIR's traffic analysis is inconsistent with previous traffic analysis performed by the same consultant. (*Id.* at ¶ 20.)

Issue 2: Approval of the project violated the City's affordable housing requirements. (*Id.* at p. 22.)

CEQA REQUIREMENTS

CEQA lays out a three-stage process. First, an agency must determine whether the particular activity is covered by CEQA. (Cal. Code Regs. tit. 14, § 15002, subd. (k)(1) ["CEQA

Guidelines"].)[1] CEQA applies to any activity which is a "project," and which is not exempt. Generally, any activity a public agency has discretion to carry out or to approve which has the potential for resulting in a physical change in the environment is a "project." (Pub. Resources Code, §§ 21065 and 21080, subd. (a); CEQA Guidelines, §§ 15002, subds. (b), (c), (i) and 15378, subd. (a).)

Second, the agency must determine whether the project may have significant environmental effects. (CEQA Guidelines, § 15002, subd. (k)(2).) Except when the project clearly *will* have such effects, the agency must conduct an initial study to assist it in making this determination. (CEQA Guidelines, §§ 15063, subds. (a), (c)(1) and 15365.) During the initial study, the agency must consult with certain other interested public agencies. (Pub. Resources Code, § 21080.3, subd. (a); CEQA Guidelines, § 15063, subd. (g).)

Based on the initial study, the agency may find that the project will not have a significant effect on the environment. In that case, in lieu of an Environmental Impact Report ("EIR"), it may adopt a statement that the project will have no significant environmental effect. Such a statement is called a negative declaration. (Pub. Resources Code, §§ 21064 and 21080, subd. (c); CEQA Guidelines, §§ 15002, subd. (k)(2), 15063, subd. (b)(2), 15064, subd. (g)(2), 15070, subd. (a) and 15371.)

Similarly, the agency may find that, although the project as originally proposed might have had potentially significant environmental effects, the project has been modified by measures which mitigate these environmental effects, and there is no substantial evidence that

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[1] The State CEQA Guidelines appear at California Code of Regulations, title 14, division 6, chapter 3, § 15000 et seq.

the project, as modified, may have a significant effect on the environment. In that case, in lieu of an EIR, the agency may adopt a MND. (CEQA Guidelines, § 15070, subd. (b).)

If the administrative record before the agency contains substantial evidence that the project may have a significant effect on the environment, it cannot adopt a negative declaration; it must go to on the third stage of the CEQA process: preparation and certification of an EIR. (Pub. Resources Code, §§ 21100 and 21151; CEQA Guidelines, §§ 15002, subd. (k)(3), 15063, subd. (b)(1), 15064, subds. (a)(1), (g) (1), 15070, and 15362.)

The EIR is the "heart" of CEQA. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84; CEQA Guidelines, § 15003, subd. (a).) An EIR is an informational document identifying significant impacts of a project, mitigation measures, and alternatives for decision-makers, other agencies, and the public. (Pub. Resources Code, §§ 21002.1, subd. (a) and 21061; CEQA Guidelines, § 15002, subds. (a) and (f); *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412.)

An EIR is the primary means of achieving the policy goal that an agency will "take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state." (Pub. Resources Code, § 21001, subd. (a).)

The main substantive components of an EIR are:

- The project description, which discloses the activity that is proposed for approval by the lead agency and responsible agencies;
- Discussion and analysis of significant environmental effects of the project, including cumulative impacts and growth-inducing impacts;
- Discussion of ways to mitigate or avoid the project's significant environmental effects; and
- Discussion of alternatives to the project as proposed.

(CEB, *Practice under the California Environmental Quality Act*, § 11.2.)

In addition to consulting with other agencies, an agency that is preparing an EIR must provide public notice of that fact within a reasonable period of time prior to final adoption by the public agency of the report. (Pub. Resources Code, § 21092.)

The public review period for a draft EIR must be at least 30 days. (Pub. Resources Code, § 21091, subd. (a).) The Guidelines suggest that the review period for a draft environmental impact report should be not less than 30 days, and not more than 90 days, from the date of the public notice, except in unusual circumstances. (CEQA Guidelines, § 15087, subd. (c).)

The lead agency must evaluate the comments it receives and must prepare a written response describing the disposition of significant environmental issues raised. (Pub. Resources Code, § 21091, subd. (d)(2); CEQA Guidelines, § 15088.) The lead agency then prepares and certifies a final environmental impact report. (CEQA Guidelines, §§ 15089, 15090.) When significant new information that the project will have new or more severe adverse effects on the environment than previously disclosed is added to an environmental impact report after public notice has been given pursuant to Public Resources Code section 21092, but prior to certification, the public agency must give additional notice and must engage in additional consultation. (Pub. Resources Code, § 21092.1.) New information added "is not 'significant' unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial ***adverse*** environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project's proponents have declined to implement." (CEQA Guidelines, § 15088.5.) Recirculation is intended to be the exception rather than the general rule. (*Laurel Heights Improvement Assn. v. Regents of University of California*, 6 Cal. 4th 1112.)

CEQA STANDARD OF REVIEW

When reviewing an EIR for legal adequacy, a court "does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document." (*Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 392; *quoting County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 189.) The question whether an EIR is sufficient as an informative document depends on the lead agency's compliance with CEQA's requirements for the contents of an EIR: whether the EIR reflects a reasonable, good faith effort to disclose and evaluate environmental impacts and to identify and describe mitigation measures and alternatives; and whether the final EIR includes reasonable responses to comments on the draft EIR raising significant environmental issues. (*Western States Petroleum Ass'n v. Superior Court* (1995) 9 Cal.4th 559, 570; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal., supra,* 47 Cal.3d at 391; *City of Long Beach v. Los Angeles Unified Sch. Dist.* (2009) 176 Cal.App.4th 889, 898; CEB, Practice under the California Environmental Quality Act, § 11.37.)

Courts apply an abuse of discretion standard when determining whether an agency complied with CEQA. Under that standard, a lead agency abuses its discretion if its determinations or conclusions on questions of fact are **not supported by substantial evidence** or if it did not comply with the procedures mandated by CEQA governing the contents of an EIR. (*Laurel Heights Improvement Ass'n v Regents of Univ. of Cal., supra,* 47 Cal.3d at 392; *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018; emphasis added.) While reviewing courts determine de novo the legal question when enforcing procedures mandated by statute, they afford deference to the agency's substantive factual

conclusions under the substantial evidence test. (*Ebbetts Pass Forest Watch v. California Dep't of Forestry & Fire Protection* (2008) 43 Cal.4th 936, 944.)

To decide the proper standard for reviewing the adequacy of an EIR, a reviewing court must identify the nature of the alleged defect and then determine whether the claim is one of improper procedure or a dispute over the facts. (*Id.* at p. 949.) While courts independently review an EIR's compliance with CEQA's procedural standards, "the correctness of factual findings predicate to the standard's application (e.g., delineation of the circumstances under which a future action is likely to occur) is a predominantly factual matter" that is reviewed under the substantial evidence test. (*Id.* at p. 954.)

CEQA does not dictate the specific contents of an EIR. (CEB, Practice under the California Environmental Quality Act, § 11.38.1.) Instead, it allows the lead agency to determine on a project-specific basis what impacts merit a detailed investigation, the methodology for collecting and synthesizing data, the appropriate scope and depth of analysis, how to frame the EIR's discussion to present a useful and informative evaluation, and what conclusions to draw from the evidence. (*Ibid.*) Because the lead agency is charged with resolving questions of fact, reviewing courts do not decide whether the agency correctly resolved disagreements about the validity of the technical analysis in the EIR, but only whether there is any substantial evidence in the record supporting it. (*Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 566, 575; *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., supra,* 47 Cal.3d at 409.) When a specific analytical method is mandated by regulation, however, whether the agency complied with the regulation raises a

question of law. (*Ebbetts Pass Forest Watch v. California Dep't of Forestry & Fire Protection, supra,* 43 Cal.4th at 949.)

The substantial evidence standard applies to "conclusions, findings and determinations" and to challenges to the scope of an EIR's analysis of a topic, the methodology used for studying an impact, and the reliability or accuracy of the data on which the EIR relied, because these types of challenges involve factual questions. (*Santa Monica Baykeeper v. City of Malibu* (2011) 193 CalApp.4th 1538, 1546; *City of Long Beach v. Los Angeles Unified Sch. Dist., supra,* 176 Cal.App.4th at 898.) An agency's "substantive factual or policy determinations" are reviewed under the substantial evidence test. (*California Native Plant Soc'y v City of Santa Cruz* (2009) 177 CalApp.4th 957, 987.)

Substantial evidence is defined as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (CEQA Guidelines, §15384, subd. (a); *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., supra,* 47 Cal.3d at pp. 393, 409.) Substantial evidence includes facts, reasonable assumptions predicated on facts, and expert opinion supported by facts, but does not include argument, speculation, or unsubstantiated opinion. (Pub. Res. Code, §§ 21080, subd. (e), 21082.2, subd. (c).)

Under the substantial evidence standard, a reviewing court does not reconsider or reweigh the evidence that was before the agency. As the court explained in *Laurel Heights*, "in applying the substantial evidence standard, the reviewing court must resolve reasonable doubts in favor of the administrative finding and decision." (47 Cal.3d at 393.)

A court should not set aside an agency's conclusion merely because an opposite conclusion would be equally or more reasonable, nor should it weigh competing technical data

and arguments on environmental issues. (*Laurel Heights, supra,* 47 Cal.3d at 408.) Instead, "the reviewing court must consider the evidence as a whole" to determine whether substantial evidence exists to support the EIR's analysis. (*Ibid.*) Although the evidence supporting the EIR might be "imperfect in various particulars," the ultimate question is whether the body of evidence relied on by the agency constitutes substantial evidence of the EIR's adequacy. (*Ibid*; *Western States Petroleum Ass'n v Superior Court* (1995) 9 Cal.4th 559, 571[high degree of deference to agency's decision is implicit in substantial evidence standard]; *Citizens of Goleta Valley v Board of Supervisors, supra,* 197 CalApp.3d 1167, 1177[under substantial evidence standard, all conflicts in evidence and any reasonable doubts must be resolved in favor of agency's decision]; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1267[court's function is not to second-guess agency decision, but to determine if conclusion has support in record; that reasonable minds can differ as to existence of impact does not mean agency conclusion lacks support].)

In *Laurel Heights*, for example, the EIR used data from sampling studies at the previous laboratory site in its analysis of emissions of organic chemicals and radioactive materials. (47 Cal.3d at 376.) Relying on evidence submitted by project opponents, the court of appeal held that the methodology and scope of the studies used by the EIR were inadequate; in effect, the court "performed its own scientific critique of the studies and found the Regents should not have relied on them." (*Ibid.*) The Supreme Court held that such an approach is inconsistent with the rule that a court does not pass on the validity of an EIR's environmental conclusions and that a disagreement among experts, *ipso facto*, does not make an EIR legally inadequate. (*Ibid.*)

In reviewing a challenge, a court must presume the agency complied with CEQA and "the party challenging the EIR has the burden of showing otherwise." (Evid. Code, § 664; Pub.

Resources Code, § 21167.3; *Al Larson Boat Shop, Inc. v. Board of Harbor Coms.* (1993) 18 Cal.App.4th 729, 740; *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2007) 157 Cal.App.4th 149, 158.)

The petitioner carries the burden to demonstrate that there is not sufficient evidence in the record to justify the public agency's action. In order to do so, a petitioner must set forth in its brief all the material evidence on the point, not merely its own evidence. (*Citizens for a Megaplex–Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91, 113.) A failure to do so is deemed a concession that the evidence supports the findings. (*Ibid*; *Markley v. City Council* (1982) 131 Cal.App.3d 656, 673.) The reason for this is that "if the [petitioners] fail to present us with all the relevant evidence, then the [petitioners] cannot carry their burden of showing the evidence was insufficient to support the agency's decision because support for that decision may lie in the evidence the [petitioners] ignore." (*Ibid*; *citing State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 749–750.) A reviewing court will not independently review the record to make up for petitioner's failure to carry his burden. (*Ibid*; *Defend the Bay v. City of Irvine, supra,* 119 Cal.App.4th at 1266.)

B. Petitioner's writ of mandate as to the first cause of action for violation of CEQA is DENIED.

Petitioner argues the City's approval of the EIR violated the requirements of CEQA because the EIR failed to adequately analyze, discuss, and mitigate the project's traffic impacts.

Petitioner argues that: (1) the EIR's traffic analysis relies upon unreasonable trip generation assumptions, (2) the City fails to document the validation of the VISSIM model in respect to replication of the existing queue conditions, (3) the EIR fails to adequately analyze and

mitigate vehicle miles travelled, and (4) the EIR's traffic analysis is inconsistent with previous traffic analysis performed by the same consultant.

Each argument will be discussed below.

i. The trip assumptions used in the traffic analysis are based on substantial evidence.

Petitioner argues that EIR's traffic analysis underestimates the number of trips the Project will generate and uses facially unreasonable assumptions not supported by substantial evidence in the record. (AR 392-393; 2470, 25544-25546.) Petitioner relies on its expert Dan Smith's ("Smith"), of Smith Engineering & Management, comments in support of its petition. Smith submitted two comment letters to the City during the review period. (September 23, 2015: AR 389-399; February 1, 2016 Letter: AR 25541-25556.) Smith is a registered professional traffic engineer (see Smith's resume at AR 400-401) and he is familiar with the surroundings of the proposed Project has he has been involved with traffic and transportation issues in Davis since 1972. (AR 389.)

Issue re: assumption that 352 residential rental units will be occupied by students.

Petitioner argues there "is no guarantee that any particular percentage [of housing units] will be occupied by students" and therefore City's assumption that 352 of the 650 residential units will be occupied by UC Davis residents is unreasonable. (Petitioner's P&As ISO of Petition, p. 17:20-24; AR 392-393.)

In opposition, City asserts that the assumption that 352 of the rental units will be occupied by UC Davis students is based on the following facts:

- The units are located adjacent to UC Davis;
- The units are designed to appeal to university students,

- Similar multi-family units near the Project site (such as the Lexington Apartments) are occupied in large part by students; and
- The vacancy rate in Davis is estimated to be less than 5%. (AR 404, 2411-2413, 25524.)

Additionally, City argues that petitioner fails to cite any legal authority that CEQA requires a "guarantee" that any particular assumption in a traffic study will come to fruition. Further, petitioner fails to provide substantial evidence to establish that the City's assumptions are inaccurate.

Substantial evidence includes facts, reasonable assumptions predicated on facts, and expert opinion supported by facts, but does not include argument, speculation, or unsubstantiated opinion. (Pub. Res. Code, §§ 21080, subd. (e), 21082.2, subd. (c).)

Further, the mere fact a plaintiff disagrees with the methodology employed by a defendant to measure a project's potential traffic impacts does not require invalidation of an EIR, so long as it provides accurate information. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 545.) Here, plaintiff does not submit any evidence to establish that information included in the EIR is inaccurate. Rather, petitioner relies solely on Smith's opinion that "there is no guarantee that any particular percentage of [the units] will be occupied by students." Smith opines that the units might be rented by:

> ...former students who have graduated and have jobs in the commutable region, but who like living in Davis and just keep their unit, couples in which one spouse or significant other is a student while the other has a job somewhere in the commutable region, or people who work anywhere reasonably commutable but who just wish to live in the Davis environment.
>
> (AR 393.)

Although there is no guarantee 352 units will be occupied by students, there are facts in the EIR that support the City's reasonable assumption that the rental units will be occupied by UC Davis students based on location, design, and other comparable nearby apartment complexes. (AR 404, 2411-2413, 25524.)

Petitioner fails to demonstrate that there is not sufficient evidence in the record to justify the public agency's action, and therefore this argument does not support a finding that CEQA was violated.

Issue re: assumption that 429 of the Project's gross daily trips will be internal trips.

Petitioner argues:

> The EIR also assumes that 429 of the Project's gross daily trips will be internal trips between the Project's residential component and its R&D-office component. (AR 2470 (Table 4.14-8a).) Recognizing that half this total are internalized trip-ends from the residential component and half are internalized trip ends from the R&D component, the numbers suggest that in excess of 20 percent of the employed residents in those 298 non-student dwelling units would be employed in the Project's R&D-office component. (AR 393, 2470.) The EIR also suggests that about 22 percent of the employees in the R&D-office component would be drawn from this 298 units of housing. (AR 393, 2470.) Both of these circumstances are extremely unlikely and unreasonable. (AR 393.)

Petitioner's argument is unclear. Based on the Table 4.14-8a, the 429 internal trips *only represents 5.9%* of new gross trips. (AR 2470.) 6,794 of the new trips will be external trips. It is unclear what petitioner is arguing as the traffic study in the EIR does *not* assert that "20 percent

of the employed residents in those 298 non-student dwelling units would be employed in the Project's R&D-office component." This argument lacks merit.

Therefore, this argument does not support a finding that CEQA was violated.

Note: In reply petitioner argues for the *first* time that the City cannot rely on the MDX Model because is not a part of the administrative record. Petitioner failed to raise this argument in its moving papers. "The salutary rule is that points raised in a reply brief for the first time will not be considered unless good cause is shown for the failure to present them before." (Hon. William F. Rylaarsdam, Hon. Lee Smalley Edmon, et al., Calif. Practice Guide: Civil Proc. Before Trial (The Rutter Group 2011) ¶ 9:106.1; *Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010.) Considering new arguments would be prejudicial to the City in that it would be denied proper notice and an opportunity to respond. Additionally, there is no reason that petitioner could not have presented the same argument in its original moving papers. The DEIR that was released for review on September 10, 2015, stated the following:

> The expected internalization of trips generated by complementary land uses within the project site was estimated based on the **Mixed-Use (MXD) Trip Generation Model,** which was developed by Fehr & Peers and several academic researchers in association with the U.S. Environmental Protection Agency. Although an internal trip calculation methodology is contained in Trip Generation Handbook (ITE 2004), it was not used in this instance because the MXD model is based on more extensive and current data. (AR 2470.)

If petitioner believed City's reliance on the MXD Model was an issue, the time for raising such an issue has passed.

ii. The EIR contains substantial evidence supporting the use of the VISSIM model to replicate existing queue conditions.

Petitioner argues that the City failed to "provide critical data on the validation of the VISSIM simulation with respect to queue length." (AR 390, 25542-25543.) Plaintiff asserts that "the record contains no documented evidence that existing queues were ever formally measured or that the VISSIM results were ever compared to directly observed queues." (P&As, p. 19:1-3.)

In opposition, City argues it is not required to "formally measure" existing queues in order to conduct a traffic study. Rather, City argues that courts have made it clear that an analysis "need not be exhaustive, but will be judged in light of what was reasonably feasible." (*Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1390–91.) Additionally, "[w]hen experts in a subject area dispute the conclusions reached by other experts whose studies were used in drafting the EIR, the EIR need only summarize the main points of disagreement and explain the agency's reasons for accepting one set of judgments instead of another." (*Id.* at 1391.)

Here, City's traffic experts Feer & Peers employed VISSIM microsimulation software to simulate and analyze traffic operations for the interconnected intersections in the Richards Boulevard interchange area. (AR 402, 2468.) They also used the United States Department of Transportation, Federal Highway Administration's Guidelines for Applying Traffic Microsimulation Modeling Software ("FHA Guidelines") to validate the existing conditions data used in the simulations. (AR 402, 1899-2044 [copy of publication of guidelines].) All reference material was available for public inspection when the DEIR was circulated. (AR 402.) Further a copy of the technical traffic data relied on, including the VISSIM calculation sheets, were attached to the FEIR. (AR 402, 517-1003.)

Petitioner fails to cite any legal authority that required the City to "formally measure" existing queues. Petitioner also fails to provide any *evidence* to establish that using the VISSIM microsimulation software and the FHA Guidelines is insufficient to make an informed decision in a traffic study. Further, petitioner fails to explain how the technical data that is attached to Appendix B in the FEIR fails to provide sufficient relevant information to support the City's conclusions.

Based on the above, EIR contains substantial evidence supporting the use of the VISSIM model to replicate existing queue conditions. Therefore, this argument does not support a finding that CEQA was violated.

iii. The EIR adequately analyzes and mitigates for potential impacts based on vehicle miles travelled.

The EIR states that the project would generate substantial new travel demand related to commuting and other trip purposes associated with the industrial and retail uses on-site. (AR 2490.) The project is projected to generate approximately 45,000 vehicle miles travelled ("VMT") per day at build-out. (*Ibid.*) The reason VMTs are relevant, is that the Davis General Plan Mobility Element Goal #2 contains performance objectives designed to improve air quality and reduce greenhouse gas ("GHG") emissions related to travel in Davis. (*Ibid.*) Performance Objective 2.2 requires a reduction in VMT of 39 percent from 2010 levels, by 2035. (*Ibid.*)

However, the Project's estimated VMT of 45,000 would increase the City-generated VMT and GHG, not reduce them. (*Ibid.*) Therefore, the EIR states this would be a potentially significant impact, and as a result, the EIR implements mitigation measure ("MM") 4.14-5. (AR 2490-2492.) With the implementation of MM 4.14-5, daily VMT associated with the Project

would be reduced in accordance with local/regional goals and the impact would be reduced to a "less-than-significant" level. (AR 2492.)

Petitioner argues that "substantial evidence does not support the assumptions and conclusions that the Project's increase in VMT would be 45,000 miles per day and not significantly higher." (Pet. P&As, p. 20:7-9.) More specifically, petitioner argues that the EIR provides a distribution table (see AR 2470) of the residence locations of workers holding jobs located in the City of Davis or at the UC Davis campus, but there is no indication of where employed residents of Davis who do *not* work in Davis commute to. (Pet. P&As, p. 19:23-25.) Petitioner argues that since the EIR fails to provide computations of VMT, the public has no way of knowing whether the 45,000 VMT estimate is reasonable or accurate. Petitioner further argues that since MM 4.15-5 is based upon 45,000 VMT, and the actual "VMT may be significantly higher, the impact may not be fully as asserted in the EIR." (*Id.* at p. 20:9-10.)

City argues that the petitioner inappropriately compares forecasted VMT to the trip distribution table in the EIR. (AR 2470 [Table 4.14-8a], 25525.) The VMT forecast is based on all daily project trips, while the trip distribution table provided in the EIR (Table 4.14-8a) is for trips assigned to the roadway network *during the AM and PM peak hour* for the intersection Level of Service ("LOS") analysis. (*Ibid.*) The VMT forecast of 45,000 reflects all daily trips, and their associated trip lengths, including commute trips (typically about 30 percent of trips) and non-commute trips (the remaining 70 percent of trips). (*Ibid.*)

To calculate the VMT generated by the Project, the City's traffic experts used the MXD Model. (AR 25525.) In response to Dan Smith's February 2, 2016 letter, the City explained how the forecasted VMT was calculated:

The MXD model used to estimate VMT provides an estimate of three outcomes: choice of internal destination, choice of walking on external trips, and choice of transit on external trips. Models are estimated separately by trip purpose: home-based-work, home-based-other, and non-home-based. This allows for MXD model to isolate how different factors influence different trip purposes and gives the ability to distinguish peak hour travel (disproportionately home-based-work) from off-peak travel (disproportionately home-based-other and non-home-based).

The MXD model starts with Institute of Transportation Engineers ("ITE") trip generation as a baseline. ITE trip generation does not distinguish trip generation by trip purposes. MXD uses national data from NCHRP Report 716, *Travel Demand Forecasting: Parameters and Techniques* (2012) to distribute total trips (as estimated by ITE) into the three trip purposes described above. These trip purpose distributions vary by land use type (e.g. retail land uses have a higher percentage of home-based-other trips than industrial land uses). As NCHRP Report 716 is based on national data, the user may insert more accurate local data where appropriate. For this project, trip purpose distribution values from the City of Davis citywide travel model[1] [ftnt 1: City of Davis Travel Demand Model Development Report, Fehr & Peers, March 2003] were used for all land uses.

The MXD model calculates reductions to the ITE trip generation once the trips are distributed to the various trip purposes. These net trips (by purpose) are then used for estimation of VMT. The DEIR incorporates adjustments for on-site internalization, walk, bike, and transit mode shares for home-based work, homebased other, and not home-based trips, then multiplies the resulting vehicle trips by average trip lengths to calculate VMT. Mode shares and average trip lengths were generally derived from the 2012 California Household Travel Survey ("CHTS"). Additional data adjustments were applied to account for the unique characteristics of the Proposed Project relative to existing Davis developments based on expected home locations of employees (BAE, 2014) and work locations of residents. For employees who do not live in Davis and residents who do not work in Davis, home-based work mode shares were assumed to reflect SACOG model averages. Average trip lengths were similarly derived from the *City of Davis Economic Evaluation of Innovation Park Proposals* (Bay Area Economics, March 2015) for project employees who do not live in Davis, and from SACOG model averages for residents who do not work in Davis. The average one-way commute trip length that is incorporated in the VMT forecast for the share of project employees who would not live in Davis, based on the BAE (2015) report, is 21.5 miles.

(AR 25525-25526.)

Petitioner appears to base its entire argument on the "peak" trip numbers provided in Table 4.14-8a. (AR 2470.) Petitioner does not discuss the methods used by the City in calculating the estimated VMT or provide any evidence that the method used was inappropriate.

Here, there is enough relevant information and reasonable inferences from the information in the EIR that a fair argument can be made to support a conclusion that the City relied on a proper method in calculating the forecasted VMT. Therefore, this argument does not support a finding that CEQA was violated.

iv. Substantial evidence supports the results obtained by the Project's traffic study.

Petitioner argues that there are inconsistent conclusions made by Fehr & Peers on the level of service ("LOS") at certain intersections, when compared to a previous report prepared by Fehr & Peers in 2011.

Fehr & Peers is the traffic consultant for the Project. (City's Oppo P&As, p. 21:2.)

According to petitioner, in 2011, Fehr & Peers prepared a transportation analysis for the *UC Davis Hyatt Place Hotel Expansion and Old Davis Road Extension Focused Tiered DEIR* ("Hyatt DEIR"). (AR 391, 403, 25543.) In the 2011 report, Fehr & Peers found that the existing delay and LOS at the Richards-Olive intersection was 24 seconds and a LOS C in the AM peak, and 15 seconds and a LOS B in the PM peak. (AR 391.) However, in the current EIR, Fehr & Peers found the found that the existing delay and LOS at the Richards-Olive intersection is 15.4 seconds and LOS B in the AM peak, and 20.7 seconds and LOS C in the PM peak. (AR 2453.)

YEAR[2]	AM PEAK	PM PEAK
2011	24 / LOS C	15 / LOS B
2014	15.4 / LOS B	20.7 / LOS C

Petitioner argues the two studies "reach remarkably inconsistent conclusions." (Petitioner's P&Ss, p. 21:11-12.)

Petitioner also argues that in the Hyatt EIR, it stated that (1) the HCM 2000 methodology used to analyze the Richards-Olive and Richards-1st intersections did not consider the effects of queuing that extends into adjacent intersections, and (2) that field observations indicated that the intersections often operated unacceptably during peak hours. (AR 391.) Based on this, petitioner argues that the "VISSIM simulation employed in the current EIR also fails to replicate the unacceptable conditions that exist in the peak hours at Richards/Olive. (AR 392.)" (Petitioner's P&As, p. 21:5-6.)

In opposition, City argues that it is not required to explain any apparent discrepancies between the two studies because the Hyatt EIR was conducted for an entirely different project, three years prior to the study for the current EIR. Further, the Hyatt EIR is not included in the administrative record, and therefore an accurate comparison cannot be made.. Petitioner could have, but failed, to attach a copy of the Hyatt EIR in its comments to make the Hyatt EIR a part of the current record. (City's Oppo P&As, p. 22:5-7.)

[2] These are the results petitioner asserts are "remarkably inconsistent conclusions." For ease of comparing the two results, I placed them in a chart to assist the Court.

Despite its position, the City did explain the apparent discrepancies between the two traffic studies in the record. (AR 403.) The City points out that the cited language from Hyatt EIR indicates that the HCM 2000 methodology used for the 2011 study "**does not consider the effects of queuing** that extends into adjacent intersections." (AR 391, 403; emphasis added.) However, the HCM 2000 methodology *was not used* in preparing the current EIR. In response to Dan Smith's September 23, 2015 letter, the City explained, in part, as follows:

> Regarding the [current] Draft EIR, to determine the effects of queuing from adjacent intersections on level of service, a micro-simulation evaluation tool such as VISSIM was used based on traffic counts conducted in 2014, versus those studied in 2011. The VISSIM analysis conducted for the study intersections for this Draft EIR estimates the average delay for all movements, **and accounts for delays and queues** that vary within the peak hour.
>
> (AR 403; emphasis added.)

In reply, petitioner repeats its same argument and asserts that using a different methodology and using traffic counts from two different years, does not adequately explain "this major discrepancy in critical data regarding the inconsistent conclusions on LOS." (Reply, p. 4 21-22.)

"In applying the substantial evidence standard, the reviewing court must resolve reasonable doubts in favor of the administrative finding and decision." (*Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., supra,* 47 Cal.3d at p. 393.) Here, the City provided a reasonable explanation as to why the two studies have somewhat different results. Petitioner's assertion that the two studies have "remarkably inconsistent conclusions" is

unsupported. Further, petitioner failed to include the Hyatt EIR in the administrative record and therefore the comparison between the two is limited.

Based on the above, this argument does not support a finding that CEQA was violated.

C. Petitioner's writ of mandate as to the second cause of action for violation is DENIED.

Petitioner argues that approval of the Project violated the City's Affordable Housing Ordinance ("AHO").

In opposition, City argues that the AHO does not apply. City argues that all of the 440 multi-family rental units and the 210 stacked flat condominiums are exempt from the AHO.

As admitted by petitioner in its moving papers, the AHO **exempts stacked flat condominiums**. (Petitioner's P&As, p. 24:17-20; See Davis Mun. Code, § 18.05.080, subd. (b); emphasis added.) Therefore, the only units at issue are the 440 rental units.

Davis Municipal Code section 18.05.060(e), states that rental housing is not required to provide deed-restricted affordable units based on the holding in *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles* (2009) 175 Cal.App.4th 1396 ("*Palmer*").

In *Palmer*, the court held the Costa-Hawkins Act (Civil Code section 1954.50 et seq.) precludes local governments from requiring a developer to set affordable rental levels in private rental housing units unless the developer agrees to do so in exchange for financial assistance or other consideration from the local government. (*Palmer, supra*, 175 Cal. App. 4th at 1410.) Local government is not required to provide financial assistance, and therefore, it is in the City's discretion to decide if it wants to offer financial assistance.

Davis Municipal Code section 18.05.060(e) sets forth the holding of *Palmer* and states that the requirement for rental Affordable Housing in section 18.05.060 is not operable and shall not be operative until at such time as *Palmer* is overturned, disapproved or depublished, or the state legislature amends the law to authorize local governments to require rental affordable housing.

Therefore, as set forth in *Palmer* and section 18.05.060(e), the City was prohibited from requiring rent-restricted rental housing, unless the City decided to provide financial or other consideration for the rent-restricted units and the developer agreed to provide the units based on the City's financial participation. Therefore, the 440 rental units are also exempt, and approval of the Project did not violate the City's AHO.

In reply, petitioner appears to concede that its position lacks merit. Petitioner states:

> Upon review of the City's Opposition brief, Petitioner acknowledges the ruling in *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles* (2009) 175 Cal.App.4th 1396.)
>
> (Reply, p. 5.)

Based on the above, the petition for writ of mandate is DENIED in its entirety. Any motion for reconsideration shall be filed with proper notice on the law and motion calendar of Department 7.

Signed in Woodland, California on August 8, 2017

The Honorable Samuel T. McAdam